CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 22/08
[2011] ZACC 8

In the matter between:

RESIDENTS OF JOE SLOVO COMMUNITY, WESTERN CAPE	Applicants
and	
THUBELISHA HOMES	First Respondent
MINISTER FOR HUMAN SETTLEMENTS	Second Respondent
MEC FOR HUMAN SETTLEMENTS, WESTERN CAPE	Third Respondent
together with	
CENTRE ON HOUSING RIGHTS AND EVICTIONS	First Amicus Curiae
COMMUNITY LAW CENTRE, UNIVERSITY OF THE WESTERN CAPE	Second Amicus Curiae

Decided on : 31 March 2011

JUDGMENT

THE COURT:

[1] This judgment is about whether an ejectment order, coupled with a detailed supervisory order (supervised eviction order) concerning the execution of that order, previously made by this Court, can or should be rescinded or discharged in the light of changed circumstances. The order related to about 20 000 people[1] who were residents of an informal settlement that had acquired the name "Joe Slovo informal settlement". It was made pursuant to the provisions of section 6 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act[2] (PIE Act). We mention at the outset that the operation of the order was suspended more than a year ago.

[2] The supervised eviction order was granted 21 months ago.[3] The relevant part of the order is fully set out:

> 1. . . . .
> 2. . . . .
> 3. . . . .
> 4. The applicants are ordered to vacate the Joe Slovo Informal Settlement (Joe Slovo) in accordance with the timetable set out in annexure "A" hereto, subject to any revisions to that timetable agreed to in terms of paragraphs 5 – 7 of this order. The order to vacate is conditional upon and subject to the applicants being relocated to temporary residential units situated at Delft or another appropriate location on the conditions set out in paragraphs 8 – 10 below.

[1] 4 386 households.

[2] 19 of 1998.

[3] On 10 June 2009.

5. The applicants and the respondents are ordered, through their respective representatives, to engage meaningfully with each other with a view to reaching agreement on the following issues:
    5.1 a date upon which the relocation will commence different to that contemplated in annexure "A";
    5.2 a timetable for the relocation process different to that contemplated in annexure "A"; and
    5.3 any other relevant matter upon which they agree to engage.
6. The process of engagement described in the previous paragraph of this order must be completed by 30 June 2009.
7. If the process of engagement results in agreement between the parties, the agreement must be placed before this Court,
   by 7 July 2009 for this Court to consider whether it is appropriate to issue an order giving effect to the agreement.
8. The respondents are ordered to provide alternative accommodation in the form of temporary residential units to those applicants who vacate Joe Slovo.
9. A temporary residential unit must be made available to each household moved, and each temporary residential accommodation unit:
    9.1 that already exists, must in all respects comply with the specifications in paragraph 10 of this order; and
    9.2 that is newly constructed, must be of an equivalent or superior quality.
10. The temporary residential accommodation unit must:
    10.1 be at least $24m^2$ in extent;
    10.2 be serviced with tarred roads;
    10.3 be individually numbered for purposes of identification;
    10.4 have walls constructed with a substance called Nutec;
    10.5 have a galvanised iron roof;

10.6 be supplied with electricity through a pre-paid electricity meter;

10.7 be situated within reasonable proximity of a communal ablution facility;

10.8 make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and

10.9 make reasonable provision (which may be communal) for fresh water.

11. The respondents are further directed to engage with the affected residents in respect of each relocation that is to take place, the engagement to take place at least one week prior to the date specified for the relocation in annexure "A" or as otherwise specified in an order of this Court. The engagement must include (but not be limited to) the following issues:

11.1 Ascertainment of the names, details and relevant personal circumstances of those who are to be affected by each relocation;

11.2 The exact time, manner and conditions under which the relocation of each affected household will be conducted;

11.3 The precise temporary residential accommodation units to be allocated to those persons to be relocated;

11.4 The need for transport to be provided to those to be relocated;

11.5 The need for transport of the possessions of those to be relocated;

11.6 The provision of transport facilities to the affected residents from the temporary residential accommodation units to amenities, including schools, health facilities and places of work;

11.7 The prospect in due course of the allocation of permanent housing to those relocated to

temporary residential accommodation units, including information regarding their current position on the housing waiting list, and the provision of assistance to those relocated with the completion of application forms for housing subsidies.

