

A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context

Clireesh Terry Cloete



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Supervisor: Professor ZT Boggenpoel

Co-supervisor: Professor JM Pienaar

Faculty of Law

Department of Private law

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

In the pre-constitutional era courts had a very specific approach to eviction remedies. This approach was the result of legal doctrine that regulated the concept of ownership, eviction remedies and standard practices of presiding officers as entrenched in rules of interpretation and procedural rules.

The advent of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) transformed the eviction landscape by way of section 26(3) of the Constitution and the subsequent promulgation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). After the first Constitutional Court judgment *Port Elizabeth Municipality v Various Occupiers* (2005 (1) SA 217 (CC)) it became apparent that the PIE not only replaced the pre-constitutional eviction remedies but in fact also required that the deep-level assumptions of a landowner’s right to evict and the standard practices associated with the courts’ role in eviction cases were also revolutionised. The pivotal consideration of this study, in light of these developments of eviction law brought about by the constitutional dawn, is whether the courts are indeed approaching and applying PIE in line with their mandate. This is critical as a superficial shift will only frustrate the transformative thrust of the Constitution in the context of eviction.

The study of the courts’ approach to eviction remedies in the pre-constitutional and constitutional context has shown that section 26(3) and PIE have indeed transformed the eviction landscape on a theoretical basis. In this regard, the courts’ approach to eviction remedies has changed from conservative, formalistic and passive in the pre-constitutional era to context-sensitive, flexible and proactive. However, some courts, especially the lower courts, are still failing to apply PIE as mandated. This is due to the continued pre-constitutional deep-level assumptions of the strength of the landowner’s right to evict, combined with procedural practices that form part of their pre-constitutional legal culture. Interestingly, the specific focus on landowners in this study indicated that this failure on the part of the court is surprisingly problematic for landowners.

Opsomming

Voor die inwerkingtreding van die Grondwet van die Republiek van Suid Afrika, 1996 (die “Grondwet”) het die howe uitsettingsremedies op ’n baie spesifieke wyse benader. Dié benadering was die resultaat van die regsdogma wat die eiendomsbegrip gereguleer het, die wese van bestaande uitsettingsremedies, sowel as die reëls van interpretasie en prosedure rakende die voorsittende beampte se rol in hofverrigtinge.

Die inwerkingtreding van die Grondwet en die Wet of die Voorkoming van Onwettige Uitsetting en Onregmatige Okkupasie van Grond Wet 19 van 1998 (“Uitsettingswet”) is daarop gemik om die wyse waarop uitsettings gereguleer en benader word, te transformeer. Die hof in *Port Elizabeth Municipality v Various Occupiers* (2005 (1) SA 217 (CC)) het dit duidelik gemaak dat die Uitsettingswet nie net die voor-grondwetlike uitsettingsremedies vervang het nie, maar ook ’n ommekeer vereis. Laasgenoemde word vereis ten aansien van onderliggende aannames oor ’n eienaar se reg op uitsetting, asook standaardpraktyke wat betref die hof se rol in uitsettingsake. Dié uitspraak rakende die hof se nuwe rol is kardinaal omdat slegs ’n oppervlakkige verandering die transformasie-oogmerke van die Grondwet sal frustreer.

Die studie van die wyse waarop howe uitsettingsremedies in die grondwetlike en voor-grondwetlike era benader, dui aan dat artikel 26(3) van die Grondwet en die Uitsettingswet op ’n teoretiese vlak die uitsettingslandskap verander het. In hierdie verband het die studie aangetoon dat die hof se benadering verander het vanaf ’n konservatiewe, meganiese en onbetrokke benadering voor die inwerkingtrede van die Grondwet tot ’n konteks-sensitiewe, soepele en betrokke benadering.

Ten spyte hiervan dui onlangse regspraak steeds daarop dat die vereiste transformasie nie altyd bespeur word wanneer howe uitsettingsake beslis nie. Die studie wys uit dat sommige howe, veral laer howe, steeds nie daarin slaag om die Uitsettingswet toe te pas soos deur die Grondwet vereis nie. Hierdie versuim kan toegeskryf word aan die handhawing van voor-grondwetlike regskultuur wat betref onderliggende aannames oor die inherente krag van eiendomsreg en die navolg van voor-grondwetlike prosedurele praktyke. Die navorsing dui verder aan dat in gevalle waar howe sodanig misluk, hul dienooreenkomstig nalaat om grondeienaars se eiendomsreg na behore te beskerm.

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Chapter 1: Introduction

1 1 Introduction to the research problem

The common law *rei vindicatio* has for many years been the remedy available to a landowner to evict unlawful occupiers.¹ In this regard, unlawful occupiers are persons occupying property without the owner's consent or another right in law to occupy such property.² The *rei vindicatio* allowed landowners to obtain eviction orders against unlawful occupier(s) irrespective of the circumstances of such occupier(s).³ Evictions brought about by this private law remedy had the implication that swift action could be taken against unlawful occupiers on the basis of landowners' relatively strong right *vis-a-vis* the weak position of unlawful occupiers.⁴ Accordingly, the availability and effect of the *rei vindicatio* flowed naturally from the owner's ownership. However, the *rei vindicatio* was not the only legal remedy that could prompt a court to order the eviction of unlawful occupiers. Evictions in accordance with legislation were very popular in the pre-constitutional era and were even less complex and more expedient than the *rei*

¹ CG van der Merwe *Sakereg* 2 ed (1989) 346; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 467; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 538-555.

² CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 467; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 242; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539.

³ CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; *Vumane v Mkize* 1990 (1) SA 465 (W); *Shimuadi v Shirunga* 1990 (3) SA 344 (SWA).

⁴ AJ van der Walt & GJ Pienaar *Introduction to the law of property* 7 ed (2016) 145. Van der Walt and Pienaar observe that the underlying idea behind the *rei vindicatio* is "that the owner's real right to the thing is so strong, that the thing [...] held without any legal cause, can be recovered by the owner". See further CG van der Merwe *Sakereg* 2 ed (1989) 350; AJ van der Walt *Property in the margins* (2009) 53; *Chetty v Naidoo* 1974 (3) SA 13 (A) 16.

vindicatio.⁵ As a result, courts approached eviction cases in a very specific manner, privileging ownership above any other right.

The advent of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) envisioned a new approach for eviction in South Africa.⁶ Section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”), promulgated to give effect to section 26(3), require a shift from a rights-based approach to an approach where all relevant factors must be considered.⁷ This shift on the surface is evident in the complete move from a common law-based eviction remedy to an eviction remedy based on legislation in the context of unlawful occupation.⁸ Furthermore, it is characterised as a move away from stringent and fixed requirements towards a more flexible approach that mandates courts to consider all relevant circumstances.⁹ Sachs J in the landmark decision *Port Elizabeth Municipality v Various Occupiers* (“PE Municipality”) enunciated that:

“[t]he court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must

⁵ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 55; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 386; JM Pienaar *Land reform* (2014) 667.

⁵ JM Pienaar *Land reform* (2014) 688.

⁶ The court in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23 held that “[i]n sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counter poses to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head on with the genuine despair of people in dire need of accommodation.”

⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23; *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) para 15; *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016) para 17.

⁸ Section 4(1) of PIE; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 242; JM Pienaar *Land reform* (2014) 688; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 270.

⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23; *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) para 15; *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016) para 17.

deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make.”¹⁰

This dictum of the Constitutional Court not only denounced the traditional approach to eviction cases, but it also enjoined courts to align their (philosophical, procedural, interpretive and remedial) approach to the eviction of unlawful occupiers with section 26(3) of the Constitution and PIE.

Interestingly, in a recent case *Pitje v Shibambo and Others*¹¹ (“*Pitje CC*”) the Constitutional Court highlighted that the type of approach courts employ in eviction cases is critical after the High Court in *Shibambo and Others v Pitje*¹² (“*Pitje HC*”) failed to apply the PIE, as mandated by the legislative measure itself, the constitutional provision in terms of which the legislation came into existence and the numerous Constitutional Court judgments handed down since PIE’s promulgation.

Pitje HC concerned an application for the eviction of an elderly person of ill-health from his primary residence.¹³ In an attempt to resist the eviction proceedings against him, the respondent alleged that a valid and enforceable sale agreement existed between himself and the seller,¹⁴ of which the applicant had prior knowledge.¹⁵ In the alternative, the respondent raised the provisions of PIE against the eviction order sought by the applicants.¹⁶

The court assumed on the basis of the pleadings that the case was a relatively straightforward double sales case and ignored the respondent’s defence in terms of PIE. Therefore, its *ratio* primarily focussed on whether or not the applicants were *bona fide* purchasers for purposes of determining whether the doctrine of notice should find application in these circumstances. The court eventually found that no prior knowledge

¹⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 36.

¹¹ (144/15) [2016] ZACC 5 (25 February 2016).

¹² (77700/2010) [2015] ZAGPPHC 89 (17 February 2015).

¹³ *Shibambo and Others v Pitje* (77700/2010) [2015] ZAGPPHC 89 (17 February 2015) para 1; *Shibambo and Others v Pitje* (77000/10) [2014] ZAGPPHC 501 (7 March 2014) paras 2-3.

¹⁴ *Shibambo and Others v Pitje* (77700/2010) [2015] ZAGPPHC 89 (17 February 2015) para 2.

¹⁵ *Shibambo and Others v Pitje* (77700/2010) [2015] ZAGPPHC 89 (17 February 2015) para 2.

¹⁶ *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016) para 10.

existed and therefore held that the sale between the applicants and the seller was valid and enforceable against the respondent. On this basis alone the court granted an order for eviction against the respondent.¹⁷ The respondent subsequently applied to the Supreme Court of Appeal for leave to appeal, however, such leave was refused.¹⁸

In particular, two issues emerge here, namely (a) the disregard of the legislative measure PIE as a whole; and (b) the granting of eviction orders without any regard to section 26(3) of the Constitution that expressly requires that courts consider all relevant circumstances in eviction cases. The *Pitje HC* decision shows that courts continue to struggle to deal with the mandate conferred upon them in the context of evictions.

The pivotal consideration of this study, in light of the obvious changes to the eviction landscape brought about by the constitutional dawn, is whether the courts are indeed approaching and applying PIE in line with their mandate. This is critical as a superficial shift only may lead to more *Pitje HC*-style judgments and consequently frustrate the transformative thrust of the Constitution in the context of eviction.¹⁹ Therefore, the question that arises and which is explored in this study is whether the courts' approach to eviction remedies in actual fact always reflect the new role of the court as envisioned by the Constitutional Court in *PE Municipality*, as alluded to above.

1 2 Research aims, hypotheses and methodology

This research is not aimed at determining whether a change in approach has taken place on the surface level only (in other words, the remedy an owner can utilize in the context of unlawful occupation of land and its chances of success). Rather, the aim is

¹⁷ *Shibambo and Others v Pitje* (77700/2010) [2015] ZAGPPHC 89 (17 February 2015) para 16.

¹⁸ *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016) para 1.

¹⁹ In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 36 the court held that “[t]he Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.”

to ultimately assess whether the underlying rationale of the courts in the constitutional dispensation is in line with the transformative thrust of eviction law.²⁰ In this regard the study investigates the extent to which section 26(3) of the Constitution has influenced the courts' approach to the application of eviction remedies available to an owner looking to evict unlawful occupiers.²¹ It will therefore be important to consider whether theoretical underpinnings and background assumptions influence the rationale with which courts approach eviction remedies. These assumptions and underpinnings have been described as the unarticulated premises or concealed stimuli of judges that consist of, as Dugard puts it, a "judge's legal education, race and class, political, economic and moral prejudices."²² To that end, great emphasis will also be placed on the legal culture of judges in South Africa.

My hypothesis is that some courts are applying the transformative eviction remedy, PIE, within a pre-constitutional paradigm. This has important implications, including that the constitutional eviction paradigm is precluded from achieving its objectives. Furthermore, where courts fail to embrace their new role in eviction cases, as was the case in *Pitje HC*, it is expected that the rights and interests of unlawful occupiers will not find adequate protection *via* the provisions of PIE. However, the ensuing impact of

²⁰ The preamble of the applicable Act, namely the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 sets out the objectives of the Act. These objectives include that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property; AND WHEREAS 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; AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances; AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered."

²¹ The study will specifically not focus on unlawful evictions but rather lawful evictions where owners diligently followed all the procedures prescribed by the remedies in order to ultimately assess the approach of the court in these circumstances. For a discussion of the remedies possibly available to a possessor in that regard see: ZT Boggempoel & JM Pienaar "The continued relevance of the mandament van spolie: Recent developments relating to dispossession and eviction" (2013) 46 *De Jure* 999-1021.

²² See CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 188 (citing) J Frank *Law and the modern mind* 1 ed (1930) 105.

such failure on the owners' rights has not been reiterated and explained with regard to section 25 of the Constitution. My presumption, in this regard, is that a pre-constitutional approach to eviction remedies that automatically prioritises landowners' entitlements has the effect that the landowner is not unjustifiably limited in his property rights.

In order to investigate the research problems, I will describe and analyse the manner in which courts applied eviction remedies before the constitutional dispensation. This investigation will be undertaken with the help of legal historical textbooks, pre-constitutional case law and journal articles concerning and dealing with the courts' approach to evictions of unlawful occupiers as informed by the way it viewed the owner's right to evict unlawful occupiers. The purpose of such description is to enable an understanding of the underlying assumptions. This is done by way of identifying characteristics of the pre-constitutional approach that accompanied the courts' application of eviction remedies in that era with specific reference to the rights protected by the eviction remedies and the courts' interpretive and procedural role in eviction cases.

I will then investigate the contemporary approach courts are required to follow in the constitutional context by identifying, describing and analysing the applicable sections in the Constitution, legislation, journal articles, case law and textbooks. This will enable deductions to be made about certain characteristics that should underpin the approach courts follow when they apply the eviction remedy, PIE. These characteristics will be deduced from a careful analysis of case law and academic literature pertaining to the philosophical underpinnings of the PIE, as well as courts' prescribed interpretive and procedural role in eviction cases in the constitutional era. Eviction case law adjudicated under the auspices of PIE will be analysed specifically so as to determine whether the actual approach of courts aligns with the constitutional standard set for evictions.

The findings of the above investigations will be critically analysed to indicate whether a new eviction paradigm with regard to the philosophical underpinnings, interpretive function of courts and the prescribed procedural role of courts on a theoretical level has taken place. This finding will be compared with the conclusions drawn from the analysis of the approach that is actually employed by courts. In the event of disparities

between the approach *theoretically* required and the approach *actually* being applied, a further investigation into whether such disparities can be ascribed to the pre-constitutional legal culture of courts will be undertaken. In light of the above-mentioned conclusions about the pre-constitutional thinking within the constitutional eviction paradigm, the research explores briefly the ensuing consequences for, in particular, landowners where the underlying rationale and deep-level assumptions of some courts still reflect pre-constitutional legal culture. The consequences for landowners are specifically focussed on in this study due to the relatively strong position of landowners before PIE came into existence. However, this is not the main focus of the study, but rather a consequential investigation. A brief constitutional analysis will indicate whether such failure may cause an arbitrary deprivation of a landowner's constitutional property rights.

1 3 Overview of the chapters

This thesis consists of five chapters, including the current introductory chapter. Chapter two investigates the courts' approach to eviction remedies before the commencement of the Constitution. It sets out and describes the impact of the established doctrine pertaining to ownership and an owner's right to evict on the courts' approach to eviction remedies in the pre-constitutional era. Accordingly, the chapter describes the historical development of and the philosophical approach that developed the concept of ownership and the *rei vindicatio* in Roman, Roman-Dutch and South African law and subsequent eviction legislation. From this discussion the main characteristics with which the concept of ownership and the eviction remedies were received into South African law are identified. A further analysis of South African case law is undertaken to illustrate how these characteristics established certain deep-level assumptions regarding the strength of an owner's right to vindicate.

Furthermore, the chapter investigates the impact of courts' prescribed interpretive function and procedural role on the way in which courts applied and approached eviction remedies in the pre-constitutional era. In this regard, chapter two describes the dominant interpretive rules in the pre-constitutional era as well as the rules pertaining to the role of presiding officers during court proceedings. From these rules

certain characteristics are deduced to describe the courts' approach to eviction remedies in the pre-constitutional era.

Chapter three turns to the courts' approach to eviction remedies in the constitutional era. The chapter starts by describing the historical and the political background that led to the promulgation of PIE. It furthermore describes the philosophical tenets that underpin PIE by means of a detailed description of the landmark decision of *Port Elizabeth Municipality v Various Occupiers*.²³ The description of the philosophical underpinnings are employed so as to deduce the characteristics that should be guiding the courts' approach to PIE. The chapter also discusses and analyses the basic requirements of PIE. The most important case law in this regard is also scrutinised to determine whether or not the identified characteristics are in actual fact present in the courts' application of PIE.

Furthermore, the chapter describes and analyses the courts' prescribed interpretive role and the prescribed role of presiding officers in the constitutional context. This is followed by an analysis of how these rules in the constitutional era require courts to apply PIE. This analysis paves the way for determining the impact of these rules on courts' application of PIE and ultimately describes the manner in which these interpretive and procedural rules enjoin courts to apply PIE in the constitutional era.

