

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CONSTITUTIONAL COURT CASE NUMBER: CCT 24/07  
SUPREME COURT OF APPEAL CASE NUMBER: 253/2006**

*In the matter between –*

**OCCUPIERS OF 51 OLIVIA ROAD,  
BEREA TOWNSHIP AND 197  
MAIN STREET, JOHANNESBURG**

Applicant  
(Second Respondent in the court *a quo*)

and

**CITY OF JOHANNESBURG**

First Respondent  
(Appellant in the court *a quo*)

**RAND PROPERTIES (PTY) LTD**

Second Respondent  
(First Respondent in the court *a quo*)

**MINISTER OF TRADE AND  
INDUSTRY**

Third Respondent  
(Third Respondent in the court *a quo*)

**PRESIDENT OF THE  
REPUBLIC OF SOUTH AFRICA**

Fourth Respondent  
(Fourth Respondent in the court *a quo*)

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**FILING SHEET**

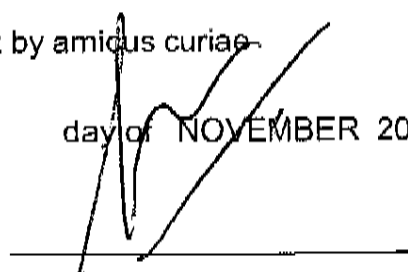
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Presented for service and filing :

Affidavit by ~~amicus curiae~~

Dated at JOHANNESBURG on this

day of NOVEMBER 2007



**S KAHANOVITZ**  
Attorney to the Amici Curiae  
Legal Resources Centre, CLU  
9<sup>th</sup> Floor, Bram Fischer House  
25 Rissik Street  
JOHANNESBURG

TO:

**The Registrar**  
Constitutional Court  
JOHANNESBURG

AND TO:

**Webber Wentzel Bowens**  
Attorneys to Occupiers of  
197 Main Street, Johannesburg  
10 Fricker Road  
Illovo Boulevard  
JOHANNESBURG  
(Ref: Mr M Hathorn/1408522/04)

AND TO:

**WITS Law Clinic**  
Attorneys to Occupiers of  
51 Olivia Rd, Berea Township  
University of the Witwatersrand  
Braamfontein  
JOHANNESBURG  
(Ref: Mr T Mmako)

AND TO:

**The State attorney**  
Attorneys for the Minister  
Of Trade and Industry  
And the President of the Republic  
Of South Africa  
10<sup>th</sup> Floor, North State Building  
95 Market Street, cnr Kruis Street  
JOHANNESBURG

AND TO:

**Moodie & Robertson**  
First Respondent's Attorneys  
9<sup>th</sup> Floor, 209 Smit Street  
Braamfontein  
(Ref: Mr C Povall)

Accepted Without Prejudice  
MOODIE & ROBERTSON

DATE ..... 07/11/2007 .....

TIME ..... 15:28 .....

*Moy*

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case No: CCT 24/07

SCA Case No: 253/2006

In the matter between:

**OCCUPIERS OF 51 OLIVIA ROAD, BEREA TOWNSHIP  
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Applicant / Appellant

And

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**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Fourth Respondent

**CENTRE ON HOUSING RIGHTS & EVICTIONS  
("COHRE")**

1<sup>st</sup> *Amicus Curiae*

**COMMUNITY LAW CENTRE, UNIVERSITY OF THE  
WESTERN CAPE ("CLC")**

2<sup>nd</sup> *Amicus Curiae*

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**AFFIDAVIT**

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I, the undersigned

**SANDRA LIEBENBERG**

do hereby make oath and state:

1. I am the Harry Oppenheimer Professor of Human Rights Law at the University of Stellenbosch. I am a member of the Board of Directors and treasurer of the Centre on Housing Rights and Evictions (COHRE), which is one of the *amici curiae* admitted in this matter. I am duly authorised to depose to this affidavit on behalf of both of the *amici curiae*. An affidavit of Sibonile Khoza of the Community Law Centre at the University of the Western Cape is annexed hereto marked "A".
2. The contents hereof are, unless stated to the contrary or otherwise appears from the context, within my personal knowledge and are true and correct.
3. I have read the affidavits of Moray Hathorn and Karen Brits delivered on 24 October 2007 and the supplementary affidavit of Hathorn delivered on 30 October 2007. Those affidavits were delivered in terms of the interim order issued by this Court on 30 August 2007 ("the interim order"). The purpose of this affidavit is to comment on the affidavits that have been filed by the parties and to set out the attitude of the *amici* in this regard.