12. The first respondent is directed, in accordance with its tender to do so, to render assistance to the parties affected to move their possessions insofar as it is reasonably practicable.
13. The applicants are interdicted, once they have been relocated from Joe Slovo, from returning to Joe Slovo for the purpose of erecting or taking up residence in informal dwellings.
14. The applicants are entitled to remove their informal structures when they leave Joe Slovo.
15. After the informal dwellings at Joe Slovo have been vacated in accordance with this order, the respondents are authorised to demolish the housing that remains in the areas vacated.
16. The parties are directed:
    - 16.1 to lodge affidavits with the Registrar of this Court not later than 1 December 2009 setting out a report on:
        - 16.1.1 the implementation of this order;
        - 16.1.2 the allocation of permanent housing opportunities to those affected by this order.
    - 16.2 to serve copies of the affidavits on the legal representatives of all the parties.
17. The respondents are directed to allocate 70% of the *Breaking New Ground* houses (that is low-cost government housing available at low rentals) to be built at the site of Joe Slovo to:
    - 17.1 the current residents of Joe Slovo; and
    - 17.2 those former residents of Joe Slovo who left Joe Slovo after the N2 Gateway Housing Project

was launched after being requested to do so by the respondents or the City; and who apply for and qualify for this housing.

18. It is recorded that the respondents have indicated that the total number of *Breaking New Ground* houses to be built at the site of Joe Slovo will not number fewer than 1 500. The respondents are ordered to inform the other parties and the Court within 14 days of this order if this number has changed or is likely to change whereupon the Court may issue further directions in this regard.
19. The second respondent and third respondent are directed to ensure - in accordance with their undertakings to do so - that any successor to the first respondent agrees to the terms of this order, and agrees to be bound by the obligations of the first respondent under this order.
20. If a successor to the first respondent is appointed and becomes bound by the terms of this order, the first respondent will be relieved of its obligations to the extent that they are taken over by its successor, with effect from the date upon which the successor becomes bound.
21. Should this order not be complied with by any party, or should the order give rise to unforeseen difficulties, any party may approach the Court on notice to the other parties for an amendment, supplementation or variation of this order.
22. The first, second and third respondents are ordered, jointly and severally, to pay 50% of the costs of the applicants in this Court, and the High Court, such costs to include the costs of both teams of legal representatives employed by the applicants and the costs of two counsel where two counsel were employed.[4]

[4] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) at para 7.

[3] It is well to repeat that the applicants are representatives of the Joe Slovo community. The first respondent was the developer of the settlement; the second respondent is the Minister for Human Settlements (Minister); and the third respondent is the MEC for Human Settlements, Western Cape (MEC).[5] We will refer to all the three respondents collectively as the government.

[4] Salient features of the supervised eviction order are identified.

(a) The order to vacate was qualified[6] to the extent that the applicants could be evicted from the Joe Slovo settlement only if government complied with a timetable[7] annexed to the order. That timetable provided for a detailed process for the systematic transfer of all the people occupying the settlement to certain temporary accommodation. The process was to begin about two months after the date of the supervised eviction order[8] and end about 10 months[9] later.

(b) The timetable could be amended but only if a process of engagement resulted in agreement between the parties concerning the timing and process described in paragraph (a) above and only if that agreement was

[5] The titles of both the National and the Provincial Ministers of Housing have been changed to the Minister for Human Settlements and the MEC for Human Settlements, Western Cape respectively.

[6] Above [2] at para 4 of the order.

[7] As I point out later the timetable was provisional.

[8] On 17 August 2009.