Chapter four provides a critical analysis of the changes brought about by section 26(3) and PIE in the constitutional era, compared to the pre-constitutional era. In this comparison the role of the court in the constitutional era is focussed on specifically. The new approach of courts is subsequently compared with common law equity to determine the extent of change brought about by section 26(3) of the Constitution and PIE. This comparison is followed by a critical analysis of the actual approach of courts. Where a flaw in the approach of the courts is identified, the study explores whether it can be ascribed to pre-constitutional legal culture. Finally, chapter four explores the impact of the failure of courts to apply PIE as mandated on landowners in particular.

The concluding chapter provides a summary of the findings and purports to provide some reflection on the research problem.

²³ 2005 (1) SA 217 (CC).

Chapter 2: The courts' approach to eviction remedies before the Constitution

2 1 Introduction

The purpose of this chapter is to determine the courts' approach to eviction remedies prior to the commencement of the Constitution of the Republic of South Africa, 1996 (the "Constitution"). The eviction remedies discussed are limited to only those remedies that were available to an owner of immovable property to evict unlawful occupiers from residential property, on the basis of ownership and not mere possession.¹ In the pre-constitutional era certain rules had an impact on the owner's ability to vindicate her property. The point of departure was that an owner of property could not be deprived of her property without her permission.² The reason being that the law accepted and assumed that the owner would normally be in possession of her property unless the owner deliberately consented to the possession thereof by another.³ This was the general point of departure for both movable and immovable property.⁴ Therefore, in the context of evictions where the type of property concerned

¹ See ZT Boggenpoel & JM Pienaar "The continued relevance of the mandament van spolie: Recent developments relating to dispossession and eviction" (2013) 46 *De Jure* 999-1021 for a discussion of the remedies possibly available to a possessor.

² PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 242. However, this point of departure must be recognised along with its qualifications or exceptions. The state's regulatory or police power could, in the pre-constitutional era, limit property rights in favour of public safety, public security or public purpose. Such a limitation was justifiable and could even extend to expropriation of property. See AJ van der Walt *Property in the margins* (2009) 61. Also see *Gien v Gien* 1979 (2) SA 1113 (T) 1120 where Spoelstra AJ held that:

"The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law."

³ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

⁴ CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 467-468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539.

immovable property, these rules also applied. For example, where the owner of immovable property found unlawful occupiers on her land, the law was structured in such a way to provide legal recourse to an owner seeking to vindicate her ownership. South African common law⁵ and statutory law,⁶ provided this recourse in the form of remedies which operated in favour of the owner.⁷ The common law offered the *rei vindicatio* and legislation offered provisions that regulated evictions. Both remedies provided the owner with procedural and substantive frameworks to effectively vindicate and recover occupation. Therefore, two distinct legal remedies existed, upon which the court could adjudicate eviction cases, depending on which one of the two the owner relied upon.

The requirements of the respective remedies, together with the unique facts of each case, steered the court in deciding whether an eviction order should be granted. However, these were not the only factors that influenced the outcome of eviction cases. Therefore, in this chapter the emphasis will not only be on the impact of the remedies and their requirements on the courts' approach to eviction, but it will extend to identifying the legal culture within which the court applied eviction remedies to provide a holistic view of the courts' approach to eviction in the pre-constitutional period.

Accordingly, the courts' approach, in this chapter, is dealt with, with reference to the particular legal culture of the South African courts in the pre-constitutional era. Bhana explains that legal culture comprises of the various attitudes and understandings of law in a society.⁸ She argues that these various attitudes and understandings are a result of a society's legal education and members of a society's personal experiences of the law. Furthermore, these attitudes and understandings comprise of the "highly theoretical legal conceptions put forward by jurisprudential scholars[,] 'professional

⁵ AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 256.

⁶ AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 259. Examples of legislation that made provision for evictions are: the War Measure Act 13 of 1940 ("WMA") and the Prevention of Illegal Squatting Act 52 of 1951 ("PISA").

⁷ CG van der Merwe *Sakereg* 2 ed (1989) 347.

⁸ D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124.

sensibilities, habits of mind [and the]... intellectual reflexes' and ensuing standard practices of judges and lawyers".⁹ In this chapter the courts' understanding and attitude towards the right to evict are described through both the identification of the highly theoretical conceptions of eviction remedies that were embraced by courts and the courts' standard practices and procedures that were applicable when courts adjudicated eviction cases.

The chapter is divided into three main parts. The first and second parts highlight the courts' understanding of eviction remedies in the pre-constitutional era, by setting out the historical background and theoretical underpinnings of the pre-constitutional eviction remedies (the *rei vindicatio* and statutory eviction provisions). It identifies the historical origin and development of the eviction remedies in conjunction with the historical roots and development of the concept of ownership. The purpose of this discussion is to emphasise the strong link between the conceptual understanding of ownership and the application of eviction remedies during the pre-constitutional era. This allows for inferences to be made about the type of legal culture that the conceptual understanding of ownership and the right to evict brought about. This in turn allows for conclusions to be drawn about the courts' approach to the application of eviction remedies in the pre-constitutional era.

The third part of the chapter focuses on the impact that the prescribed role and functions of courts in the pre-constitutional period had on the manner in which they applied eviction remedies. Firstly, this section identifies the way in which courts were required to interpret the law (both the common law and statutory law). Secondly, the section investigates the impact of the adversarial nature of court proceedings on the way adjudication took place. Finally, these two findings are utilised to describe the legal culture with which courts applied eviction remedies in the pre-constitutional era.

⁹ D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124. Footnotes omitted.

2 2 The common law eviction remedy: The *rei vindicatio*

2 2 1 Introduction

Ownership (or property) may be protected by various remedies or methods, depending on the factual situation and objectives of the particular remedy sought.¹⁰ The *rei vindicatio* is one of the remedies aimed at protecting ownership and it is regarded as the most important remedy to this effect.¹¹ In this regard, what sets the *rei vindicatio* apart from all the other remedies is its unique operation, namely that it allows the owner to recover possession from any type of unlawful occupier¹² (*mala fide* or *bona*

¹⁰ H Mostert, JM Pienaar & J van Wyk “Land” in WA Joubert & JA Faris (eds) *LAWSA Vol 14 Part 1 2* ed (2010) para 30. See further CG van der Merwe *Sakereg* 2 ed (1989) 346-373; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 464; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 242-270; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 538-555.

¹¹ See also CG van der Merwe *Sakereg* 2 ed (1989) 346; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 467; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 538-555 where the authors reiterate that the *rei vindicatio* is the most important vindicatory remedy.

¹² See J Voet *Commentarius ad Pandectas* (1829 translated by P Gane *Commentary on the Pandect* 1958, hereafter referred to as “Voet”) 6.1.22; CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 476; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 242; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 539; *Wainwright and Co v Trustee Assigned Estate S Hassan Mahomed* (1908) 29 NLR 619 626-627; *Mngadino NO v Ntuli and Others* 1981 (3) SA 478 (D) 485. The focus of this chapter will fall on the *rei vindicatio* and not on possessory actions. The *rei vindicatio* is a real vindicatory action available to an owner to recover possession, although it is essentially aimed at protecting ownership of property. Its real nature implies that the owner can institute the action against any person who has possession of her property. From this the difference between the *rei vindicatio* and a possessory action becomes evident. In the first place, the possessory action is available to possessors, while the *rei vindicatio* is only available to the owner of the property. In this regard, see *Ncume v Kula* (1905) 19 EDC 338 338-340. In the second place, the *rei vindicatio* enables an owner to recover lost property from any person with unlawful possession of the property while a possessory remedy may only be recovered from the specific person who dispossessed the lawful possessor. See CG van der Merwe *Sakereg* 2 ed (1989) 96-97.

fide); and that it purports to restore the owner's physical control (possession) over the property, together with the fruits thereof.¹³

In the context of immovable property, the remedy protects the owner's right to occupy her property by requiring a court to order eviction, after the owner satisfied the requirements of the remedy.¹⁴ An owner or co-owner could succeed with an eviction application in the event of him or her successfully proving three requirements. These requirements are set out in the Supreme Court of Appeal judgment of *Chetty v Naidoo*.¹⁵ In the first place, the applicant has to prove ownership of the relevant property.¹⁶ In this regard, it is sufficient for the applicant to prove on a balance of probabilities that she is the registered owner of the land.¹⁷ Secondly, the property must be in the possession of the defendant at the time the action is instituted.¹⁸ The third

¹³ Voet 6.1.30; CG van der Merwe *Sakereg* 2 ed (1989) 352; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 472-474; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 246; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 540.

¹⁴ T Mommsen, P Kruger & A Watson *The Digest of Justinian* Vol IV (1998), hereafter referred to as "D" 6.1.1.1; CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; *Vumane v Mkize* 1990 (1) SA 465 (W); *Shimuadi v Shirunga* 1990 (3) SA 344 (SWA).

¹⁵ 1974 (3) SA 13 (A).

¹⁶ *Chetty v Naidoo* 1974 (3) SA 13 (A) 21. See further Voet 6.1.20, 24; CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Kemp v Roper NO* (1885-1906) 2 Buch AC 141 143; *Judelman v Colonial Government* (1906-1909) 3 Buch AC 446 452-453; *Marcus v Stamper and Zoutendijk* 1910 AD 58 72; *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382; *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) 744; *Henning v Petra Meubels Bpk* 1947 (2) SA 407 (T) 412; *Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) 110.

¹⁷ Voet 6.1.24. CG van der Merwe *Sakereg* 2 ed (1989) 348; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 244; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) 82; *Gemeenskapsontwikkelingsraad v Williams* 1977 (2) SA 692 (W) 696.

¹⁸ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20. See further Voet 6.1.2; CG van der Merwe *Sakereg* 2 ed (1989) 349; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; CG van der

requirement for the *rei vindicatio* is that the property must still exist and be identifiable.¹⁹

If an applicant succeeded in proving these three requirements the court had a duty to grant the *rei vindicatio* and order the eviction of the defendant from the property, unless the defendant could prove a legal basis (or *ius possidendi*) for being in possession of the property or successfully raise one of the recognised defences against the *rei vindicatio*.²⁰ Defences against the *rei vindicatio* encompass any contestation of the *facta probanda*, including: (i) that the applicant was not the true owner of the property;²¹ (ii) that the property was already destroyed before the action was instituted;²² (iii) that the defendant did not have physical control over the property at

Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382; *Clifford v Farinha* 1988 (4) SA 315 (W) 319.

¹⁹ Voet 6.1.24; CG van der Merwe *Sakereg* 2 ed (1989) 349; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 244; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Leal and Co v Williams* 1906 TS 554 558; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 996.

²⁰ An *ius possidendi* refers to a right to be in possession. Thus, if a defendant can prove that she for instance has a right of retention or a contractual right in terms of a lease contract to occupy the land, the owner will not succeed with the *rei vindicatio*. The onus will then shift to the owner to prove that the alleged *ius possidendi* has lapsed or has been cancelled. See CG van der Merwe *Sakereg* 2 ed (1989) 349, 350; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 244; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 540; *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382-383; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20-21; *Graham v Ridley* 1931 TPD 476; *Boshoff v Union Government* 1932 TPD 345; *Henning v Petra Meubels Bpk* 1947 (2) SA 407 (T) 412.

²¹ CG van der Merwe *Sakereg* 2 ed (1989) 350; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 245; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 540; *Ncume v Kula* (1905) 19 EDC 338; *Dreyer v AXZS Industries (Pty) Ltd* 2006 (3) SA 13 (A) para 18.

²² CG van der Merwe *Sakereg* 2 ed (1989) 350; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 540; *South African Railways and Harbours v Fisher's Estate* 1954 (1) SA 337 (A) 342; *Street v Regina Manufacturers (Pty) Ltd* 1960 (2) SA 646 (T) 648.

the time the action was instituted;²³ and (iv) a defence based on *estoppel*.²⁴ The consequence of a successful eviction order in terms of the *rei vindicatio* was that the owner was able to recover her lost possession,²⁵ which in practice meant that the owner could reoccupy her immovable property.

Therefore, the result of an owner succeeding with the *rei vindicatio* is that the owner would be in the position to take occupation of her land by evicting the unlawful occupiers.²⁶ This occurrence is described by Van der Walt as the “normal state of affairs” in eviction proceedings.²⁷ This normal state of affairs refers to the assumption that it is traditionally accepted that the owner, as a point of departure, will be in occupation of her property unless the owner extended permission to another person

²³ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 245; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 540. In the event that the defendant denies that she does not have possession of the property the court may order that the plaintiff be put in possession of the property even if the plaintiff failed to prove that she is the owner of the property. See D 6.1.80; Voet 6.1.25; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 245; *Mehlape v Minister of Safety and Security* 1996 (4) SA 133 (W) 136.

²⁴ CG van der Merwe *Sakereg* 2 ed (1989) 350; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 472; PJ Rabie “Estoppel” in WA Joubert & JA Faris (eds) *LAWSA Vol 9 Part 1 2* ed (2005) para 667; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 245; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552-554; JC Sonnekus & PJ Rabie *The law of estoppel in South Africa* 3 ed (2012) 30-34. The defence of *estoppel* will be available to a defendant to raise against the *rei vindicatio* if the owner of the property intentionally or negligently made the defendant believe that ownership was transferred to the defendant, or that a third party had the authority to transfer ownership to the defendant, so that the defendant exercised physical control as if he/she was the true owner to his/her detriment. In this regard, see *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 442; *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 161-162.

²⁵ AJ van der Walt & GJ Pienaar *Introduction to the law of property* 6 ed (2009) 146.

²⁶ CG van der Merwe *Sakereg* 2 ed (1989) 350; *Chetty v Naidoo* 1974 (3) SA 13 (A) 16.

²⁷ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 257. Van der Walt states that “[t]he protection afforded by this action [the *rei vindicatio*] is very strong, as it is based on the ‘normality’ assumption that the owner is entitled to exclusive possession of his or her property – this is what is considered the ‘normal state of affairs’, and what would most likely be upheld in the absence of good reason for not doing so.”

to occupy the property.²⁸ Therefore, the *rei vindicatio* was available to the owner to restore the *status quo* (exclusive possession) in the event of it being disrupted by unlawful occupation.

2 2 2 The historical and the philosophical roots of the South African *rei vindicatio*

2 2 2 1 Roman law

2 2 2 1 1 The operation of the *vindicatio* in Roman law

The action available to an owner in South Africa to restore lost possession of her property (the *rei vindicatio*) has its origins in Roman law.²⁹ The ancient Roman law version of the *rei vindicatio* was known as the *vindicatio* (vindicatory action) and formed part of the *legis actio sacramento in rem* (proprietary remedies) of ancient Rome.³⁰ Although the modern *rei vindicatio* has its roots in the authentic Roman law *vindicatio* these remedies are not identical.³¹ The focus in ancient and pre-classical Roman law fell on actions (remedies). The relevant principles and rules applicable thereto were developed subsequent to these actions.³² This position differs from the South African pre-constitutional position where the emphasis was always on rights rather than actions.³³

²⁸ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 258.

²⁹ D 1.1-1.80; G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94; M Kaser *Römisches Privatrecht* (6 ed 1960 translated by R Dannenbring *Roman private law* 2 ed 1968) 39.

³⁰ G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94; M Kaser *Römisches Privatrecht* (6 ed 1960 translated by R Dannenbring *Roman private law* 2 ed 1968) 39.

³¹ G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94.

³² GP Stein “‘Equitable’ remedies for the protection of property” in P Birks (ed) *New Perspectives in the Roman law of property* (1989) 185-194 185; AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 303 309; AJ van der Walt “Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)” (1988) 21 *De Jure* 306 313.

³³ In South African law, the *rei vindicatio* is only available to those vested with ownership rights. See for instance CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 476; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of*

The prescribed procedure for the application of the ancient *rei vindicatio* as a *legis actio sacramento in rem* required firstly; that the plaintiff claimed that she was the owner of the property.³⁴ Secondly, the defendant also had to claim that she was the true owner.³⁵ Thirdly, the court had a duty to declare that the property belongs to one of the litigants.³⁶ Finally, both parties had to deposit a wager-sum, which the successful litigant received while the unsuccessful litigant forfeited her wager-sum to the state.³⁷

These procedural rules fail to explain what happened when neither of the parties could prove ownership.³⁸ This is interesting, because as a rule the court still had to pronounce that the property must be delivered to one of the parties. As a result, it could have meant that the *vindicatio* was not only available to owners, but also available to those who could prove any entitlement to possession.³⁹ This can be

property 5 ed (2006) 242; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539.

³⁴ M Kaser *Römisches Privatrecht* (6 ed 1960 translated by R Dannenbring *Roman private law* 2 ed 1968) 113; G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94; P du Plessis *Borkowski's textbook on Roman law* 4 ed (2010) 75; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 313. However, the plaintiff could choose not to rely on the *rei vindicatio* and rather institute an *actio Publiciana* in which case the plaintiff would not have to prove ownership. See for instance M Kaser *Römisches Privatrecht* (6 ed 1960 translated by R Dannenbring *Roman private law* 2 ed 1968) 113.

³⁵ M Kaser *Römisches Privatrecht* (6 ed 1960 translated by R Dannenbring *Roman private law* 2 ed 1968) 113; G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94.