#### 4. THE AGREEMENT REACHED BY THE PARTIES

4.1 The *amici curiae* note that the parties have, after a process of engagement between them, concluded an agreement which comprehensively deals with the practical situation of the appellant occupiers. The *amici* were not involved in this process, nor did they seek to participate therein, as the interim order was understood by the *amici* to be a mechanism to deal with the immediate plight of appellant occupiers.

4.2 The *amici* welcome the settlement of these aspects of the case and the process of engagement out of which the settlement has arisen. It is our submission that the process and its outcome are a graphic illustration of the correctness of the submissions made in paragraphs 9 and 10 of our heads of argument that "there is a need for outcomes which are pragmatic, humane and people-centred", and of the importance of the theme that runs through our heads of argument, namely that a key element of finding such solutions is ensuring participation in the process by affected persons.

## 5. OUTSTANDING ISSUES

5.1 However, while participatory processes are often effective, as in this case, to deal with the practical realities of evictions, questions of statutory constitutionality, legality and proper administrative procedure cannot be resolved by agreement.

5.2 For this reason, it is submitted, it is unsurprising that the parties have not been able to reach an agreement on various other key disputes in the litigation before this Court. As suggested in paragraph 11 of Hathorn's supplementary affidavit, these issues include the following:

5.2.1 The constitutionality of section 12(4)(b) of the National Building Regulations and Building Standards Act, 103 of 1977 ("the NBRA") and, in particular whether it unconstitutionally allows for evictions "without an order of court made after considering all the relevant circumstances" If the Court finds that the Act is capable of being read in conformity with section 26(3) of the Constitution, a determination is necessary of how the Act is to be interpreted in accordance with constitutional requirements.

5.2.2 The procedural obligations imposed on municipalities by the right to just administrative action and the Promotion of

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Administrative Justice Act, 3 of 2000, when relying on the provisions of section 12(4)(b) of the NBRA; and

5.2.3 The applicability of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 when the provisions of section 12(4)(b) of the NBRA are relied upon.

5.3 Unlike the immediate practical position of the appellant occupiers, these issues cannot be resolved by means of consultation and agreement between the parties. They can only be determined by a court.

5.4 The *amici* further submit that, apart from the rights of the people who are living in the two buildings which were the subject of the application by the City, the rights of a very large number of other people are also affected by the issues before the Court. In this regard, we refer specifically to the residents of the many other buildings which the City has designated as "bad buildings", which in the view of the City require evacuation.

5.5 The *amici* submit that it is essential in the interests of justice that the legal questions raised by these proceedings be determined by this Court. There is now a judgment of the Supreme Court of Appeal with regard to those questions. That judgment will bind all High Courts, and

will be understood by all affected as determinative of the issues. If (as the *amici* have submitted) that judgment is incorrect in certain respects, and it is allowed to stand, the consequences will be very serious.

5.6 Proceedings of this kind are brought overwhelmingly against poor people, who do not have access to the resources or assistance which are necessary to defend their rights effectively. The applicants in this case had the good fortune that they were able to obtain the services of public-spirited attorneys and counsel who were prepared to represent them in extensive and complex litigation. Other people in their position will not be so fortunate. The result will be that their rights will in effect be determined by the judgment of the Supreme Court of Appeal. The City (and for that matter other municipalities) will be able to act on the basis of that judgment. The consequence of that judgment is, for example, that a municipality may without a hearing issue a notice which criminalises people's continued occupation of their homes. If that is not consistent with the Constitution – and the *amici* submit that it is not – then the result will be that unconstitutional conduct which has been brought before this Court will be able to continue, to the severe detriment of those who are most vulnerable. I respectfully submit that this can not be in the interests of justice.

Stuart Wilson  
2007/11/09

5.7 If the Court does not rule on these issues in this case, it is likely that it will have to do so at some stage in the future. Bringing the issues before this Court again will require considerable resources. The period for which the law will continue to be understood and applied in accordance with the judgment of the SCA will, to some extent, depend on chance.

5.8 The issues have now been fully ventilated in three courts, including this Court. The *amici* submit that the importance of the issues is such that it would be in the interests of justice for the Court to rule on them, despite the fact that the parties have reached an agreement on the practical consequences of this particular case. In this regard, I respectfully refer to the recent decision of this Court in *MEC for Education KwaZulu-Natal and Others v Pillay and Others* (Constitutional Court, Case No. 51/06, 5 October 2007) at paragraphs 32 - 35.