[9] At the end of the week beginning 21 June 2010.

considered appropriate by this Court. The agreement, if concluded, had to be placed before the Court for approval less than a month after the date of the supervised eviction order.[10] It follows that if the movement of people did not begin according to the timetable on 17 August 2009 the government would not have been able to evict at all unless there was agreement between the parties or the order was amended or varied.[11]

(c) The supervised eviction order was subject to numerous conditions. One of these was that the applicants were to be relocated to certain temporary residential units[12] (TRUs) which had to comply with detailed minimum requirements.[13]

(d) The government was obliged, at least one week before the relocation of a particular family took place, to engage with that family on certain details of the relocation[14] including transport needs for the relocation,[15] and the prospect of the allocation of permanent housing to the family.[16]

(e) The government was empowered to demolish the housing left behind in the wake of the departure of residents.[17]

[10] Above [2] at paras 4, 5, 6 and 7 of the order.

[11] Id at para 21 of the order.

[12] Id at para 4 read with para 8 of the order.

[13] Id at para 10 of the order.

[14] Id at para 11 of the order.

[15] Id at paras 11.4 and 11.5 of the order.

[16] Id at para 11.7 of the order.

[17] Id at para 15 of the order.

(f) The parties were required to report on the implementation of the ejectment order before 1 December 2009.[18]

(g) 70% of the low cost government housing to be built on the site was to be allocated to Joe Slovo residents and to certain former Joe Slovo residents.[19]

(h) Most importantly, the supervisory part of the order was limited to the process of eviction, if the eviction took place, and had nothing to do with the way in which the area was to be developed.

Background

[5] The parties were unable to reach agreement by the 7 July 2009 deadline prescribed by the order and a request for an extension of time[20] was granted.[21] A report was also filed[22] explaining that some progress had been made and that an extension of time until 31 July 2009 was required to enable the parties to reach agreement on the process and timing of eviction. This Court extended the period within which agreement had to be reached to 3 August 2009. This extension was fruitless. The second report, filed one day later than the expiry of the extension,[23] was again to the effect that no agreement concerning the implementation of the supervised eviction order had been reached between the parties.

[18] Id at para 16 of the order.

[19] Id at para 17 of the order.

[20] By letter of the State Attorney dated 7 July 2009.

[21] On 27 July 2009.

[22] On 8 July 2009.

[23] Lodged on 4 August 2009.

[6] Of concern however was the information in the report that the MEC had requested that implementation of the eviction order of this Court be postponed. This was apparently because of "grave concerns" regarding, amongst other things, the costs and timing of the construction of TRUs which were essential to the execution of the order. In other words, there were apparently second thoughts about whether the relocation order of this Court was appropriate and effective, and whether it could be complied with in a cost effective way.

[7] Concerns were also raised about the social, financial and legal impact on the Joe Slovo residents of a relocation of massive proportions compared to an *in situ* upgrading of the site. Doubts were being expressed about whether it was appropriate to relocate the people at all and, by necessary implication, whether it had been appropriate to secure the order of this Court in the first place. The report contained not one word about negotiations aimed at agreement concerning a new relocation timetable.

[8] Instead the report informed us that the MEC intended to commission an expert study in an effort to determine how these concerns could be addressed. An extension of time was again requested, this time until 30 September 2009. The provisional timetable provided by the Court would by then have been ineffective because the date on which the relocation was to commence would have long passed. Importantly, the extension of time was not requested for the purpose of reaching agreement on a new relocation timetable,

but on the basis that the expert study would be available by that date. Presumably, the expert study would help determine whether the large scale relocation ordered by this Court was necessary or appropriate.

[9] This Court nevertheless granted an extension[24] until 30 September 2009 but the Minister and the MEC were expressly ordered to report to the Court "concerning the process of engagement contemplated in paragraphs 5, 6 and 7" of the supervised eviction order. The order granting the extension also provided in the light of that part of the order requiring a progress report on the process of engagement, that the order to vacate was suspended until further notice.