³⁶ M Kaser *Römisches Privatrecht* (6 ed 1960 translated by R Dannenbring *Roman private law* 2 ed 1968) 115; G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94.

³⁷ G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94. Furthermore, where the disputed property produced fruits the successful applicant had a further delictual claim against the defendant on the basis of false vindication. This delictual claim was for double the value of the fruit the defendant took while the property was in her unlawful possession. See M Kaser *Römisches Privatrecht* (6 ed 1960 translated by R Dannenbring *Roman private law* 2 ed 1968) 113.

³⁸ G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 94-95.

³⁹ Divergent opinions on what the requirement and underlying theory of the *vindicatio* were in pre-classical Roman law developed. Three distinct suggestions were made by Lotmar, Roth and Ihering respectively. Lotmar suggests that the supposed *contravindicatio* (the requirement that the defendant also has to prove ownership) was not part of the vindication procedure. Accordingly, the property remained with the defendant where the plaintiff failed to prove ownership. Similarly, Roth argues that only one of the party's submissions was examined by the judge, but what makes his argument different

ascribed to the fact that in ancient Roman law, ownership was never defined properly.⁴⁰ Borkowski and Du Plessis indicate that the reason why no precise definition of ownership existed is due to the fact that the *paterfamilias* exercised control over the persons and things in his household.⁴¹ This social structure would accordingly factor out possible property disputes by private individuals.⁴² However, in later classical Roman times the Romans coined the institution of ownership as “*dominium*”, which referred to the relationship between the owner and his property.⁴³

from Lotmar’s argument is the fact that Roth acknowledges the existence of the *contravindicatio* and submits that the judge in actual fact only examined the *contravindicatio* and not the *vindicatio*. In other words, his contention is that after the plaintiff declared that he is the true owner, the court will look to the defendant to *contravindicare*. The defendant will then not only have to declare his ownership, but also prove it. Accordingly, where the defendant failed to prove ownership, the property was restored to the plaintiff. In contrast, Ihering is of the opinion that both parties were required to declare and prove their alleged rights. The judge could then declare that both the plaintiff’s and the defendant’s claims were baseless. See for instance, G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 95.

⁴⁰ G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 51; D Johnston *Roman law in context* (1999) 53; A Borkowski & P du Plessis *Textbook on Roman law* 3 ed (2005) 157; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 79.

⁴¹ A Borkowski & P du Plessis *Textbook on Roman law* 3 ed (2005) 157; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 79.

⁴² A Borkowski & P du Plessis *Textbook on Roman law* 3 ed (2005) 157; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 79.

⁴³ AM Prichard *Leage’s Roman private law: Founded on the Institutes of Gaius and Justinian* 3 ed (1961) 158; G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 51; A Borkowski & P du Plessis *Textbook on Roman law* 3 ed (2005) 157; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 80.

2 2 2 1 2 The philosophical underpinnings of the *vindicatio* in Roman law

The legal philosophical influence that underpinned Roman law was the philosophy of ancient natural and moral law.⁴⁴ Both Gaius and Ulpian, whose legal work informed the *Digesta* of Justinian, were avid classical natural and moral philosophers.⁴⁵ Accordingly, the *vindicatio* was also explained, developed and applied in accordance with classical natural and moral notions and ideals.⁴⁶ Classical natural and moral philosophy assumed that the function of law is only to give effect to and sustain the rational ordering and structure of the universe.⁴⁷ According to classical natural law, God is this rational order that rules and guides the universe.⁴⁸ Therefore, all law had to align with the standard of right and wrong that is found in the rational order and imprinted in nature.⁴⁹ This explains why the focus in classical Roman law was on actions.⁵⁰ In the event of human conduct that contradicted the rational order, the rational order required a suitable counter action to restore the natural order of the universe.

Interestingly, the work of Thomas Aquinas, a classical natural and moral philosopher of the thirteenth century, indicates that the classical natural and moral philosophical justification for accepting that man can own and control objects in nature is found in the belief that nature is impregnated with the rational order of the divine God and that

⁴⁴ JR Kroger "The philosophical foundations of Roman law: Aristotle, the stoics, and roman theories of natural law" 2004 *Wis L Rev* 905 905; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

⁴⁵ D 1.1.3; D 1.1.1.9; JR Kroger "The philosophical foundations of Roman law: Aristotle, the stoics, and roman theories of natural law" 2004 *Wis L Rev* 905 905.

⁴⁶ See D 6.1.1; D 6.1.3; D 6.1.5; D 6.1.9; D 6.1.11; D 6.1.15; D 6.1.17; D 6.1.19; D 6.1.22; D 6.1.25; D 6.1.37; D 6.1.39; D 6.1.41; D 6.1.45; D 6.1.54; D 6.1.68; D 6.1.72; D 6.1.73; D 6.1.75; D 6.1.77; D 6.6.18; D 6.1.20; D 6.1.24; D 6.1.28; D 6.1.30; D 6.1.36; D 6.1.40; D 6.1.44; D 6.1.76.

⁴⁷ JR Kroger "The philosophical foundations of Roman law: Aristotle, the stoics, and roman theories of natural law" 2004 *Wis L Rev* 905 924.

⁴⁸ JR Kroger "The philosophical foundations of Roman law: Aristotle, the stoics, and roman theories of natural law" 2004 *Wis L Rev* 905 925.

⁴⁹ JR Kroger "The philosophical foundations of Roman law: Aristotle, the stoics, and roman theories of natural law" 2004 *Wis L Rev* 905 924.

⁵⁰ T Mautner "How rights became 'subjective'" (2013) 26 *Ratio Juris* 111 112.

man is made in the image of the divine God.⁵¹ Accordingly, man's position in nature allowed him to own and control property at will and restore such property when necessary.⁵² For example: where X occupies Y's house without Y's permission, Y could institute the *vindicatio* to eliminate the irrational conduct of X and restore the rational order. This example illustrates firstly, the ability of man to hold and control objects in nature and secondly, the function of law in classical natural legal philosophical terms, which was to sustain the rational order in line with the divine reason.

2 2 2 2 *Roman-Dutch law*

2 2 2 2 1 The operation of the *rei vindicatio* in Roman-Dutch law

The action that was available to an owner of property to restore lost possession in Roman-Dutch law was the same action that was available in Roman law, namely the *vindicatio*.⁵³ Grotius explained that "the general rule that an owner may vindicate his property from anyone who holds it without title, even though the holder may have gotten possession in good faith and for value"⁵⁴ was received from Roman law into Roman-Dutch law.⁵⁵

Voet sets out the requirements of the *vindicatio* in Roman-Dutch law. He identifies that in order for an owner to succeed with a vindication claim in terms of the *rei vindicatio* the claimant had to prove that she is the owner of the property.⁵⁶ In this regard, Voet

⁵¹ AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 317-318; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

⁵² AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 317-318.

⁵³ H de Groot *Inleidinge tot de Hollandsche rechtsgeleertheyd* (1631 translated by RW Lee *The jurisprudence of Holland* 1926, hereafter referred to as "Grotius") 2.2.5; CG van der Merwe *Sakereg* 2 ed (1989) 346-347.

⁵⁴ Grotius 2.2.5.

⁵⁵ CG van der Merwe *Sakereg* 2 ed (1989) 346-347.

⁵⁶ Voet 6.1.20; CG van der Merwe *Sakereg* 2 ed (1989) 347; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243.

was satisfied that all the claimant had to show to comply with this requirement was that her predecessor in title was the legal owner of the property and that an appropriate legal basis existed for the transfer of the property from the predecessor in title to herself.⁵⁷ In the context of immovable property, proof of registration was sufficient to prove ownership.⁵⁸ Voet further identifies that the second requirement the claimant had to satisfy was that the property still existed and was capable of being identified.⁵⁹ Voet explains that the final requirement that the owner had to satisfy in terms of the *rei vindicatio* in Roman-Dutch law was proving that the person against whom the claimant instituted the *rei vindicatio* was in possession of the property at the time of the proceedings.⁶⁰

From the above discussion it becomes evident that in Roman-Dutch law the requirements for the *rei vindicatio* were much clearer than in Roman times, and in fact similar to the South African law requirements of the *rei vindicatio*.⁶¹ This might be because in Roman-Dutch law the institution of ownership was clearly defined as opposed to the position in Roman law where the first definition of ownership was only accepted in the fourteenth century when Roman jurists adopted Bartolus de Saxoferrato's definition of ownership.⁶² Bartolus described ownership as "the right to

⁵⁷ Voet 6.1.24; CG van der Merwe *Sakereg 2* ed (1989) 348; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243-244.

⁵⁸ Voet 6.1.24; CG van der Merwe *Sakereg 2* ed (1989) 348; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243-244.

⁵⁹ Voet 6.1.24; CG van der Merwe *Sakereg 2* ed (1989) 349; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243-244.

⁶⁰ Voet 6.1.2; Voet 2 1 24; CG van der Merwe *Sakereg 2* ed (1989) 349; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243-244.

⁶¹ See chapter 2, section 2.2 above.

⁶² G Diosdi *Ownership in ancient and pre-classical Roman law* (1970) 51; D Johnston *Roman law in context* (1999) 53; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692-694; A Borkowski & P du Plessis *Textbook on Roman law* 3 ed (2005) 157; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 79. With regard to the first definition of ownership in Roman law, see AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 305 309. AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569 577-578; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross:*

perfectly dispose of a corporeal object, unless this is prohibited by law.”⁶³ Roman-Dutch law was subsequently developed on the basis of Bartolus’ definition of ownership.⁶⁴ This is evident in that one of the most prominent Roman-Dutch law scholars, Grotius, developed a definition of ownership on the basis of Bartolus’ definition.⁶⁵ Grotius defined ownership as “that which entitles a man to do with a thing and for his advantage anything he pleases which is not forbidden by the law.”⁶⁶ This definition of ownership seemed to have had a direct bearing on the owner’s ability to vindicate his property in terms of the *rei vindicatio*; the more clearly defined the right of ownership was, the stronger the right to vindicate property.

Civil law and common law in South Africa (1996) 657-699 692; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 81.

⁶³ D 41.2.17.1; D 45.1.58; AJ van der Walt “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *THRHR* 569 577-578; JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 8.

⁶⁴ AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 305 305; AJ van der Walt “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *THRHR* 569 577-578; JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 82.

⁶⁵ Grotius 2.3.10; AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 305 317; GJ Pienaar “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *TSAR* 295 301; JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 81.

⁶⁶ Grotius 2.3.10; AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 305 317; GJ Pienaar “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *TSAR* 295 301; JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 6657-699 692; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 81.

2 2 2 2 The philosophical underpinnings of the *rei vindicatio* in Roman-Dutch law

The revival of natural law in fifteenth and sixteenth century Netherlands had the most significant impact on the development of Roman-Dutch law, due to the natural and moral theorist Grotius.⁶⁷ During this time, Roman-Dutch law developed and was interpreted in line with modern natural and moral legal theory.⁶⁸ Grotius' reliance on and support of modern natural and moral legal theory in his ideas and development of Roman-Dutch property law principles informed his interpretation of the Roman law concepts.⁶⁹ Therefore, it is important to understand the developments that influenced the way in which Grotius understood concepts of ownership and vindication.

In the sixteenth century the philosophical underpinnings which informed classical natural and moral law were developed. This was evident in the gradual rise of scholars with different opinions about the function of law.⁷⁰ Classical natural and moral law was transformed at this stage by nominalists.⁷¹ The nominalists moved away from the

⁶⁷ DH van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 186.

⁶⁸ DH van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 186. The natural law that revived in the Netherland was not the classical natural law of Aquinas and the realists which suffused early Roman law, but it was the modern natural law that was developed by Ockham and the nominalists (voluntarists). Modern natural law was premised on the view that no divine ethical guidance or rational order can be derived from nature, except empirical and scientific facts. It is with this view of nature as a starting point that the scholars in the Netherland developed the Roman-Dutch law. For a discussion of the difference between classical natural law and modern natural law see WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 39-41.

⁶⁹ Grotius 2.3.10; Grotius 2.22.1; AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 317; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 318-319; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

⁷⁰ T Mautner "How rights became 'subjective'" (2013) 26 *Ratio Juris* 111 118.

⁷¹ The rise of the nominalists was the result of the *universalia* debate which revolved around the existence of universals. In this regard two schools, namely the nominalists and realists had different opinions concerning the existence of universalities. In the first place, the realists (proponents of the classical natural law philosophy) argued in favour of the existence of universals in nature, while the nominalists argued the contrary, namely "that universal concepts were only words and that in nature

enchanted and mystical ideas brought forward by classical natural law, to a modern natural and moral law that relied on rationality and empirical and scientific facts only.⁷² They rejected the enchanted view of nature (that the divine rational order is embedded in all of nature) and advanced viewing nature as quantifiable and therefore controllable by mankind.⁷³ The basis of this development in natural and moral legal philosophical thinking is found in the reasoning of the leading nominalist William Ockham.⁷⁴ Ockham rejected the idea of the existence of universals in nature. In this regard, his argument was based on the primacy of God's will.⁷⁵ He argued that because God is absolute, He is not made subject to His own will in that He can change His mind as to what He deems right and wrong. Accordingly, no fixed divine reason or universal concepts can exist in nature because the will of God is free to change.⁷⁶ This shift from the realist view of the existence of universals (that nature is impregnated with the ability to distinguish between right and wrong) to the nominalist view (that universals cannot exist because God's will can change) marked an important development in the

only concrete entities exist". See WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 39-40.

⁷² The initial break from the complete support of the universality ideologies of classical natural law was brought about by avid nominalist scholar William of Ockham. However, this initial break was still in line with his belief in a divine order. Ockham argued that man is incapable of understanding and participating in the essence of God. Subsequently, he suggests that humans can only understand the material and empirical character of nature. See JWG van der Walt *The twilight of legal subjectivity: towards a deconstructive republican theory of law* LLD dissertation Rand Afrikaans University (1995) 34-38; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

⁷³ WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40. This scientific approach to nature concerned the realisation that nature can be studied and that from the studying of nature logical deductions can be made about nature that in turn allows humans to control it.

⁷⁴ F Oakley "Medieval theories of natural law: William of Ockham and the significance of the voluntarist tradition" (1961) 6 *Nat LF* 65 65; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

⁷⁵ F Oakley "Medieval theories of natural law: William of Ockham and the significance of the voluntarist tradition" (1961) 6 *Nat LF* 65 65; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

⁷⁶ F Oakley "Medieval theories of natural law: William of Ockham and the significance of the voluntarist tradition" (1961) 6 *Nat LF* 65 68-69; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 39-40.

philosophy of natural and moral legal thinking. Based on the argument that universals do not exist the nominalists asserted that due to the non-existence of universalities, man has no access to the divine reason of God and could subsequently only have knowledge of God's will through faith.⁷⁷ This assertion further marked the development of subsequent natural legal rationalists' focus on the human abilities and natural sciences because nominalists believed that the only knowledge and reason man can attain is knowledge of empirical things.⁷⁸

Subsequently, the late Spanish scholastics adopted the nominalist's view and developed it further with the emphasis on man's ability to own and control objects in nature.⁷⁹ In this regard, the Spanish scholastics used and added to the first formal definition of ownership formulated by Bartolus de Saxoferrato in order to assert men's ability to own and control objects.⁸⁰ The Spanish scholastics emphasised the use entitlements of an owner in relation to her property. Van der Walt and Le Roux respectively indicate that this emphasis on the comprehensiveness of an owner's use entitlements laid the foundation for the view that man's ability to own and control property is unrestricted of nature.⁸¹

⁷⁷ WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 39-40.

⁷⁸ WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 39-40.

⁷⁹ AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 316-317; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 318.

⁸⁰ AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 313; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 318; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 54. For Bartolus de Saxoferrato's definition of ownership, see D.41.2.17.1; D 45.1.58.

⁸¹ AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 313-314; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 318; GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 304; WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40. See also E

These developments of the philosophical ideals underpinning the concepts of owning and controlling objects in nature inspired the Roman-Dutch legal theorist Grotius' thinking about the concept of ownership.⁸² One of the most significant developments for property law brought about by the natural and moral legal theorist Grotius was his description of ownership.⁸³ Grotius distinguished between full ownership and limited ownership and emphasised the complete nature of full ownership, specifically with regard to an owner's entitlements in her property.⁸⁴ In this regard, Grotius ascribed the qualities of fullness and completeness (within the legal framework) to ownership as a concept.⁸⁵ It is with this understanding of the conceptual basis of ownership that

van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 54.

⁸² AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 317; GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 303; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 317; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692.

⁸³ Grotius 2.3.10; AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 305 317; GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 301; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 81; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 55.

⁸⁴ Grotius 2.3.9-2.3.11; Grotius 2.33.1; AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 305 317; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 55.

⁸⁵ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694-695. Grotius defined ownership as "that which entitles a man to do with a thing and for his advantage anything he pleases which is not forbidden by law". Grotius 2.3.10; AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 317; GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 301; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 318-319; AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of

Grotius defined ownership as “that which entitles a man to do with a thing and for his advantage anything he pleases which is not forbidden by law”.⁸⁶ Grotius’ modern natural legal philosophical ideas in conjunction with his moral philosophical influences caused him to move away from the starting point of objects and their characteristics, towards the individual and his interests in these objects.⁸⁷ He described ownership with reference to the owner’s entitlements.⁸⁸ Focussing on individual interests, with the emphasis on entitlements to describe ownership, had the unavoidable consequence that Grotius explained the difference between entitlements of the owner compared to entitlements of non-owners, with reference to the completeness of the owner’s rights *vis-à-vis* the rights or entitlements of non-owners.