## 6. THE "NEW" MATERIAL SUBMITTED BY THE RESPONDENTS

6.1 The *amici* submit that in addition to the above questions, a further important issue that remains unresolved is the question whether, at the time that the litigation was launched, the City of Johannesburg had formulated and implemented a reasonable plan to progressively realise

the rights of access to adequate housing of the appellants and the class of persons they represent.

6.2 A judgment of the Court will give much-needed assistance and guidance to state institutions that bear responsibilities in relation to the right to housing, both in respect of the scope of that duty and in relation to the kinds of measures that are regarded as being reasonable or unreasonable in seeking to comply with it, particularly with regard to people who are living in circumstances such as those described by the City in this case, and whom a municipality seeks to have evicted from their homes.

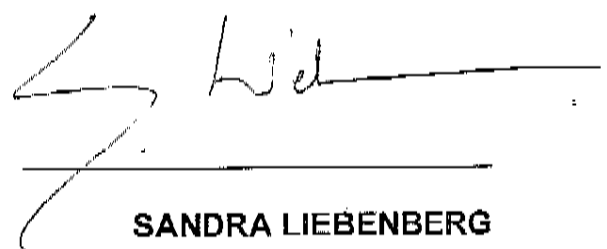
6.3 In this regard, the *amici* are in agreement with the submission in paragraphs 11 – 12 of Hathorn's supplementary affidavit that, should the Court be minded to consider these issues on the basis of the new material submitted by the respondents in their supplementary affidavit, all the parties, including the *amici*, should be given an appropriate opportunity to examine the said material, to consult expert witnesses if needs be, and to file further affidavits that deal with the reasonableness of the plan that the City has submitted. In addition, it is submitted that it would be appropriate to allow the parties to file further written submissions and to schedule a further hearing of the matter.

## 7. CONCLUSION

7.1 For these reasons, the *amici curiae* support the position taken by the appellants that, despite the agreement that has been reached between the parties:

7.1.1 A number of issues in the litigation remain ripe for determination and it would be in the interests of justice for the Court to determine them; and

7.1.2 To the extent that the court is minded to take into account the additional evidence submitted by the respondents, the Court should issue directions affording the parties and the *amici* an opportunity to file further affidavits dealing with the content thereof, set out a timetable for the delivery of further written argument, and schedule a further hearing to deal with the question of the reasonableness of the City's plan in relation to housing.



**SANDRA LIEBENBERG**

I certify that on this 5<sup>th</sup> day of **NOVEMBER 2007**, in my presence at  
, the deponent signed this declaration and declared that she:

1. knew and understood the contents hereof;
2. has no objection to taking this oath;
3. considered this oath to be binding on her conscience;

and uttered the words "I swear that the contents of this declaration are true, so help me God"

---

**COMMISSIONER OF OATHS**

JOHANNES DIERIK VAN DER MERWE  
PRACTISING ATTORNEY  
CHENNELLS ALBERTYN  
44 ALEXANDER STREET  
STELLENBOSCH 7600

**Annexure "A"**

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1<sup>st</sup> *Amicus Curiae*

**COMMUNITY LAW CENTRE, UNIVERSITY OF THE  
WESTERN CAPE ("CLC")**

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**AFFIDAVIT**

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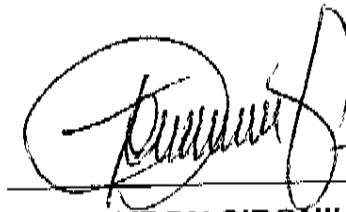
I, the undersigned,

**GAYEON SIBONILE SIMON NKAZA**

*[Handwritten signatures]*

do hereby make oath and state:

1. I am a senior researcher and co-ordinator of the Socio Economic Rights Project of the Community Law Centre, University of the Western Cape, Cape Town ("the CLC"), the second *amicus curiae* in this litigation. I am duly authorised to make this application and this affidavit on behalf of the CLC.
2. The contents hereof are, unless stated to the contrary or otherwise appears from the context, within my personal knowledge and are true and correct.
3. I have read the affidavit of Sandra Liebenberg of COHRE and confirm the correctness thereof insofar as it relates to the CLC. In particular, I confirm that the CLC aligns itself fully with the position and attitude set out in that affidavit.




GAYBON SIBONILE SIMON KHOZA

I certify that on this <sup>5<sup>th</sup></sup> day of **NOVEMBER 2007**, in my presence at **BELLVILLE**, the deponent signed this declaration and declared that he:

1. knew and understood the contents hereof;
2. has no objection to taking this oath;
3. considered this oath to be binding on his conscience;

and uttered the words " I swear that the contents of this declaration are true, so help me God"



COMMISSIONER OF OATHS