[10] The report filed on 30 September 2009 did not comply with the order of this Court. It said nothing about any process of engagement relating to the relocation of the residents of the Joe Slovo settlement nor did it explain this patent non-compliance. It merely pointed out that no new expert would be commissioned but existing information would be used to determine, amongst other things, the number of families to be accommodated upon relocation. It requested an extension of time until 30 October 2009.

[11] A further document was filed on 30 October 2009 which, once again, did not address the question of progress in engagement concerning the relocation, apparently because there had been none. On the contrary the document said that an increased

[24] On 24 August 2009.

densification and an *in situ* upgrading model had been placed on the negotiating table and that the proposal had been positively received by the applicants and their legal representatives. The Minister had approved an agreement that had apparently been reached between the residents and the developer and the MEC to the effect that *in situ* upgrading would now take place. We were also informed that intensive workshops and consultative processes would be undertaken with the members of the broad Joe Slovo community.

[12] On 17 November 2009 this Court once more ordered the Minister and the MEC to report on the process of engagement on the relocation by 1 February 2010. The document filed on 1 February 2010 in response to this order again failed to comply with it. The document reflected that an on-site meeting had taken place between the Joe Slovo community and provincial government officials. It also said that the community had been advised that the 70/30 split would no longer apply and that all houses to be built at Joe Slovo would be for their benefit and for the benefit of former Joe Slovo residents. A joint technical steering committee had been established and was ironing out certain technical aspects of the development proposal.

[13] It is not necessary to detail the further correspondence and further documents concerning discussions about the nature of the development, as distinct from engagement on the implementation of this Court's supervisory eviction order, that were lodged during

the succeeding three and a half months. On 24 May 2010 this Court issued directions requiring the respondents to lodge affidavits by 25 June 2010:

> "a. indicating whether they intend to provide reasonable housing in the Joe Slovo settlement area by engaging in what has been referred to as an in-situ development, in other words, whether the area will be developed without disturbing the occupation of the people who presently occupy the Joe Slovo settlement area. If so,
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> b. providing reasons for the necessity of the ejectment order granted on 10 June 2009; and
>
> c. showing cause why the ejectment order made on 10 June 2009 should not be discharged."

[14] The MEC filed an affidavit confirming the intention of the provincial government to undertake an *in situ* upgrade but saying that a final decision could not be taken as financial and technical assessments and further consultations with the community were still necessary. The provincial government did not want the ejectment order to be discharged.

[15] Ultimately this Court issued further directions[25] requiring the Minister and the MEC to show cause on affidavit[26] "why the eviction order made on 10 June 2009 should not be discharged." The applicants were given the opportunity to file an answering

[25] On 9 November 2010.

[26] By 22 November 2010.

affidavit.[27] Affidavits were filed. The Minister expressed concern that absent a court order, there might be a collapse in the process of meaningful engagement and that there remained a degree of uncertainty with the result that it may be necessary to evict some of the residents. The Court was requested to keep the eviction order in place. The applicants emphasised that it was now common cause that high density *in situ* upgrading was highly achievable. They averred that the factual grounds upon which this Court's judgment was based no longer existed, and that the order should be discharged as it would be arbitrary and impermissible to evict any residents upon facts as they stood 18 months earlier.

[16] This Court then[28] issued directions requiring the parties to lodge submissions on whether the ejectment order should be discharged. The submissions filed in response to these directions in effect repeated those in the affidavits save that the applicants dealt in some detail with the basis upon which it was contended that this Court had the power to discharge the order.

[17] Hence this judgment.

The composition of this Court

[27] By 29 November 2010.

[28] On 6 December 2010.

[18] We record that the Court is composed differently today compared to its composition on 21 August 2008 when the matter was heard.[29] This is because of leave and retirement. Seven of our number who did not participate in the first decision now participate in this one.