Grotius’ definition of ownership brought about a shift in thinking about property rights and entitlements from the idea that multiple forms of ownership exist, to the idea that only one full complete type of ownership exists to which all other rights in property are

ownership” (1993) 56 *THRHR* 569 584; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The law of property* 5 ed (2006) 91; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 82.

⁸⁶ Grotius 2.3.10; Grotius 2.22.1; AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 303 317; AJ van der Walt “Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)” (1988) 21 *De Jure* 306 318-319; JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694; WB le Roux “Natural law theories” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

⁸⁷ The shift in focus from the search for the divine rational order to the empirical study of nature, brought about by the nominalists, had the effect that sciences of quantification and characterisation of objects came to being. Furthermore, the denouncement of classical natural law beliefs where ethical guidance and dignity could be found in the divine rational order had the consequence that the freedom of humans to act and deal freely in nature was accepted to be the standard to which human progress and human dignity must be measured. It is this fundamental point of the philosophy of modern natural law that informed Grotius’s definition of ownership. AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 303 317; WB le Roux “Natural law theories” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40-41.

⁸⁸ AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 303 317.

inferior.⁸⁹ This development marked the start of viewing rights in a hierarchical manner.⁹⁰

Furthermore, the function of law in Roman-Dutch law at the time was different from the function of law in Roman times. The function of law shifted from the protection of the rational order to the protection of individual entitlements. This shift gave rise to the focus on rights rather than actions and had a significant impact on the way in which an owner could protect his right of ownership. The action available to protect ownership remained the *rei vindicatio*, but the focus of the remedy shifted to the enforcement of the entitlements of the owner. In this regard, all the requirements of the remedy only focussed on confirming the owner's rights in her property and accordingly excluded any possibility of developing the remedy to take factors other than rights into account.

The above discussion of Roman and Roman-Dutch law shows that the institution of ownership in society, and its concomitant impact on the remedies available to the owner of property, has not been static. It has undergone various changes and developments due to historical, social, political, economic and philosophical considerations that in turn resulted in different definitions of ownership, and has developed the owner's ability to vindicate her property.⁹¹ Despite different definitions

⁸⁹ DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39 41; AJ van der Walt "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *TSAR* 15 20-22; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 56.

⁹⁰ DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39 41; AJ van der Walt "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *TSAR* 15 20-22; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 56.

⁹¹ DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 7-8; AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 306; GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 295; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 16 17; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692-694; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg &*

of ownership, the conceptual basis ascribed to ownership by the institutional writer and avid natural and moral legal theorist, Grotius, has remained one of the most important developments of the modern ownership concept.⁹² Any confusion as to who had what type of ownership and which one was stronger than the other was successfully disposed of. Those with the title of owner were placed in the position to easily recover lost possession from any unlawful possessors. Accordingly, Grotius ensured that ownership received the status of being the strongest right and in this way ensured that the owner's ability to vindicate her property by way of the *rei vindicatio* was also attributed the same strength.

2 2 2 3 *South African law*

The concept of ownership in South African law, together with the proprietary remedy of the *rei vindicatio*, is a direct result of the above historical events.⁹³ Legal rules relating to ownership and the protection thereof were inherited from Roman-Dutch

Schoeman's The law of property 5 ed (2006) 91; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 34; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 79.

⁹² AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 317; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 55. It should be noted that Grotius derived his definition of ownership from that of Bartolus de Saxoferrato's definition of ownership. In this regard, see D 41.2.17.1; D 45.1.58; AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 317; GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 301; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 16 17; AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569 577-578; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 91; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 81.

⁹³ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 685.

law⁹⁴ and have been applied more or less consistently in the South African legal system.⁹⁵ The modern natural and moral law notion – that ownership is a full and complete right – as well as the *rei vindicandi* was brought to South Africa by Dutch settlers in the 1700s and therefore formed part of the early South African common law.⁹⁶ As a result the work of the Roman-Dutch scholar, Grotius particularly, formed the basis of early South African law.⁹⁷

However, German scholars also had a significant impact on the interpretation of the Roman-Dutch law in South Africa.⁹⁸ They too relied on modern natural and moral philosophy to explain Roman-Dutch rules and principles.⁹⁹ However, their point of departure was a development of the nominalist natural and moral thinking introduced by Ockham, towards a more secular, scientific approach to the law.¹⁰⁰ This group of jurisprudential scholars were referred to as the pandectists.¹⁰¹ The pandectists'

⁹⁴ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 685.

⁹⁵ JM Pienaar "Die beskerming van onroerende eiendom: Nuwe ontwikkelings" in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 141-157 143. For the concept of ownership, see *Gien v Gien* 1979 (2) SA 1113 (T) 1120; *Graham v Ridley* 1931 TPD 476. See also *Kemp v Roper, NO* (1885-1906) 2 Buch AC 143; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

⁹⁶ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 659.

⁹⁷ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 659; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 34.

⁹⁸ AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569 569; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694.

⁹⁹ GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 302-303; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694.

¹⁰⁰ AJ van der Walt & DG Kleyn "Duplex dominium: The history and significance of the concept of divided ownership" in DP Visser (ed) *Essays on the history of law* (1989) 213-260 247; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 62.

¹⁰¹ DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39 47; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 697.

philosophical ideas emerged because of the industrial revolution at the time that sparked a desire for economic freedom.¹⁰² This desire motivated a return to classical Roman doctrine, more specifically the Roman law concept of ownership, which would support their economic freedom motive.¹⁰³ Their purpose is evident in the name they gave themselves, namely: pandectists (the modern application of the Roman law).¹⁰⁴ The pandectists defined ownership as the complete or absolute legal submission of a thing to the will of the owner.¹⁰⁵

The focus of the pandectists, much like that of Grotius, fell on the entrenchment of individual rights, by ascribing to ownership the characteristics of completeness. However, this group of scholars went further to advance that the characteristics of individuality and abstractness flow from the characteristic of completeness attributed to ownership.¹⁰⁶ Accordingly, the pandectist scholars' concept of ownership had striking similarities with Grotius' concept thereof (namely complete in nature). However, the pandectists added two additional characteristics, namely individuality of ownership and abstractness of ownership. This occurred because the work of the pandectists was a transformed and expanded version of the work of Grotius.¹⁰⁷ The pandectists basically refined Grotius' idea that ownership's moral function is to entrench and ensure the protection of individual liberties into a "comprehensive and

¹⁰² GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 301.

¹⁰³ GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 302; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694.

¹⁰⁴ DH van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 237.

¹⁰⁵ AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 317; AJ van der Walt "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 318-319; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD dissertation Stellenbosch University (2015) 63.

¹⁰⁶ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694.

¹⁰⁷ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 693.

consistent scientific system of subjective rights”.¹⁰⁸ The transformation is evident in the pandectists’ formulation of the definition of ownership that emphasises the characteristics of not only completeness, but also individuality, exclusivity and abstractness.¹⁰⁹

After the reception of Roman-Dutch law into the South African legal system the work of authoritative Roman-Dutch and German jurists became a very important source of reference for the interpretation of the South African common law that includes the concept of ownership.¹¹⁰ South African courts had the propensity to refer to and quote their interpretations and codifications of classic Roman law.¹¹¹ Furthermore, their methodology and terminology, particularly in the sphere of the law of things, were followed and also incorporated into the work of early South African legal authors.¹¹² This is evident from the definitions of ownership that academic authors of South Africa constructed.¹¹³ All of these definitions proceed from the stance that ownership is the

¹⁰⁸ JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 693.

¹⁰⁹ JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694.

¹¹⁰ DH van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 204; DP Visser “The ‘absoluteness’ of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39 47; AJ van der Walt “The South African law of ownership: A historical and philosophical perspective” (1992) 25 *De Jure* 446 454; R Zimmerman & D Visser “Introduction” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 1 11.

¹¹¹ DP Visser “The ‘absoluteness’ of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39 47; JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 693.

¹¹² JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 697. Milton explained that “[t]he extent of the adoption of pandectist version of property rights is illustrated by the authoritative and influential exposition of the South African law of Property provided by CG van der Merwe in his text-book *Sakereg*. First published in 1979.”

¹¹³ AJ van der Walt “The South African law of ownership: A historical and philosophical perspective” (1992) 25 *De Jure* 446 447.

most complete right.¹¹⁴ Also, the characteristics of individuality and abstractness were ascribed to ownership in an absolute sense.¹¹⁵

Academics and courts relied on these authors to understand the rules, principles and remedies contained in the Roman-Dutch common law.¹¹⁶ Accordingly, the South African legal professionals (courts and academics) inherited the thoughts, notions, explanations and institutions of these legal writers and in this way ensured that they continued to exist in the South African legal system. The pandectists can therefore be said to have contributed greatly, along with Grotius, to the concept of the pre-constitutional institution of ownership accepted by South African courts.¹¹⁷ Understandably, the pre-constitutional South African concept of ownership was described with reference to characteristics of completeness, individuality and abstractness.¹¹⁸ This conceptual understanding of ownership in turn resulted in the *rei vindicatio* being confined to the function of protecting the rights of owners, and not the protection of the rational order as was the case in Roman law.

¹¹⁴ See CG van der Merwe *Sakereg* 2 ed (1989) 171; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 248-249; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 91; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 440.

¹¹⁵ AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 317; GJ Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295 301; DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39 46-47; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 693.

¹¹⁶ JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694.

¹¹⁷ AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 318.

¹¹⁸ AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446 447.

2 2 3 The theoretical underpinnings of the *rei vindicatio* in South African law

2 2 3 1 *Introduction*

The broad power conferred upon the owner, according to the above-mentioned conceptual understanding of ownership, would logically require a suitable and equally strong protective mechanism. Therefore, the rhetoric behind ownership as a concept is the rhetoric that was applied when the court considered the protection of ownership by way of the *rei vindicatio*.¹¹⁹ This section considers firstly, the primary principle that underlies the application of the *rei vindicatio* in South African law and secondly, the way in which this principle is informed by the rhetoric and underlying assumptions of ownership. The rhetoric and underlying assumptions of ownership in this section are informed by such characteristics as individuality, completeness and abstractness.

2 2 3 2 *Characteristics and entitlements underlying the rei vindicatio*

There is support in academic literature and case law that exclusivity of ownership underpins the availability of the *rei vindicatio* in South African law.¹²⁰ Van der Walt observes that the notion of exclusivity of ownership “indicate[s] that [a right in property] is held and exercised by an individual owner to the exclusion of others, thereby providing a guaranteed private sphere of individual freedom”.¹²¹ Accordingly, the

¹¹⁹ AJ van der Walt *Property in the margins* (2009) 34.

¹²⁰ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 243.

¹²¹ AJ van der Walt “The South African law of ownership: A historical and philosophical perspective” (1992) 25 *De Jure* 446 447. Interestingly, it becomes evident in academic literature that no consensus exists as to the specific nature of the notion of exclusivity. However, Dhliwayo has recently tied exclusivity to the characteristic of absoluteness of ownership by highlighting the way in which the different aspects of absoluteness, namely completeness, individuality and abstractness denote the owner’s right to exclude. See in this regard P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 89. Badenhorst, Pienaar and Mostert also link the notion of exclusivity of ownership to the individualistic character of ownership, however, no author in their discussion of the entitlements of ownership expressly states that exclusivity is a characteristic or incident or even an entitlement derived from ownership. It is only in the section concerning remedies that the authors on the basis of *Chetty v Naidoo* link exclusivity of ownership with the entitlement to vindicate. Accordingly, exclusivity is derived from an owner’s entitlement

owner can exclude anyone from using, enjoying and possessing her property without her consent. This idea was brought forth in *Chetty v Naidoo*¹²² by Jansen JA where he explained that:

“It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council v. Rand Townships Registrar and Others*, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v. Gengemma*, 1954 (4) S.A. 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever [is] holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).”¹²³

Interestingly, Badenhorst, Pienaar and Mostert observe, on the basis of the above dictum, that exclusivity is linked to the incident of ownership that entitles an owner to vindicate in order to have exclusive possession of her property.¹²⁴ Stated differently, exclusivity of ownership allows the owner of property to exclude anyone from the use and enjoyment of her property. Such exclusion extends as far as to allow the owner to assert her ownership by means of vindicating her property where her exclusive use of the property has been compromised.¹²⁵ Accordingly, exclusivity of ownership can be explained with reference to the established *entitlements* of ownership but also with reference to the *characteristics* of ownership. With reference to the entitlements of ownership, it can be said that exclusivity is a result of the interaction between two generally recognised entitlements of ownership, namely the entitlement to occupy your

to claim back her property from any person with unlawful possession thereof. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 93.

¹²² 1974 (3) SA 13 (A).

¹²³ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

¹²⁴ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

¹²⁵ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367368.

own property (*ius possidendi*)¹²⁶ and the entitlement to claim your own property from any unlawful possessors (*ius vindicandi*).¹²⁷ In the alternative, one can use the characteristics of ownership, which are related to the notion of absoluteness of ownership, to explain how exclusivity relates to ownership. In this regard, academic literature supports the view that the characteristic of individuality that is ascribed to ownership denotes the idea that the owner should have exclusive control over her property.¹²⁸

Dhliwayo shows that individuality is not the only characteristic of ownership that is related to the idea of exclusivity.¹²⁹ Instead, she argues that exclusivity of ownership is related to not one, but in fact all three of the characteristics ascribed to ownership by the Grotian-pandectist concept thereof, namely completeness, abstractness and individuality.¹³⁰ Furthermore, Dhliwayo highlights the relationship between exclusivity, the characteristics of ownership and the notion of absoluteness of ownership.¹³¹ In her discussion of the relationship between these characteristics, her starting point is the notion of absoluteness. In this regard she considers the characteristics of ownership

¹²⁶ CG van der Merwe *Sakereg* 2 ed (1989) 137; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 249; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 93; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 470.

¹²⁷ CG van der Merwe *Sakereg* 2 ed (1989) 137; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 249; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 93; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 470.

¹²⁸ CG van der Merwe *Sakereg* 2 ed (1989) 175; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 92; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective (1992) 25 *De Jure* 446 447; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 91-62.

¹²⁹ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 91-62.

¹³⁰ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 89-96.

¹³¹ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 89.

as aspects or different meanings of absoluteness, and she explains how each characteristic relates to an owner's right to exclude.

Firstly, Dhliwayo shows that the completeness characteristic of ownership is an aspect of absoluteness in that completeness denotes that an owner has the most complete rights in her property as opposed to other incomplete rights (like limited real rights).¹³² Furthermore, she shows that the characteristic of completeness indicates that the owner would, in principle, have all the entitlements to the property unless she decides to limit those entitlements.¹³³ Accordingly, completeness as an aspect of absoluteness signals that the owner has exclusive control because she has all the entitlements to the property, unless she decides to transfer some of the entitlements. Therefore, exclusivity determines what an owner may do with her property. It is therefore not a characteristic of ownership, but rather an entitlement of ownership.¹³⁴ Consequently, a direct relationship exists between the characteristic of completeness of ownership and the entitlement of an owner to exclusive use and enjoyment of her property.¹³⁵

Dhliwayo also connects exclusivity to the individuality characteristic of ownership.¹³⁶ The characteristic of individuality suggests that only one person can be the owner of

¹³² P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 89. Dhliwayo states that when "referring to ownership as a complete real right denotes its fullness in the sense that only ownership includes all the entitlements of ownership, whereas a holder of a limited real right or personal right only has a limited entitlement to use someone else's property temporarily". See further AJ van der Walt *Property in the margins* (2009) 32; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 92; *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

¹³³ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 90.

¹³⁴ This view of Dhliwayo is shared by Badenhorst, Pienaar and Mostert – see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 89.

¹³⁵ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 89.

¹³⁶ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 91. See further CG van der Merwe *Sakereg* 2 ed (1989) 175; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed

the property to the exclusion of all others.¹³⁷ Furthermore, she argues that individuality describes the position of the owner with regard to her property in relation to other persons.¹³⁸ This denotes that the person with ownership can enforce her property rights against the whole world and that individuality of ownership underpins the strength ascribed to the owner's entitlement to exclude.¹³⁹

The third aspect Dhliwayo connects to exclusivity is the abstract character of ownership. Abstractness of ownership assumes that "ownership is always more than the sum total of its constituent entitlements and that it is not exhausted or eroded by the temporary granting of limited real rights or by the temporary imposition of restrictions".¹⁴⁰ Abstractness, as a characteristic of ownership therefore has certain implications for the manner in which exclusivity of ownership is viewed. Dhliwayo suggests that because ownership is perceived to be more than the sum total of all its entitlements; ownership as a right is determined in an abstract and static manner void of consideration of context.¹⁴¹ This a-contextual view of ownership is accordingly

(2006) 92; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective (1992) 25 *De Jure* 446 447.

¹³⁷ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 91; CG van der Merwe *Sakereg* 2 ed (1989) 175; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 44 447.

¹³⁸ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 92.