[19] The difference in composition does not create a difficulty for, as we held in *Chonco 3*:[30]

> "The Court's jurisdiction and powers must be exercised over matters and causes falling for decision before it, regardless of changes in its composition from time to time."[31]
> (Footnote omitted.)

In any event, like in *Chonco 3*, the issues to be decided in this case are "separately justiciable" and this Court as presently constituted must decide them.[32]

Does this Court have the power to vary or discharge the order?

[20] The applicants place some reliance on that part of the supervised eviction order[33] which permits a party to "approach the Court . . . for an amendment, supplementation or variation of this order" if it is not complied with by any party or gives rise to unforeseen

[29] The matter was heard by Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J.

[30] *Minister for Justice and Constitutional Development v Chonco and Others* [2010] ZACC 9; 2010 (7) BCLR 629 (CC).

[31] Id at para 5.

[32] Id at para 6.

[33] Paragraph 21 of the order at [2] above.

difficulties. This contention raises the question whether, bearing in mind that there is no reference to discharge, paragraph 21 of the order can be interpreted widely to authorise discharge of the order. We do not think it is necessary to proceed along that route. However we must always bear in mind that the order does not expressly provide for discharge.

[21] The starting point in the discussion on whether this Court has the power to discharge an order of the kind that had been issued in this case is the case of *Zondi.*[34] This Court was in that case concerned with whether we had the power to extend the period prescribed in an order requiring a legislature to correct a defect contained in a law. All orders requiring the legislature to correct defects in legislation are made pursuant to section 172(1)(b) of the Constitution which empowers the Court to make any order that is just and equitable including:

> "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[22] In the course of the investigation into whether this Court has the power to vary an order previously made on the basis that it was just and equitable to make it, this Court said:

[34] *Zondi v MEC, Traditional and Local Government Affairs, and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC).

> "The question that arises is whether having considered it just and equitable to suspend the order of invalidity for a fixed period this Court can extend that period. By its very nature an order that is 'just and equitable' in the context of the suspension of a declaration of invalidity is subject to variation. This is so because the decision to suspend the declaration of invalidity, the determination of the period of suspension as well as the conditions to be attached to such suspension, are informed by the facts and circumstances that are at the disposal of the Court at the time the order is made. New facts may emerge or circumstances may change and render the period of suspension previously fixed to be unjust or inequitable. In these circumstances, this Court not only has the power but also has the obligation under its just and equitable jurisdiction to vary that period of suspension and the conditions attached to the suspension, if necessary, to reflect the justice and equity required by the facts of the case."[35]

[23] The essence of the judgment in *Zondi* is that a court that makes a section 172(1)(b) order that is just and equitable can also vary that order when justice and equity require. Although that case is confined to section 172(1)(b) orders, the case of *Zondi* is strong support for the proposition that where an order is made on an assessment of the circumstances that existed at a particular time, a court retains the power to vary that order if these circumstances change.

[24] But the question that must be answered in this case is whether it is permissible for this Court to discharge, not vary, an order and, if so, the circumstances in which this can be done. There may be some force in the argument that there is no reason in logic or policy why an order that is made because it is just and equitable to make it should not be susceptible to rescission when justice and equity require that course. Indeed, it seems

[35] Id at para 39.

illogical for this Court to have the power to vary an order issued on the basis that it was just and equitable when changing circumstances require, but not to have the power to discharge an order when the dictates of justice and equity require. Common sense tells us, and we must emphasise, that there is a fundamental difference between the variation of an order and its rescission. That difference requires that orders of this Court ought not to be discharged lightly. In our view, something more than a change in circumstances pointing to a different justice and equity conclusion is required.

[25] This Court has approved the principle laid down by the Appellate Division concerning variation of judgments[36] in the case of *Ntuli*[37] in the following terms:

> "The general principles of the common law applicable to the variation of orders of Court were summarised by Trollip JA in *Firestone* South Africa (Pty) Ltd v Genticuro AG as follows:
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> > 'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.' (Citation omitted.)
>
> Certain exceptions to this general principle have been recognised and are referred to in the *Firestone* judgment. They are variations in a judgment or order which are necessary to explain ambiguities, to correct errors of expression, to deal with accessory or consequential matters which were 'overlooked or inadvertently omitted', and to correct orders for costs made without having heard argument thereon.