¹³⁹ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 92; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective (1992) 25 *De Jure* 446 447.

¹⁴⁰ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 92. See further CG van der Merwe *Sakereg* 2 ed (1989) 175-176; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 249; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 470-471; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446 447; AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569 582.

¹⁴¹ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 92.

transferred to how exclusivity is viewed with the result that the right to exclude is dealt with in the same abstract and a-contextual manner.¹⁴²

Dhliwayo's analysis of the way in which the general characteristics of ownership relate to the owner's entitlement or right to exclude, indicates the theoretical underpinnings of an owner's right to exclude (emphasised by his right to evict). It shows how exclusivity of ownership receives its strength and force from the generally accepted characteristics of ownership; namely completeness, individuality and abstractness. Therefore, if these characteristics relate to the right to exclude in this way, it should follow that they are also included in the *ratio* of courts, expressly or by implication, when courts deal with cases involving an owner's right to exclude (right to evict).

2 2 3 3 *The courts' approach to an owner's right to exclude*

2 2 3 3 1 Introduction

This section provides an analysis of South African case law in order to determine whether the characteristics of ownership; namely completeness, individuality and abstractness feature expressly or by implication in the courts' *ratio* when courts applied and considered the owner's right to exclude in terms of the *rei vindicatio* in the pre-constitutional era. The cases that will be considered to make the above point are *Van der Merwe v Webb*,¹⁴³ *Jeena v Minister of Lands*¹⁴⁴ and *Chetty v Naidoo*.¹⁴⁵ These cases are significant because all of them dealt with the manner in which courts approached questions pertaining to the scope of an owner's right to exclude in terms of the *rei vindicatio*.¹⁴⁶

¹⁴² P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 92.

¹⁴³ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

¹⁴⁴ *Jeena v Minister of Lands* 1955 (3) All SA 27 (A).

¹⁴⁵ *Chetty v Naidoo* 1974 (3) SA 13 (A) 16.

¹⁴⁶ Both *Jeena* and *Chetty* deal specifically with an owner's right to evict as a form of an owner's right to exclude in terms of immovable property. However, *Webb* deals with the owner's right to exclude in relation to movable property. Although *Webb* concerns movable property the principles pertaining to an owner's right to exclude emanating from *Webb* are equally valid in relation to immovable property.

2 2 3 3 2 Case law discussion

In *Webb*¹⁴⁷ the court had to decide on the scope of the owner's right to exclude others from possession in terms of the *rei vindicatio*. The plaintiff in *Webb* as the owner of the property instituted the *rei vindicatio* to recover three stolen oxen from the defendant. The defendant was a *bona fide* purchaser of the property who had bought the property at a public market.¹⁴⁸ The defendant argued that the owner cannot rely on his vindicatory action to recover his stolen oxen that the defendant later bought at a public market. In this regard, free market practices prohibited an owner to recover lost possession from a person that bought the owner's property at a public market.¹⁴⁹ Accordingly, the court had to determine whether in South African law the *rei vindicatio* would allow an owner to vindicate her property from a *bona fide* purchaser of goods at a public market. To answer this question the court had to determine whether or not the free market practices of Dutch customary law formed part of the South African Roman-Dutch law. Berry JP's point of departure in answering the legal question was the concept of ownership. In this regard he held that:

"But the title to property, whether acquired by possession or otherwise, was gradually strengthened, and acquired great solidity and energy when it became to be understood that no man should be deprived of his property without his consent, and that even the honest purchaser was not safe under a defective title. The general principle applicable to the law of personal property throughout civilised Europe became therefore and now is, "nemo plus juris ad alium transferre potest quam ipse haberet" (Dig., 50, 17,54), preceded by the other maxim, "Id quod nostrum est sine facto nostro ad alium transferre non potest," (Dig., 50,17, 11). From the latter maxim, the owner cannot be deprived of his right of property by the

¹⁴⁷ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

¹⁴⁸ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

¹⁴⁹ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 99; Voet 6.1.12; CG van der Merwe *Sakereg* 2 ed (1989) 361; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 476; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 245; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 546-547.

wrongful act of anyone who has taken it without title, or who, having it in his possession for another purpose, sells it. From the former maxim it follows that the thief or borrower cannot give title even to a bon[a] fide purchaser. The original owner was entitled to reclaim his property, whether acquired bon[a] or mal[a] fide by the purchaser; and the reason that he is bound to give it up is this, not because he has done any wrong in buying it, but because it is the untransferred property of someone else who cannot be divested of it without his consent. The right of property does not go with the possession.”¹⁵⁰

The principles from which the court defined the scope of the owner’s ability to vindicate her property are found in these two maxims quoted in the paragraph above.¹⁵¹ Both these maxims emphasise the wide protection an owner is afforded by law in respect of the relationship between herself and her property. The first maxim, *nemo plus juris ad alium transferre potest quam ipse haberet*, explains that a person without rights cannot transfer rights.¹⁵² This maxim encourages a wide interpretation and understanding of the owner’s right to vindicate as long as the transferee of the thing had no rights. However, this maxim also presupposes that the owner has complete rights in her property and that those complete rights always vest in the owner unless the owner consents to their vesting in another person. The maxim clearly emphasises the characteristics of individuality and completeness of ownership.

From the second maxim, *id quod nostrum est sine facto nostro ad alium transferre non potest*, it is apparent that an owner is allowed to claim back her property in any circumstances.¹⁵³ This maxim emphasises the completeness, individuality and abstractness of ownership. These maxims are in favour of a generous interpretation of the scope of the owner’s ability to vindicate her property. In other words, they support the argument that an owner’s right to vindicate can be enforced against *bona fide* purchasers, in all circumstances including public market transactions. The two maxims simply gave an indication of the strong protective power that is assumed to

¹⁵⁰ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

¹⁵¹ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

¹⁵² D 50.17.54; CG van der Merwe *Sakereg* 2 ed (1989) 361; *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

¹⁵³ D 50.17.11; CG van der Merwe *Sakereg* 2 ed (1989) 361; *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

an owner whose property is transferred against her will and the fact that in those circumstances, the owner can claim the property back. This finding of the court indirectly impacted on the application of the *mobilia non habent sequelam* maxim. The *mobilia* maxim provides that the owner can only institute a vindicatory action, where the seller voluntarily sold the property to a *bona fide* purchaser, after the owner paid the purchase price back to the defendant.¹⁵⁴ The court's *ratio* and finding in the *Webb* case implies that in these instances an owner need not pay compensation.

The court preferred to accept in light of its historical philosophical investigation into the origins of ownership and after asserting by implication the characteristics of ownership that the maxim *nemo plus juris ad alium transferre potest quam ipse habet* and the maxim *id quod nostrum est sine facto nostro ad alium transferre non potest* inform the scope of the *rei vindicatio*.¹⁵⁵ Accordingly, the court established that the underlying principle of the *rei vindicatio* is exclusivity of ownership. It did so by choosing the maxim *id quod nostrum est sine facto nostro ad alium transferre non potest*, that asserts exclusivity, above the restrictive free market practices that would have undermined exclusivity as a central feature of ownership.

The court's inclination to give priority to the protection of the owner's entitlements is clear in the starting point of the court's *ratio*. This highlights the court's doctrinal preference of the owner's relatively strong right in its application of the *rei vindicatio*. These are the characteristics of the concept of ownership, namely completeness, individuality and abstractness. In defining the scope of the owner's right to exclusive use and possession, the court inherently employed these characteristics to guide it into determining the limits of the owner's right to exclude. Completeness, individuality and abstractness favour an absolute right to exclude. Therefore, the judgment of the court comes as no surprise. It may further be said that the reasoning of the court in relation to the conceptual understanding of ownership played a significant role in the

¹⁵⁴ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 99; Voet 6.1.12; CG van der Merwe *Sakereg* 2 ed (1989) 361; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 476; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 245; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 546-547.

¹⁵⁵ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 97.

way in which the court rationalised, understood and ultimately pronounced on the scope of the remedy.

In *Jeena*, the court also dealt with the scope of an owner's right to vindicate in terms of the *rei vindicatio*. The government purchased lots 15(a) and 21 of the farm Roodekopjes in order for a Mr Scheepers to take occupation of the lots in terms of the Land Settlement Act 12 of 1912.¹⁵⁶ Lot 21 was occupied by the appellant in terms of a valid lease agreement but after the lease agreement was terminated the appellant continued to occupy the property unlawfully.¹⁵⁷ Accordingly, the government instituted eviction proceedings and succeeded by obtaining an eviction order in its favour.¹⁵⁸ The unlawful occupier appealed to the appellate division arguing that the government as owner was not entitled to an eviction order because it had transferred its right of possession to Mr Scheepers.¹⁵⁹ Consequently, only Mr Scheepers had the right to evict and not the government.

The court's starting point was the question of ownership. It held that it cannot be disputed that the government is the owner of the property and that the occupier was in unlawful occupation of the lot.¹⁶⁰ In this regard, the court turned to the *Graham v Ridley*¹⁶¹ case in order to assert that the government as owner of property has a valid cause of action to evict unlawful occupiers from property.¹⁶² In particular, the court relied on Greenburg JA's emphasis in *Graham* concerning the rights and entitlements flowing from ownership:

"One of the rights arising out of ownership is the right to possession; indeed Grotius *Introd.* 2.3.4., says that ownership consists in the right to recover lost possession. *Prima facie* therefore proof that the appellant is owner and that the respondent is in possession entitles the appellant to an order giving him possession, i.e. to an order for ejection."¹⁶³

¹⁵⁶ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382.

¹⁵⁷ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382.

¹⁵⁸ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382.

¹⁵⁹ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382.

¹⁶⁰ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383.

¹⁶¹ *Graham v Ridley* 1931 TPD 476.

¹⁶² *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383.

¹⁶³ *Graham v Ridley* 1931 TPD 476; *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383.

As a result, the court refuted the claim of the occupier that the government cannot evict the unlawful occupier.¹⁶⁴ It held that the government has the right to evict, irrespective of whether or not it bought the lots so that Mr Scheepers could occupy them.¹⁶⁵ The government is therefore in a position to assert its right and vindicate its property as owner.¹⁶⁶

Similar to *Webb*, the *Jeena*-judgment illustrates that the court in the pre-constitutional era turned to the rights and entitlements that flow from ownership when it had to decide on the scope of an owner's *rei vindicatio*. The court implicitly entrenched the character of completeness and individuality of ownership when it asserted that the government will have the right to evict because the legal occupier has not taken occupation of the property as yet. This finding confirms that an owner of the property has all the entitlements unless she validly limits her entitlements by transferral thereof. The owner is clearly the only bearer of ownership entitlements, namely the right to evict in terms of the *rei vindicatio*, unless another overriding right exists.

*Chetty*¹⁶⁷ is another case that highlights the significance of the courts' conceptual understanding of ownership and shows how such an understanding impacts on its approach to the application of the *rei vindicatio*. In *Chetty*¹⁶⁸ the appellant appealed against an eviction order granted against her on the basis that the court *a quo*'s finding pertaining to the onus and burden of proof was wrongly decided.¹⁶⁹ Accordingly, the Supreme Court of Appeal had to decide whether the plaintiff or the defendant had the onus of proving ownership in a vindicatory action. In the process of deciding the legal issue, the court set out and confirmed some of the basic principles and requirements of the *rei vindicatio*.¹⁷⁰ Jansen JA's point of departure was the concept of ownership. In this respect he held:

"It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council v. Rand Townships Registrar and Others*, 1910 T.S. 1314 at p. 1319), but there

¹⁶⁴ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383.

¹⁶⁵ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383.

¹⁶⁶ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383.

¹⁶⁷ *Chetty v Naidoo* 1974 (3) SA 13 (A) 16.

¹⁶⁸ *Chetty v Naidoo* 1974 (3) SA 13 (A) 16.

¹⁶⁹ *Chetty v Naidoo* 1974 (3) SA 13 (A) 18.

¹⁷⁰ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

can be little doubt (despite some reservations expressed in *Munsamy v. Gengemma*, 1954 (4) S.A. 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever [is] holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).¹⁷¹

This passage from *Chetty*¹⁷² highlights the link between ownership and the protection thereof by means of the *rei vindicatio*. Although the court did not go so far as to try and provide a definition of ownership, it alluded to the rights that an owner would normally have as an owner. These are the right to exclusive use and possession of property and the right to claim back (or vindicate) property. The latter right is furthermore described as a “necessary corollary” of the former.¹⁷³ The court stressed the importance of the owner’s right to exclusive use and possession as the central feature of ownership.¹⁷⁴

The idea that ownership has an exclusive element to it in the context of vindication is derived from the Roman maxim *ubi rem meam invenio ibi eam vindicio*.¹⁷⁵ The phrase means that an owner is able to vindicate her property wherever she finds it.¹⁷⁶ The

¹⁷¹ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

¹⁷² *Chetty v Naidoo* 1974 (3) SA 13 (A) 16.

¹⁷³ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

¹⁷⁴ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; D 6.1.49. See chapter 2, section 2.2.3.1 above; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 243. These authors confirm that the idea that ownership is exclusive is derived from the Roman maxim *ubi rem meam invenio ibi eam vindicio* in the context of vindication.

¹⁷⁵ D 6.1.49; D 44.7.25; CG van der Merwe *Sakereg* 2 ed (1989) 347; JRL Milton “Ownership” in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 243; CG van der Merwe & A Pope “Property” in F du Bois (eds) *Wille’s principles of South African law* 9 ed (2007) 405-729 539; *Morum Bros Ltd v Nuppen* 1916 CPD 392; *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 406; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; *Hefer v Van Greuning* 1979 (4) SA 952 (A) 959; *Kahn v Volschenk* 1986 (3) SA 84 (A) 92.

¹⁷⁶ CG van der Merwe *Sakereg* 2 ed (1989) 347; CG van der Merwe & A Pope “Property” in F du Bois (eds) *Wille’s principles of South African law* 9 ed (2007) 405-729 539.

reasoning of the court in *Chetty*¹⁷⁷ confirms the reception of such a maxim into South African law.¹⁷⁸ Therefore, it emphasises the notion of exclusivity of ownership and the way in which the application of the *rei vindicatio* endorses such a notion. The *rei vindicatio* endorses this notion by giving effect to its corollary, the right to vindicate. Therefore, the *rei vindicatio* is ultimately the maxim in the form of a remedy.

The maxim further indicates the purpose of the remedy, which is to enable the owner to recover lost possession from any person. In this way, the maxim also gives an indication of the extent of the ability of the owner to regain lost possession. In this regard, the owner's capacity to vindicate her property seems to be unlimited in light of the maxim.¹⁷⁹ However, the maxim results in direct and indirect limitations to the use of the *rei vindicatio*. The limitation found directly in the maxim is the specific reference to an owner. This implies that the right to institute the *rei vindicatio* is only available to owners.¹⁸⁰ The indirect limitation of the owner's right to vindicate can be found in the operation of the remedy itself, namely that the owner has to follow due legal process to regain possession.¹⁸¹ However, these qualifications do not subtract from the owner's strong position, because courts primarily approach property disputes (more

¹⁷⁷ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

¹⁷⁸ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

¹⁷⁹ CG van der Merwe *Sakereg* 2 ed (1989) 361-374; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 255-260; CG van der Merwe & A Pope "Property" in F du Bois (eds) *Wille's principles of South African law* 9 ed (2007) 405 546-555.

¹⁸⁰ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; Voet 6.1.20; 6.1.24; CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Kemp v Roper, NO* (1885-1906) 2 Buch AC 143; *Judelman v Colonial Government* (1906-1909) 3 Buch AC 446 452-453; *Marcus v Stamper and Zoutendijk* 1910 AD 58 72; *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383; *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) 744; *Henning v Petra Meubels Bpk* 1947 (2) SA 407 (T) 412; *Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) 110. Interestingly, Van der Merwe points out that a person to whom the right of ownership has been ceded can also institute the *rei vindicatio*. See CG van der Merwe *Sakereg* 2 ed (1989) 347; *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel en Andere* 1971 (2) SA 466 (T) 469. However, as previously stated, the exercise of this right is subject to legality and restricted to the incidents that still belong to the owner. See in this regard, *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

¹⁸¹ AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 257.

specifically eviction proceedings) with the purpose of ultimately giving effect to the owner's right to vindicate her property,¹⁸² subject to the requirements of the remedy.

The impact of these deep-level assumptions about an owner's right to evict and the courts' duty to fiercely uphold such a right was revealed in a plethora of case law immediately after section 26(3) of the Constitution commenced and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") was promulgated to regulate the eviction of unlawful occupiers.¹⁸³ *ABSA Bank Ltd v Amod*,¹⁸⁴ *Betta Eiendomme (Pty) Ltd v Ekple-epoh*¹⁸⁵ and *Ellis v Viljoen*¹⁸⁶ are all cases in which the courts had to determine whether the landowners, in the respective cases, were entitled to institute the *rei vindicatio* in order to evict occupiers whose occupation rights had lapsed.¹⁸⁷ In *ABSA Bank* the court was satisfied that PIE indeed limits the owner's right to evict, but that such limitation is restricted to the eviction of unlawful occupiers constituting 'classic squatters'.¹⁸⁸ It held that if PIE ought to limit a landowner's right to evict tenants holding over such limitation would amount to an absurdity.¹⁸⁹ This line of thinking was confirmed in *Betta Eiedomme* where the court went further and held that section 26(3) does not limit a landowner's right to evict at all, because both the substantive law concerning the owner's right to evict and procedural issues pertaining to the pleadings are unaffected by section 26(3) of the Constitution.¹⁹⁰ This conservative approach to limitations imposed on a landowner's right to evict was also employed by the court in *Ellis*. In *Ellis* the court upheld and confirmed the findings of the above two judgments when it reiterated that a

¹⁸² AJ van der Walt *Property in the margins* (2009) 22.

¹⁸³ These cases were decided in the constitutional era. However, they are worthy of mention here as they illuminate the pre-constitutional legal culture. JM Pienaar "Die beskerming van onroerende eiendom: Nuwe ontwikkelings" in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 141-157 145-149; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 4 ed (2003) 229-230.

¹⁸⁴ 1999 (2) All SA 423 (W).

¹⁸⁵ 2000 (4) SA 468 (W).

¹⁸⁶ 2001 (4) SA 795 (C).

¹⁸⁷ See *ABSA Bank Ltd V Amod* 1999 (2) All SA 423 (W) 426; *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) paras 1-2; *Ellis v Viljoen* 2001 (4) SA 795 (C) 797.

¹⁸⁸ *ABSA Bank Ltd V Amod* 1999 (2) All SA 423 (W) 430.

¹⁸⁹ *ABSA Bank Ltd V Amod* 1999 (2) All SA 423 (W) 430.

¹⁹⁰ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 15.

landowner's right to evict cannot be limited by section 26(3) of the Constitution because such limitation will infringe on a landowner's section 25 constitutional property right.¹⁹¹ Van der Walt observes that the approach followed by all the above courts, with regard to the question of whether section 26(3) of the Constitution and PIE limit a landowner's ability to evict at common law, highlight the deep-level "assumptions about the function of the law and the courts to uphold the *status quo*".¹⁹²

The discussion of all the cases mentioned above shows that courts in the pre-constitutional era emphasised the characteristics of ownership when they adjudicated eviction cases in terms of the *rei vindicatio* in order to give full force to an owner's right to exclude. It is clear that these characteristics formed part of the courts' underlying reasoning when they interpreted certain entitlements and maxims applicable to the *rei vindicatio* in order to ensure that the strong nature of an owner's right to exclude was not undermined by another right.

Chetty shows that the court was not required to have regard to the rights of the alleged unlawful occupier.¹⁹³ The court only considered the rights of the owner. This approach emphasises the complete, individualistic and abstract character of ownership. It highlights the abstract nature of ownership because such understanding of exclusivity, as Dhliwayo correctly points out, results in a-contextual application of an owner's right to evict.¹⁹⁴

Van der Walt's analysis of the South African property regime and his identification of the foundations thereof, explains the approach adopted in *Chetty* in relation to the strong right of the owner.¹⁹⁵ He suggests that like most other civil law systems South

¹⁹¹ *Ellis v Viljoen* 2001 (4) SA 795 (C) 807.

¹⁹² AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law" (2002) 18 *SAJHR* 372 400.

¹⁹³ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

¹⁹⁴ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 92. For general remarks on the owner's right to evict and the individualistic character of ownership, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 94; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 368.

¹⁹⁵ AJ van der Walt *Property in the margins* (2009) 27.

African law operates in a rights paradigm.¹⁹⁶ The main objective of the rights paradigm is to protect and entrench existing rights so as to ensure stability and certainty.¹⁹⁷ It does so by protecting rights in a hierarchical scheme in which ownership is always seen as the strongest right, followed by limited real rights and personal rights.¹⁹⁸ In this hierarchy non-rights have no standing. Van der Walt goes further and links this rights based property regime in operation in South African law to characteristics such as absoluteness, completeness and exclusivity.¹⁹⁹ He argues that the result of these characteristics being ascribed to ownership is that ownership is not only regarded as more valuable and more important than other property interests, but is also protected more strongly.²⁰⁰ He explains the syllogism between these characteristics of ownership and the idea behind protecting ownership as follows:

“[S]aying that ownership is absolute also implies that ownership is exclusive; given the status of ownership in the property hierarchy, that is tantamount to saying that the pinnacle of the property regime exists in the fact that a property owner can exclude anybody else from possession or use of that property, unless the other person can prove

¹⁹⁶ AJ van der Walt *Property in the margins* (2009) 27; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 139.

¹⁹⁷ AJ van der Walt *Property in the margins* (2009) 31. For a discussion of the nature and implications of the rights paradigm, see P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 28.

¹⁹⁸ AJ van der Walt *Property in the margins* (2009) 27.

¹⁹⁹ AJ van der Walt *Property in the margins* (2009) 32.

²⁰⁰ AJ van der Walt *Property in the margins* (2009) 34. This position was altered by the Constitution. See chapters three and four below for a detailed discussion of the way in which the Constitution has changed this position. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23 Sachs J held that:

“[T]he Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counter poses to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.”

a valid and enforceable right to possess or use, derived from either legislation or the consent of the owner and her predecessors in title”.²⁰¹

Furthermore, this approach that favoured ownership above all other rights and non-rights is also reflected in the administration and recording systems of deeds registration and regulated in the Deeds Registries Act 45 of 1937. In South African property law a distinction is made between real rights, and other rights in land for registration purposes.²⁰² A real right refers to the most complete right a person can have in relation to property. Ownership is the only complete real right that exists in property law because it is the only right that provides holders with complete entitlements. However, other types of rights in property also exist, namely limited real rights and personal rights. A holder of a limited real right only has some entitlements in the property of another. Personal rights are rights enforceable against a person for performance. Personal rights ordinarily do not have third party effect.²⁰³ Interestingly, section 63(1) of the Deeds Registration Act 47 of 1937 only provides for the registration of real rights and limited real rights. Personal rights are only recorded in support of real rights.²⁰⁴ So, apart from the fact that ownership is protected strongly, its administration and registration with regard to the recording of rights are also prioritised. It shows that administrative and support systems in South African law are designed to serve real rights (firstly, ownership and secondly, limited real rights) only. This accordingly feeds the deep-level assumptions that exist with regard to the superiority of ownership and the superiority of the owner’s right to vindicate. All of this supports Van der Walt’s explanation of the “normal state of affairs” where ownership and individual title are paramount.

²⁰¹ AJ van der Walt *Property in the margins* (2009) 34. (Footnotes omitted).

²⁰² Section 63(1) of the Deeds Registries Act 47 of 1937; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 208.

²⁰³ CG van der Merwe *Sakereg* 2 ed (1989) 58-60; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 47-48; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 427-428.

²⁰⁴ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 50; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 427-428.

The common law eviction remedy in the pre-constitutional era only concerned itself with the question of who had the strongest and most complete right in the relevant property.²⁰⁵ Adjudication in the eviction context was consequently centred on giving effect to that right. Van der Walt further points out that the common law *rei vindicatio* presupposed that the owner was entitled to be in occupation of her property.²⁰⁶ This again reiterates that the function of the remedies employed to protect ownership was aimed at protecting the *status quo*.²⁰⁷ Van der Walt explains that:

“Although the owner is not allowed at common law to evict without legal process, the protection afforded by this action is very strong, as it is based on the ‘normality’ assumption that the owner is entitled to exclusive possession of his or her property – this is what is considered the ‘normal state of affairs’, and what will most likely be upheld in the absence of good reason for not doing so.”²⁰⁸

The basis for this convention can be linked to the protection of the exclusivity and completeness of ownership.²⁰⁹ In line with this observation, Pienaar argues that the approach employed by the courts in the pre-constitutional era was a conventional approach because it sought to entrench and protect existing property rights by means of the conventional method, namely evictions.²¹⁰ She notes that this approach automatically prioritised the owner’s rights above the interests of non-owners.²¹¹

The above discussion shows that it is only when ownership’s complete, individualistic and abstract nature is acknowledged that the “normal state of affairs” will continue without any interferences. Accordingly, Van der Walt ties these main contentions

²⁰⁵ AJ van der Walt *Property in the margins* (2009) 34.

²⁰⁶ AJ van der Walt *Property in the margins* (2009) 58. See also T Roux *The politics of principle: The first South African constitutional court, 1995-2005* (2013) 326. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

²⁰⁷ AJ van der Walt *Property in the margins* (2009) 31.

²⁰⁸ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 257.

²⁰⁹ AJ van der Walt *Property in the margins* (2009) 59.

²¹⁰ JM Pienaar *Land reform* (2014) 668.

²¹¹ JM Pienaar *Land reform* (2014) 668.

flowing from the Grotian-pandectists' natural and moral legal thinking to the preserving of the current state of affairs.

2 3 Statutory eviction remedies

2 3 1 The historical roots of the statutory eviction remedies

While the *rei vindicatio* was available to owners of land to evict unlawful occupiers throughout the pre-constitutional era, the government of South Africa at the time also developed apartheid land law for the ideological goal of racial segregation which dramatically changed the pre-constitutional eviction law landscape.²¹² The pursuance of this ideology resulted in a plethora of legislative measures promulgated to effect evictions.²¹³ Essentially, two broad categories of legislative measures emerged: (a) measures aimed at regulating eviction specifically; and (b) measures aimed at regulating various matters incidental to occupation, thereby impacting on evictions indirectly. The War Measure Act 13 of 1940 ("WMA"), the Prevention of Illegal Squatting Act 52 of 1951 ("PISA") and the Prevention of Illegal Squatting Amendment Act 92 of 1976 ("Amendment Act") specifically allowed for the state and private owners to evict unlawful occupiers. Eviction remedies in these statutes were an alternative option to the common law *rei vindicatio*.

The Native Urban Areas Act 21 of 1923 ("NUAA") and the Group Areas Act 41 of 1950 ("GAA") worked together with the subsequent PISA and the Amendment Act thereof

²¹² AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 259; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 269; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 9; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 369; JM Pienaar *Land reform* (2014) 622-663.

²¹³ AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 259; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 269; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 9-12; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 370; JM Pienaar *Land reform* (2014) 664.

in order to ensure that private parties and the state could evict unlawful occupiers with ease.²¹⁴ These statutes formed part of a bigger framework that was aimed at realising the ideology of apartheid by respectively allocating certain areas of land to specific race groups;²¹⁵ restricting free movement of residents between these areas (so-called influx control);²¹⁶ and facilitating forced removals from such areas of land not allocated to the relevant race group.²¹⁷

The state, as public authority, also evicted occupiers belonging to certain race groups from land through seemingly neutral regulatory measures.²¹⁸ These measures included the Physical Planning Act 88 of 1967 (“PPA”), the Health Act 63 of 1977 (“HA”) and the Slums Act of 1979 (“SA”). They were invariably aimed at controlling movement and settlement in and around allocated areas but were not *per se* aimed at eviction. The combined operation of these statutes and PISA had the result that occupiers of land were forcibly removed from their homes and relocated onto other land, invariably in new underdeveloped areas.²¹⁹ While relocation and re-ordering of

²¹⁴ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 259; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 9-12; JM Pienaar *Land reform* (2014) 664.

²¹⁵ Group Areas Act 41 of 1950; Group Areas Act 77 of 1957; Group Areas Act 36 of 1966. See also AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 259; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 10; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 375; JM Pienaar *Land reform* (2014) 107.

²¹⁶ Native Urban Areas Act 21 of 1923; Native Urban Areas Consolidation Act 25 of 1945. See also GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 383; JM Pienaar *Land reform* (2014) 105.

²¹⁷ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 43; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 375; JM Pienaar *Land reform* (2014) 687.

²¹⁸ JM Pienaar *Land reform* (2014) 112.

²¹⁹ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 70; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 394; JM Pienaar *Land reform* (2014) 789-795.

settlement and occupation in this context were guided by land use planning and sanitation measures, the ideological goal of racial segregation formed the underlying motive.²²⁰

In 1940 the legislator promulgated the WMA and subsequently, the War Measure of 1944 which for the first time expressly dealt with the eviction process.²²¹ The WMA conferred upon the court (magistrate) the authority to make an order for the immediate eviction of unlawful occupiers. It found application in the situation where the government sought to evict unlawful occupiers, occupying land without the permission from the person in charge or the owner of the land. Accordingly, the *rei vindicatio* was not the remedy applied by the state; only by private owners in such situations. The WMA ultimately proved to be inadequate due to the tendency of evicted occupiers to simply move on to other vacant land. Accordingly, the measure was not working towards decreasing unlawful occupation but in reality only relocating the unlawful occupation.²²²

In response to the above shortfall parliament enacted PISA. With the promulgation of PISA, together with the GAA, the statutory regulation of evictions changed.²²³ PISA not only empowered the state and the landowner to approach a court for the eviction

²²⁰ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 70; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 394; JM Pienaar *Land reform* (2014) 789-795.

²²¹ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 54; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 382.

²²² GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 54; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 382.

²²³ The difference between WMA and PISA can be found in the scope of the requirement of unlawfulness. Unlawfulness in terms of the WMA was only restricted to the situation where the owner did not consent to the occupation by the occupier, while PISA extended the definition to any unlawful ground. This unlawful reason was informed by what legislation proclaimed to be unlawful. See GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) in this regard.

of the unlawful occupier(s), it also criminalised the unlawful occupation of land.²²⁴ According to Van der Walt, this statutory eviction remedy founded on this “overly ideological goal of racial segregation”,²²⁵ created an alternative remedy for landowners (including the state) to obtain eviction. He states that “the private-law, Roman-Dutch legal organisation of and control over the land rights of white South Africans was by and large left untouched by apartheid law, while the law relating to black land rights was removed from the sphere of Roman-Dutch private law and largely supplanted [...] by the (public-law) statutory provisions of the new land laws.”²²⁶ Accordingly, depending on the circumstances, both the statutory mechanism and the common law *rei vindicatio* were in principle available to landowners to evict unlawful occupiers.

Consequently, two separate legal eviction remedies, based on two distinct *modus operandi* and applicable to two different race groups respectively, existed in the pre-constitutional era.²²⁷ This meant that courts in the pre-constitutional era adjudicated eviction cases based on either the *rei vindicatio* or PISA, depending on the race of the occupier(s). The *rei vindicatio* was for the most part relied on and applied in the event of the unlawful occupation by a white occupier, while PISA was generally relied upon and applied where a landowner sought an eviction order against a black unlawful

²²⁴ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 258; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 54; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 382.

²²⁵ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 258.

²²⁶ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 258.

²²⁷ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 258. This was the situation because in specific areas in South Africa, black persons could not acquire ownership or rights in land in the private law sense (common law ownership or limited real rights in land). Legislation was promulgated to regulate the eviction and the relocation of black persons in favour of allocating prime property to white groups.

occupier.²²⁸ In the latter situation PISA enabled eviction,²²⁹ while at the same time ensuring the criminal conviction of the unlawful occupier for allegedly having contravened section 1 of PISA.

Interestingly, despite the different “channels” to effect an eviction, the result of both the common law and the statutory mechanisms would be similar in that the owner’s lost possession would be restored and the owner’s right to exclude would enjoy priority. Therefore, the same type of hierarchical approach was adopted in the context of the *rei vindicatio* and the statutory eviction remedies in the pre-constitutional period. However, some differences were apparent, specifically in relation to the actual procedure and process involved, and the final standing of the unlawful occupier. The process in terms of PISA was less complex and more expedient, especially after the promulgation of the Amendment Act in 1976.²³⁰ Pienaar notes, however, that both owner and unlawful occupier were regulated strictly.²³¹ Section 3B of PISA empowered local authorities and private owners to evict unlawful occupiers summarily without a court order.²³² The Amendment Act also prohibited owners of land from consenting or allowing race groups, not designated to stay in the residential area of the owners, to occupy the land of such owners. The Act criminalised this type of consent, thereby forcing owners to evict such occupiers.²³³ The Act furthermore successfully ousted the

²²⁸ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 261.

²²⁹ AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 259; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 55; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 383; JM Pienaar *Land reform* (2014) 687.

²³⁰ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 55; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 386; JM Pienaar *Land reform* (2014) 667.

²³¹ JM Pienaar *Land reform* (2014) 688.

²³² AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 259-260; GM Muller “The legal-historical context of urban forced evictions in South Africa” (2013) 19 *Fundamina* 367 386.

²³³ Section 3A of the Prevention of Illegal Squatting Amendment Act 92 of 1976. See further GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 56; JM Pienaar *Land reform* (2014) 687.

courts' jurisdiction to grant relief.²³⁴ Muller observes that the ouster clause sought to avoid the situation where unlawful occupiers could persuade a court to find in their favour.²³⁵ The ouster of courts also ensured that courts had no interpretive function in these instances.²³⁶ Courts were obliged to order an eviction once it was established that the occupier was an unlawful occupier for purposes of PISA.²³⁷ Under PISA, an unlawful occupier committed a statutory offence by virtue of the unlawful occupation of the property, whereas an unlawful occupier under the *rei vindicatio* remained an unlawful occupier only and the unlawful occupation was not deemed to be a crime.

2 3 2 The theoretical underpinnings of the statutory eviction remedies

The pre-constitutional era was therefore characterised by the existence of a plethora of remedies (legislative and common law) that enabled the state and private owners to evict unlawful occupiers.²³⁸ Although eviction in terms of the various statutes

²³⁴ Section 3B(4)(a) of the Prevention of Illegal Squatting Amendment Act 92 of 1976.