[36] *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) 298 (AD).

[37] *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC).

> Trollip JA was prepared to assume in the *Firestone* case that the list of exceptions might not be exhaustive and that a Court might have a discretionary power to vary its orders in other appropriate cases. He stressed, however, that the
>
> > '... assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded . . . '."[38] (Footnotes omitted.)

And further:

> "The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if Courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid."[39]

[26] The *Ntuli* case is no authority for the proposition that orders of this Court can never be discharged regardless of the circumstances. Nor, in our view, is there merit in entering into an enquiry of the broad question whether this Court retains a general discretion to vary or discharge any order it makes.

[27] The supervisory eviction order in issue in this case which involved the eviction of people from their homes could only be made if the provisions of section 26(3) of the Constitution were complied with. The section, to the extent relevant, reads:

[38] Id at paras 22 and 23.

[39] Id at para 29.

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

[28] This Court does in our view have some leeway to discharge an order where the circumstances that gave rise to the grant of the eviction order change before the eviction order originally issued has been executed and the order is no longer competent. But that leeway is not wide. This Court has the discretion to discharge orders evicting people from their homes where the change is necessitated by exceptional circumstances and considerations of justice and equity. We now consider whether this test has been met.

Should the order in this case be discharged?

[29] The supervised eviction order was made in terms of section 6 of the PIE Act[40] which precludes the eviction of an unlawful occupier unless it is just and equitable to do

[40] Section 6 provides:

> "6 Eviction at instance of organ of state.—
>
> (1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
>
> (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
>
> (b) it is in the public interest to grant such an order.
>
> (2) For the purposes of this section, 'public interest' includes the interest of the health and safety of those occupying the land and the public in general.
>
> (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
>
> (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

so. The government understandably emphasises that all the judgments of this Court found the applicants to be unlawful occupiers. On the other hand, the applicants relied on the fact that the orders were issued on the basis that they were just and equitable. The crucial consideration, in our view, is that this Court would have been precluded from making any order unless it was just and equitable. The fact that all the judgments came to the conclusion that the eviction or relocation would be just and equitable is not decisive. Rather the prerequisite for the making of the order was the conclusion that it was just and equitable. This Court would not have made the ejectment order had it not found that relocation could not be said to be unnecessary. Indeed had it not been necessary to relocate the residents for the purpose of housing development or any other compelling reason, the application would probably have been dismissed. This is the context in which we must decide whether the rescission of the order is just and equitable.

[30] It is now common cause that the most likely course for the redevelopment of the Joe Slovo settlement area is *in situ* development. According to the new strategy,

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(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.

(5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).

(6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1)."

applicants will be required to relocate only if new houses have been built and allocated to them. The order cannot and will not be complied with in numerous respects.

(a) There is no intention to relocate people to TRUs.

(b) The timetable has become irrelevant.

(c) There has been little or no engagement in relation to the relocation process nor is there likely to be any engagement in relation to relocation in the future.

(d) Absent the relocation to TRUs and engagement as well as the 70/30 split, paragraphs 5 to 20 of the order no longer serve any purpose.

[31] The only part of the order that would remain if all these aspects fall away is the bare, unconditional order requiring all the applicants, and we must remember that the order granted is concerned with about 20 000 people, to vacate the Joe Slovo area. It cannot be just and equitable to leave this order in place, more particularly because the order has been in suspension for more than a year.

[32] We must, in this context, consider the two reasons advanced by the government for the order to be kept in place. The first is that discharge of the order would be premature because the decision to allocate the necessary money to go ahead with the development has not yet been taken. This does not assist the respondents. Whether or not the decision to fund the new project is taken, it remains that the relocation of residents to TRUs in

order to facilitate the development of the property is no longer on the cards. The pending funding decision is irrelevant.