²³⁵ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 59; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 384.

²³⁶ GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 59; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 384. Also see C O'Regan "No more forced removals - An historical analysis of the Prevention of Illegal Squatting Act" (1989) 5 *SAJHR* 162-179 376 for a discussion of the implications of the abandonment of judicial involvement on the rights of accused in the eviction context.

²³⁷ Section 3(1) of the Prevention of Illegal Squatting Amendment Act 92 of 1976. See further GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 59; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 386.

²³⁸ For evictions in terms of the common law, see *Chetty v Naidoo* 1974 (3) SA 13 (A) 21. See further Voet 6.1.20; Voet 6.1.24; CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 468; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 243; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539. For more on evictions in terms of pre-constitutional eviction legislation, see AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 259; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 268; GM

available did not stipulate similar requirements as the *rei vindicatio*, it seemed to be premised on the same rationale. The rationale behind evictions in general (in terms of both the legislation and the common law) was that ownership trumps all lesser rights and interests,²³⁹ and therefore an owner was ordinarily entitled to an eviction order.²⁴⁰ The presence of this rationale in the application of the apartheid eviction legislation was illustrated in *Vena v George Municipality*.²⁴¹ The court in *Vena* held that the only defence the unlawful occupier opposing the eviction in terms of PISA could raise in order to resist eviction was a right to occupy the land.²⁴²

According to Van der Walt, the Roman-Dutch eviction convention was extended and enhanced by apartheid land law pertaining to eviction.²⁴³ Therefore, the apartheid government expanded the convention in order to facilitate arbitrariness and the abuse of state power, linked to the realisation of the apartheid ideology.²⁴⁴ Accordingly, if the apartheid eviction legislation was based on the common law *rei vindicatio* convention that ownership will always trump lesser rights, it can also be argued that the statutory

Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 9-12; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 370; JM Pienaar *Land reform* (2014) 111.

²³⁹ AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 258; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 6, 33; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 368.

²⁴⁰ AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *TSAR* 254 258; GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 6, 33; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 368.

²⁴¹ 1987 (4) SA 29 (C).

²⁴² *Vena v George Municipality* 1987 (4) SA 29 (C) 43.

²⁴³ AJ van der Walt *Property in the margins* (2009) 67. See further GM Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* LLD dissertation Stellenbosch University (2011) 33,71; GM Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 369. Muller agrees with the observation made by Van der Walt.

²⁴⁴ AJ van der Walt *Property in the margins* (2009) 67; AJ van der Walt *Constitutional property law* 3 ed (2011) 413.

eviction framework likewise entrenched the Grotian-pandectist view of ownership. This observation is in line with Pienaar's description of the approach that applied to unlawful occupation as a top down approach that favoured and entrenched private ownership rights.²⁴⁵ The further implication of this convention applying to both the common law remedy and the statutory remedy for eviction is that the characteristics of completeness, individuality and abstractness also played a role in the way in which the court approached and applied the statutory instructions in eviction legislation.

2 4 The interpretive and procedural approach to eviction remedies

2 4 1 Introduction

The procedural framework within which courts adjudicate disputes impacts on how courts approach and apply legal rules, principles and remedies.²⁴⁶ It is on the basis of this assumption that I attempt to look at different aspects of the judicial process to determine what impact prescribed rules and practices pertaining to the courts' function and the judicial process, had on the manner in which courts applied remedies in general and then more specifically, the way in which courts applied eviction remedies in the pre-constitutional era. The specific aspects of the judicial process that will enjoy attention are firstly, the rules and principles pertaining to the interpretation of statutory and common law remedies and secondly, the prescribed procedural approach that determined what role the court played in proceedings. This analysis will allow me to draw conclusions about the type of judicial attitudes and assumptions that existed regarding the courts' role; the prescribed manner in which courts were expected to adjudicate cases; and how these considerations influenced the judicial mind. In other words, it would allow me to determine the type of legal culture these attitudes and assumptions created.²⁴⁷ This in turn may indicate the way in which such legal culture

²⁴⁵ JM Pienaar *Land reform* (2014) 668.

²⁴⁶ D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124.

²⁴⁷ In this respect, see KE Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146 149. Klare defines legal culture as the "inarticulate premises culturally ingrained and historically ingrained." This definition is similar to the definition or description Dugard ascribes to legal culture in CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 188.

influenced the manner in which presiding officers, and therefore courts, approached and applied pre-constitutional eviction remedies.

Klare confirms that the courts, in their approach to the interpretation and therefore the application of legal rules and principles (and remedies), are always confronted with the “conflicting pulls and tensions (formerly referred to ‘the dialectic’) of freedom and constraint”.²⁴⁸ Legal culture (one component of the unarticulated premises of judges) forms part of this dialect, and directs the way in which courts go about the judicial process.²⁴⁹ It causes courts to approach adjudication and therefore the application of remedies in a specific way based on amongst other things, their specific legal training, “professional sensibilities, habits of mind and intellectual reflexes.”²⁵⁰ Dugard²⁵¹ explains that legal culture can be described as the unarticulated premises or concealed stimuli of any judicial process. Arguably, this forms an important part of a particular judge’s methodology in interpreting text, considering factors or circumstances and, ultimately, deciding on and applying a specific remedy in a particular manner.²⁵²

2 4 2 The interpretive function of courts

When confronted with an eviction application in terms of the *rei vindicatio* or apartheid eviction legislation, the court had to interpret the requirements of the remedies and determine, based on the facts of the case, whether the requirements had been met. The interpretation exercise the court employed depended on which remedy (common law *rei vindicatio* or legislation PISA) it dealt with. This is important, as the rules of interpretation for private law issues differ from the prescribed rules of statutory

²⁴⁸ KE Klare “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146 149.

²⁴⁹ See CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 188. (citing) J Frank *Law and the modern mind* (1930) 105.

²⁵⁰ KE Klare “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146 166.

²⁵¹ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 181. Dugard focusses on the court’s interpretation of parliamentary statutes and argues that it is unreasonably constrained by courts’ obedience towards positivism. This study is not isolated to determining the courts’ approach to its interpretive function, instead it also purports to determine the manner in which the courts apply the remedies.

²⁵² AJ van der Walt *Property in the margins* (2009) 18.

interpretation. The rule that dominated in the interpretation of parliamentary statutes was the intention of the legislator-rule.²⁵³ This rule advanced that the “sole task of the court in interpreting a statute is to discover the legislator’s intention”.²⁵⁴ Under this rule, courts had to ascertain the legislator’s intention by using subsidiary rules, called rules of interpretation or canons of construction.²⁵⁵ In this regard, a court had no power to ascribe to the provisions a meaning it deemed fair or appropriate,²⁵⁶ or a meaning other than what was purportedly intended by the legislator. This constituted a narrow approach to the judicial interpretive function, leading to the court executing its judicial functions in a relatively mechanical manner.²⁵⁷ As a result, evictions in terms of PISA, before the Amendment Act was promulgated, were subject to a mechanical approach where courts were obliged to give effect only to the provisions of the statute and ask no questions about the potential implications of enforcing the provisions.

The judicial function in the interpretation of common law rules and principles was generally regarded as more flexible.²⁵⁸ Stated differently, when a court interpreted the common law and found the outcome did not do justice to the parties involved, it had the power to develop the common law to eliminate the possibility of such principles or rules having such an unwanted effect.²⁵⁹ In principle the application of the *rei vindicatio* should also have been subject to this flexible approach. However, it was not applied in this way as courts generally applied the *rei vindicatio* without having regard to whether or not its application had harsh or arbitrary effects on the unlawful occupier(s).²⁶⁰

²⁵³ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 183; LM du Plessis *Re-interpretation of statutes* (2002) 94. This intention of the legislator rule formed part of the common law canons of statutory interpretation. See HR Hahlo & E Khan *The South African legal system and its background* (1968) 178; LM du Plessis *Re-interpretation of statutes* (2002) 92.

²⁵⁴ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 182; LM du Plessis *Re-interpretation of statutes* (2002) 94.

²⁵⁵ HR Hahlo & E Khan *The South African legal system and its background* (1968) 178; LM du Plessis *Re-interpretation of statutes* (2002) 92.

²⁵⁶ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 186.

²⁵⁷ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 186.

²⁵⁸ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 183.

²⁵⁹ *Daniels v Daniels* 1958 (1) SA 513 (A) 522.

²⁶⁰ See chapter 2, section 2.4.2 below for case law that illustrates this point.

These respective rules of interpretation were established rules, introduced and engraved onto the judicial mind by means of legal education, which is also regarded as part of the legal culture of judges.²⁶¹ Legal culture is influenced by legal education, which in turn, is a product of schools of thought which judges were trained and schooled in. Therefore, to determine a specific legal culture one would need to determine which school of thought was most prominent at the time of the training of judges when both the *rei vindicatio* and apartheid eviction legislation were available to enable eviction.

Positivism was regarded as the courts' "jurisprudential guide"²⁶² to the interpretation and application of law in the pre-constitutional South Africa. In other words, the courts' approach to the law (application of rules and principles) was informed by the theory of positivism.²⁶³ Positivism "can be said to be based on two cardinal beliefs: first, the truth of the theory of command, and secondly, the need for the strict separation of law and morality".²⁶⁴ The latter required that a "strict division be maintained between law as it *is* and law as it *ought to be*".²⁶⁵ *Bongopi v Chairman of the Council of State, Ciskei*²⁶⁶ is one example of a South African judgment in which the courts' approach to the law and its legal rules and principles is expressly based on positivism. In *Bongopi*²⁶⁷ the court held unequivocally that "[t]his court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it".²⁶⁸ In light of this *ratio* of the court, it seems as though positivism was the jurisprudential guide in the pre-constitutional era.

Positivism infiltrated the South African legal system during the eighteenth to nineteenth century when South Africa was colonised by the United Kingdom ("UK").²⁶⁹ During this

²⁶¹ CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 188; D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 143.

²⁶² CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 183; D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 127.

²⁶³ CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 183; D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 127.

²⁶⁴ CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 183.

²⁶⁵ CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 184.

²⁶⁶ 1992 (3) SA 250 (CKG).

²⁶⁷ *Bongopi v Chairman of the Council of State, Ciskei* 1992 (3) SA 250 (CKG) 265.

²⁶⁸ *Bongopi v Chairman of the Council of State, Ciskei* 1992 (3) SA 250 (CKG) 265.

²⁶⁹ CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 184.

period positivism was the dominating legal philosophy in England.²⁷⁰ Accordingly, “English judges, university law schools and the inns of court, where most barristers received their legal education, fell under this influence”.²⁷¹ Therefore, when the UK colonised South Africa it brought with it legal positivism and influenced the legal training of South African law scholars with positivist legal philosophy.²⁷²

According to Dugard, the influence of positivism in the South African legal system, as illustrated by the *Bongop*²⁷³ case is responsible for the development of judicial formalism.²⁷⁴ Schauer describes formalism as “decision making according to the rule” without having regard to the effect or outcome of such decision making.²⁷⁵ Consequently, the mechanical application of legal rules and principles has to be seen in light of these developments.²⁷⁶

The *Webb* case, set out above,²⁷⁷ concerned the owner’s right to exclude in terms of movable property. Accordingly, *Webb* was not an eviction case.²⁷⁸ However, it is an important case nevertheless as it illustrates the court’s interpretive exercise in early case law dealing with the scope of an owner’s entitlement to vindicate her property. The court’s point of departure was the history of the concept of ownership and its entitlements in Roman and Roman-Dutch law.²⁷⁹ In this regard, the court focussed on the general rule that owners are entitled to claim back their property because of their right to exclusive use and enjoyment of their property.²⁸⁰ However, the court

²⁷⁰ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 SALJ 181 184.

²⁷¹ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 SALJ 181 184-185.

²⁷² CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 SALJ 181 184-185.

²⁷³ *Bongopi v Chairman of the Council of State, Ciskei* 1992 (3) SA 250 (CKG) 265.

²⁷⁴ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 SALJ 181 184-185.

²⁷⁵ F Schauer “Formalism” (1987) 97 YLJ 509 510.

²⁷⁶ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 SALJ 181 185.

²⁷⁷ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 98. See chapter 2, section 2.2.3 above for a discussion of the facts of the case.

²⁷⁸ See chapter 2, section 2.2.3 above; *Van der Merwe v Webb* (1883-1884) 3 EDC 97 98.

²⁷⁹ See chapter 2, section 2.2.3 above; *Van der Merwe v Webb* (1883-1884) 3 EDC 97 101-113.

²⁸⁰ See chapter 2, section 2.2.3 above; *Van der Merwe v Webb* (1883-1884) 3 EDC 97 102. See further Voet 6.1.22; CG van der Merwe *Sakereg* 2 ed (1989) 347; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 476; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 242; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille’s*

acknowledged that certain restrictions existed in Dutch law pertaining to the entitlement of the owner to vindicate her property from a person who purchased the owner's property at a public market.²⁸¹ In particular, the court had to decide whether Dutch free market practices limited the scope of the owner's ability to vindicate his stolen property.²⁸²

The court in *Webb* had to interpret the Roman-Dutch law concept of ownership and Roman-Dutch maxims that might find application. In this regard, the starting point was the nature of ownership with reference to Roman and Roman-Dutch authorities. The court interpreted these authorities by ascribing to them their ordinary meaning and determining the context within which they were applied in both jurisdictions. It then moved on to determine what the impact of the respective maxims were on the owner's entitlements in South African law and finally came to a conclusion that would not undermine, but strengthen the concept of ownership as received.²⁸³

Accordingly, *Webb* illustrates that the interpretation of Roman and Roman-Dutch authorities led the court to ascribe to the relevant text (a) its ordinary meaning in (b) the context in which it was used in Roman or Roman-Dutch times, respectively. This is in accordance with the canons of interpretation of literalism and objectivism respectively.²⁸⁴ *Webb* furthermore, indicates that the court chose an interpretation that

principles of South African law 9 ed (2007) 405-729 539; *Wainwright and Co v Trustee Assigned Estate S Hassan Mahomed* (1908) 29 NLR 619 626-627; *Mngadino v Ntuli NO and Others* 1981 (3) SA 478 (D) 485.

²⁸¹ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 103.

²⁸² See chapter 2, section 2.2.3 above; Voet 6.1.12; CG van der Merwe *Sakereg* 2 ed (1989) 361; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 476; JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 245; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 546-547.

²⁸³ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 105.

²⁸⁴ Literalism concerns the interpretation exercise of ascertaining the meaning of the text from the *ipsissima verba* in which the text is laid down, irrespective of an illogical or absurd result. In contrast, objectivism deals with the interpretation exercise where meaning is ascribed to statutory text on the basis that the text takes up an objective existence separate from the intention of the legislator after promulgation. See LM du Plessis *Re-interpretation of statutes* (2002) 83-98.

would strengthen ownership, rather than undermine it. This suggests that on the basis of the courts' understanding of the nature of ownership, it deemed it just to uphold ownership entitlements rather than to restrict them.²⁸⁵

Similarly, the court in *Jeena* followed the same interpretive exercise when it had to interpret the common law rules pertaining to when an owner can institute eviction proceedings against an unlawful occupier in terms of the *rei vindicatio*.²⁸⁶ In this case the court had to decide whether an owner who had transferred occupation to another party could evict a tenant holding over (unlawful occupier) from its property before the lawful occupant could take occupation.²⁸⁷ The court confirmed the Roman and Roman-Dutch law authorities on the owner's entitlement to evict.²⁸⁸ It held that the owner is entitled to evict the unlawful occupier because the lawful occupier has not taken occupancy of the property as yet.²⁸⁹ Here, the court also applied the canon of objectivism and was satisfied with its outcome.

Betta Eiendomme is a case decided in the constitutional era, but is relevant for purposes of this chapter because it illustrates the pre-constitutional approach to interpretation of the owner's right to exclude when this right collides with section 26(3) of the Constitution of the Republic of South Africa, 1996. The applicant sought the eviction of the respondent pursuant to the termination of the lease agreement between the applicant and the respondent. The termination of the lease agreement was due to the failure of the respondent to pay the agreed rent.²⁹⁰ The magistrate's court failed to grant the applicant relief in terms of the common law *rei vindicatio* on the basis of the decision of *Ross v South Peninsula Municipality*.²⁹¹ On appeal, the court confirmed

²⁸⁵ *Van der Merwe v Webb* (1883-1884) 3 EDC 97 106.

²⁸⁶ See chapter 2, section 2.2.3 above for a discussion of the facts of the case.

²⁸⁷ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382.

²⁸⁸ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 382.

²⁸⁹ *Jeena v Minister of Lands* 1955 (2) SA 380 (A) 383; *Graham v Ridley* 1931 TPD 476.

²⁹⁰ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 1.