[33] The second reason is advanced on the basis of a distinction between those people who qualify for subsidised housing and those who do not. The intention is that the Joe Slovo residents who do not qualify for subsidised housing will be relocated to TRUs. Two complications are said to arise from this. The first is that a conflict may develop between those residents who qualify for housing and those who do not and the second is that those who do not qualify for housing may be recalcitrant, would refuse to move and would hold a legitimate and necessary housing project to ransom and frustrate it because ejectment proceedings would be required before development can continue.

[34] The first so-called complication is easily disposed of. The discharge or continued existence of the order would have no bearing on the conflict between those who qualify for housing and those who do not.

[35] The argument based on the difficulty caused by the recalcitrant person who does not qualify for housing cannot be upheld either. The order does not refer to people who do not qualify for subsidised housing. The order of this Court provides for the relocation of residents either in terms of the timetable or as agreed. The order does not provide for any dispute resolution process except that the order of this Court may be amended if its implementation occasions difficulty. Even if one assumes that the order of this Court

would be applicable to recalcitrant residents of this kind, it is highly unlikely that any agreement would be reached between the resident concerned and the government. Complex proceedings before this Court will be almost inevitable to determine whether the order of this Court should be amended, the respects in which it should be amended and whether, if it is not appropriate to amend this order, this Court should resolve the dispute between the recalcitrant resident and the government or whether some other court should do so. The potential delay that might be caused by a recalcitrant resident because of the necessity of legal proceedings is accordingly not resolved by keeping the order in place.

[36] An additional reason that has relevance to the exceptional circumstance enquiry must be mentioned. It is evident from its terms that the execution of the order would have had to commence relatively shortly after the order was made. Hence the relocation process was to commence about two months after the order was made and any agreement concerning amendments to the timetable was to be placed before the Court less than a month after the date of its order. The supervised eviction order did not contemplate the commencement of execution in excess of a year and a half after the order was made. This is understandable because the justice and equity finding was made in dynamic, shifting circumstances.

[37] We come to the conclusion that save for one paragraph, to which we revert below, it is just and equitable to discharge the order in the following exceptional circumstances:

(a) There have been no adequate steps by the government to carry out the supervised eviction order made by this Court. The order has for all intents and purposes been left in abeyance.

(b) There is no intention to proceed with the supervised eviction order as granted.

(c) The order cannot be executed absent agreement between the parties or a complex amendment to the order.

(d) The order relates to thousands of people.

(e) The circumstances that motivated this Court to grant the supervised eviction order have ceased to exist.

(f) There is no reason why the threat of eviction, in all the circumstances, should continue to disturb the applicants.

[38] Paragraph 22 of the order cannot be discharged. It requires the government to pay 50% of the applicants' costs in the High Court and this Court, including the costs of two counsel. This order was not made on the basis that it was just and equitable. It is a final order not susceptible to alteration because of changed circumstances. And even if it were, we will have no hesitation in holding that none of the circumstances referred to in this judgment justify discharge of this paragraph of the order.

Order

[39] The following order is made:

THE COURT

Paragraphs 4 to 21 of the order of this Court made in this case on 10 June 2009 are discharged.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J and Yacoob J.

For the Applicants represented by the Penze Committee:	Advocate P Hathorn instructed by Chennels Albertyn.
For the Applicants represented by the Task Team:	Advocate G Budlender SC and Advocate L Kubukeli instructed by the Legal Resources Centre.
For the First Respondent:	Advocate SC Kirk-Cohen SC and Advocate H Rabkin-Naicker instructed by Nongogo Nuku Inc.
For the Second and Third Respondents:	Advocate M Donen SC and Advocate K Pillay (instructed by the State Attorney on behalf of Second Respondent and Fairbridges on behalf of Third Respondent).
For the Amici Curiae:	Advocate H Barnes and Advocate N Jele instructed by the Wits Law Clinic.