²⁹¹ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 1. In *Ross*, the court found that proof of ownership and unlawful occupation on the part of the defendant is insufficient to comply with the requirements for eviction. It held that in terms of section 26(3) all relevant circumstances should be considered before an order for eviction can be made. See *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 596.

the owner's common law position.²⁹² It reasserted that the owner's common law entitlement to be in possession of her property stands.²⁹³ In this regard, the court emphasised that this position of the owner can only be deviated from in light of clear legislative provisions to that effect.²⁹⁴

The court only considered the impact of section 26(3) on the owner's right after establishing the owner's supposedly strong position at common law.²⁹⁵ It interpreted section 26(3) in a restrictive manner by supposedly determining the ordinary meaning of section 26(3) and construing it in the context in which it had been drafted and the purpose for which it had been drafted.²⁹⁶ In this regard, the court placed considerable emphasis on the interpretation rule that provides that where limitations on rights are not clear from the relevant text, courts are obliged to apply an interpretation that favours the application of rights free from limitations.²⁹⁷ The court held that the correct interpretation of section 26(3) shows that the purpose of the section is aimed at protecting people against arbitrary eviction from their home and that "home" in the ordinary sense refers to where a person stays and has a right to stay.²⁹⁸ Section 26(3) is accordingly aimed at protecting right holders against arbitrary evictions. Therefore, in terms of the ordinary meaning and context interpretation rules squatters or people holding over are excluded from the ambit of section 26(3).²⁹⁹

As a result, the court was satisfied that section 26(3) imposed no burden on the owner's right to possession of her property in the current situation.³⁰⁰ It held that the *Ross*-case was incorrectly decided and that the court *a quo* in the current matter erred

²⁹² *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 6.

²⁹³ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 6.

²⁹⁴ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 6.

²⁹⁵ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 7.

²⁹⁶ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 7; AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law" (2002) 18 *SAJHR* 398.

²⁹⁷ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 10.

²⁹⁸ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 6.

²⁹⁹ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 7.

³⁰⁰ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 10; AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law" (2002) 18 *SAJHR* 397.

in refusing to grant an eviction order.³⁰¹ To its mind the owner's right to possession still had full force and had to be enforced accordingly.³⁰²

The cases discussed in this section illustrate that courts in the pre-constitutional era interpreted common law authorities and cases impacting on the owner's *rei vindicatio* by (a) attributing the ordinary meaning to the texts (literalist cannon of interpretation) and (b) by determining how the specific principle, concept or maxim was applied in Roman or Roman-Dutch times (objectivist cannon of interpretation). Interestingly, they also show that courts potentially regarded the outcome where the owner's entitlements are protected strongly as the most just outcome. This might explain why they never deemed it necessary to look at surrounding circumstances, because to their minds where the owner's right was protected the outcome was always just. Van der Walt points out that this approach of courts can be described as reactionary and conservative due to the fact that it highlights the deep-level assumption harboured by courts that the "existing property holdings, the *status quo*, is basically inviolate and to be accepted, protected and upheld unless any aspect of it changed clearly and for good cause".³⁰³

The formalistic manner in which courts approached questions of interpretation also comes out strongly in the cases discussed above because in all three cases the court was ultimately only interested in ascertaining rights and giving effect to those rights.

It is furthermore interesting to consider the application of eviction remedies in the pre-constitutional era, given the above-mentioned comments and case law about the way in which legal education and legal background possibly influenced the adjudication process. Courts in line with positivism only gave effect to the law as it was, and not how it should have been. When courts were confronted with an eviction application in terms of the *rei vindicatio* the court only set out to find out what the principles and requirements of the *rei vindicatio* remedy were, and consequently evaluated whether the requirements in a given case were met. Using the flexibility of its interpretive function in the application of the *rei vindicatio*, to maybe develop the remedy, was

³⁰¹ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) paras 13-15

³⁰² *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 10.

³⁰³ AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law" (2002) 18 *SAJHR* 399.

never considered. Therefore, considerations other than the strict requirements of the respective remedies would consequently have resulted in interpreting the law as it ought to be, which would have been in direct conflict with positivism.³⁰⁴

2 4 3 The prescribed role of courts

During the British occupation of South Africa, in the nineteenth century, British civil procedure and criminal procedure law infiltrated the South African legal system.³⁰⁵ Prior to the British occupation of South Africa, the procedural law that operated in South Africa was Roman-Dutch procedural law in accordance with the civil law tradition.³⁰⁶ This was the result of the Dutch East India Company's annexation activities in the Cape.³⁰⁷ However, at the time the British occupation began British authorities were dissatisfied with the existing procedural law in South Africa.³⁰⁸ Subsequently they incorporated English procedural rules, principles and practices into the South African legal system. Therefore, the civil procedure law that operated in the pre-constitutional South African legal system had its roots in the English common law tradition.³⁰⁹ English civil procedure law dictated all relevant factors, including the role of courts, the hierarchy of courts and the scope of the powers and jurisdiction of the courts.³¹⁰ The most outstanding characteristic of the common law tradition that the South African legal system inherited in the sphere of procedural law was the adversarial approach to court proceedings. The inquisitorial approach to court

³⁰⁴ HR Hahlo & E Khan *The South African legal system and its background* (1968) 23.

³⁰⁵ HJ Erasmus "The interaction of substantive law and procedure" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 141-161 146.

³⁰⁶ HJ Erasmus "The interaction of substantive law and procedure" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 141-161 145. Roman-Dutch jurists explained Roman-Dutch civil procedure. Their work was relied on heavily by South African courts.

³⁰⁷ HJ Erasmus "The interaction of substantive law and procedure" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 141-161 143.

³⁰⁸ HJ Erasmus "The interaction of substantive law and procedure" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 141-161 146.

³⁰⁹ HJ Erasmus "Historical foundations of the South African law of civil procedure" (1991) 108 *SALJ* 265 265.

³¹⁰ HJ Erasmus "The interaction of substantive law and procedure" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 141-161 146.

proceedings differs from the common law adversarial approach in that the inquisitorial nature of the civil law tradition requires judges to take up an active role in court proceedings.³¹¹ Both private law and statutory eviction remedies in the pre-constitutional era were dealt with in an adversarial manner.

An adversarial approach, or as it is referred to in procedural law “adversarial procedure”, is premised on the following three common law features: (a) that oral evidence and cross examination are two integral elements of a trial; (b) that the parties in dispute bring and argue their own cases; and (c) that the adjudicator is required to play a passive role.³¹² It is this last feature of the adversarial system that I will be focussing on further in this discussion. This feature that requires judges to play a passive role in the adjudication process has its own policy consideration (or rather underlying rationale) for purposes of the law of evidence. This policy consideration is found in the second feature mentioned above, which dictates that parties must argue and make their own cases in court.³¹³ For example; where parties in a dispute have to decide upon the relief they would prefer and the legal rules, facts and arguments they have to rely on to obtain the sought relief, there is no need for the court to do the same. It is possible that the passive role courts played in eviction proceedings had no connection with the substantive outcome of such cases. For example, where parties frame their case in a specific way and focus on specific facts more than others so as to satisfy the requirements of the remedy/relief they want and the court at the end of proceedings in its chambers decides the case on what has been placed before it; it does not mean that just because the court did not conduct the proceedings (decide on the main issues and arguments) that the substantive outcomes of the case would be

³¹¹ JA Jolowicz “Adversarial and inquisitorial models of civil procedure” (2003) 52 *ICLQ* 281 290.

³¹² PJ Schwikkard & SJ van der Merwe *Principles of Evidence* 2 ed (2002) 9. See also HJ Erasmus “Historical foundations of the South African law of civil procedure” (1991) 108 *SALJ* 265 265 where he states that “[t]he forms of procedure devised under the First and Second Charters of Justice of 1828 and 1834 for the Supreme Court of the Colony of the Cape of Good Hope display the fundamental features characteristic of proceedings at common law, namely, the adversarial character of the system and the predominant role of the parties in the conduct of the litigation, the passive and neutral role of the court, and the 'orality, immediacy and publicity of its proceedings.’” (Footnotes omitted). This underlying rationale refers to the belief that when parties bring their own case the contested, oppositional presentations of “facts” will bring the truth to light.

³¹³ PJ Schwikkard & SJ van der Merwe *Principles of Evidence* 2 ed (2002) 9.

a-contextual and unjust. However, I argue that in the context of evictions this was the case. This is illustrated in *Khuzwayo v Dludla*³¹⁴ and *Betta Eiendomme*. *Khuzwayo* concerned a case in which the Land Claims Court had to decide whether it had automatic review jurisdiction in terms of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) in a case decided in terms of the *rei vindicatio*.³¹⁵ *Khuzwayo* was decided in the constitutional era, however, it is significant for purposes of this section because it highlights the way in which the court perceived its role in eviction cases in the pre-constitutional era. The court held on the basis of *Skhosana and Others v Roos T/A Roos se Oord and Others*³¹⁶ that it would only have jurisdiction in the matter if the occupiers raised a defence against the eviction in terms ESTA.³¹⁷ In the court of first instance the plaintiff’s cause of action was the common law *rei vindicatio* in terms of his ownership and the defendants’ only defence was that they were not in unlawful occupation of the property.³¹⁸ On the basis of the parties’ pleadings the court found that the occupiers had raised no defence in terms of ESTA and that it therefore had no automatic review jurisdiction.³¹⁹ The court emphasised that in terms of the adversarial system that regulated the role of presiding officers, it is not the duty of courts to direct applicants to amend proceedings.³²⁰ Interestingly, the court observed that such an approach leaves those occupiers that ESTA and PIE purport to protect without protection and therefore vulnerable to eviction.³²¹ However, after recognising this gap, it nevertheless went on to decline to review the application.³²²

Similarly, in *Betta Eiendomme* certain remarks were made concerning the role of courts in eviction cases.³²³ The court expressed strong statements with regard to the

³¹⁴ 2001 (1) SA 714 (LCC).

³¹⁵ *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) para 1.

³¹⁶ 2000 (4) SA 561 (LLC).

³¹⁷ *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) para 10; *Skhosana and Others v Roos T/A Roos SE Oord and Others* 2000 (4) SA 561 (LLC) para 22.

³¹⁸ *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) paras 1-4.

³¹⁹ *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) para 12.

³²⁰ *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) para 13.

³²¹ *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) para 13.

³²² *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC) para 13.

³²³ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 15.

role of the court in eviction cases³²⁴ and emphasised that the court's role is not to look for defences for parties where they do not expressly raise such defences.³²⁵ The phrase "all circumstances" in terms of section 26(3) only applies to those circumstances included in the pleadings.³²⁶ A court is accordingly obliged only to refer to the defences raised in the pleadings in section 26(3) cases.³²⁷ In this regard the court reiterated that there is no duty on courts to go beyond the pleadings.³²⁸

These cases illustrate the way in which courts understood their role when applying eviction remedies. It also illustrates that the passive approach due to the adversarial system led courts to make decisions in a conservative manner, even after it became clear that an eviction order would be unjust.

Accordingly, the passive role of the court supported and entrenched the already formalistic and conservative approach employed when interpreting the facts and applying the principles of the remedies. In this context an approach was entrenched where procedure was regarded more important than asking relevant questions about substance, and where adjudication encompassed the objective and mechanical application of rules.

2 5 Concluding remarks

It is clear that the natural and moral legal understanding and institution of ownership was adopted by the South African society because of the strong influence Grotius and the pandectist scholars had on the development of South African common law.³²⁹ It caused characteristics such as completeness and exclusivity to dominate the conceptual understanding of ownership. This was particularly true for how courts and academics interpreted the institution of ownership and as a result how they interpreted and applied the *rei vindicatio* as the primary mechanism to protect ownership. The

³²⁴ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 15.

³²⁵ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 15.

³²⁶ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 15.

³²⁷ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 15.

³²⁸ *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W) para 15.

³²⁹ See chapter 2, section 2.2.2 above.

decisions of *Chetty*, *Jeena*, and *Webb* are evidence of this conceptual understanding. These cases indicate how the identified characteristics of completeness, individuality and abstractness informed an absolutist view of the right to exclude that was ultimately visible in the courts' approach to the *rei vindicatio*. Therefore, the underlying rationale of the *rei vindicatio* remedy relates directly to a strong right to exclude, with the focus being on the owner and the protection of her rights *vis-à-vis* the others.

In line with Van der Walt's normality assumption, one can argue that the acceptance of completeness and exclusivity of ownership led to the pre-constitutional acceptance by South African courts (and society) of the idea that the normal state of affairs entails the situation where the owner of immovable property is always in occupation of her property, unless the owner consents to the occupation of the property voluntarily; however, this was seen as a temporary, abnormal state of affairs.³³⁰ In other words, the theoretical framework that made up the rights paradigm not only informed the rules, requirements and principles of the *rei vindicatio*, but also informed the courts' doctrinal, rhetorical and logical assumptions behind the application of the remedy. Therefore, the courts in the pre-constitutional era, approached the application of the common law *rei vindicatio* remedy with a conservative and supposedly objective attitude, meaning that the owner's position, and therefore ownership, had to be defended as a point of departure.

The chapter also shows that the statutory eviction remedies that were available to landowners in the pre-constitutional era, alongside the *rei vindicatio*, were founded on the same conceptual foundation upon which the *rei vindicatio* was based. This conceptual basis attributed completeness, individuality and abstractness to ownership and created the basis for an absolute right to vindicate her property from unlawful occupiers. This was the case even though its ideology was racially-orientated in the form of entrenching apartheid.³³¹ Also in this context a conservative attitude was exhibited by courts in their approach to statutory eviction provisions, to ensure that the

³³⁰ See chapter 2, section 2.2.3 above.

³³¹ See chapter 2, section 2.2.2 above.

institution of ownership is not easily undermined by something like a flexible approach to statutory provisions which could potentially prohibit eviction.³³²

The analysis of the judicial function and its procedural approach to eviction remedies brought to light the fact that the court in eviction proceedings adopted a very passive and uninvolved stance. In the first instance this passive and uninvolved approach is ascribed to the fact that positivism was the courts' jurisprudential guide on how to approach and apply the law generally, including eviction remedies.³³³ This jurisprudential guide, in turn created the institution of judicial formalism in the courts' application of both statutory and common law eviction remedies. While courts were generally in no position to resist this formalistic mandate in the context of statutory interpretation, they may have had a more creative interpretive function in their application of the common law *rei vindicatio*.³³⁴

In the second instance, the adversarial approach to court proceedings which became part of the South African civil procedure law due to British occupation, furthermore contributed to the passive and uninvolved stance the court took in the context of eviction remedies by expressly requiring the court not to become involved in the proceedings.³³⁵ Accordingly, in the pre-constitutional era, the institution of ownership, based on the natural legal philosophical notions of completeness, individuality and abstractness, together with the courts' jurisprudential guide that was informed and directed by positivist legal philosophy and the adversarial system, caused the courts to approach the application of eviction remedies in a conservative, objective and formalistic manner.

³³² See chapter 2, section 2.2.2 above.

³³³ See chapter 2, section 2.4.2 above.

³³⁴ See chapter 2, section 2.4.2 above.

³³⁵ See chapter 2, section 2.4.3 above.

Chapter 3: The courts' approach to eviction remedies in the constitutional era

3 1 Introduction

The displacement of non white citizens through forced removals is a lasting effect of the apartheid regime.¹ In response to this historical reality of South Africa, the process of evictions and removals in the post-constitutional era has to take cognisance of this history.² Furthermore, the process should also strive to promote the founding values of the Constitution of the Republic of South Africa, 1996 (the "Constitution") and applicable rights in the Bill of Rights, so as to heal the divisions created by the past and prevent such gross violations of human rights from reoccurring in the future.³ With the advent of the Constitution in 1996, the Bill of Rights consequently contains section 26(3) that aims to prohibit the arbitrary eviction of people from their homes without an order of court.⁴ This provision explicitly requires judicial oversight and control where evictions from homes are concerned.⁵ However, this role ascribed to courts assumes that the legal culture, judicial processes and procedures of courts are already aligned

¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 10.

² See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 8-13. See further JM Pienaar & J Brickhill "Land" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-5 for a discussion of the historical context requirement for the interpretation of land legislation.

³ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-23. See further JM Pienaar & J Brickhill "Land" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-5; JM Pienaar *Land reform* (2014) 661 for a discussion of the constitutional context requirement for the interpretation of land legislation.

⁴ S 26(3) of the Constitution. See further K McLean "Housing" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 55-42; JM Pienaar *Land reform* (2014) 688.

⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 18.

with relevant constitutional values and goals. In this regard Van der Walt points out the possibility of a flaw in such an assumption:

“In a legal system where interpretation of the law depends upon professional judicial skills that are traditionally shaped and honed in the province of uncodified common law, this problem becomes critical, even (or especially) when the new democratic legislator introduces lavish amounts of new and innovative legislation in an attempt to force through the necessary reforms. In these instances legal tradition can play a major role in determining and circumscribing real and effective change. Politically necessary and constitutionally or statutory authorised social and economic change could be frustrated by interpretive reluctance or doctrinal immobility shaped or informed by a legal culture that was developed in a supposedly apolitical environment but that was nevertheless almost certainly influenced by pre-reform (and very likely political discredited) social and political thinking and attitudes.”⁶

The quote by Van der Walt explains the *ratio* for this chapter and the bigger question this research attempts to answer. It describes the important, but often underestimated, impact that professional judicial skills, (forming part of legal tradition, legal education and ultimately the legal culture of judges) have on the successful operation of a legal system with specific reform goals in mind.⁷

The purpose of this chapter is to determine the courts’ approach to eviction remedies in the constitutional era after the promulgation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). The focus will fall on determining the legal culture that currently informs the courts’ approach to eviction cases and the impact that the legal culture has on the courts’ ability to adequately deal with eviction cases in the constitutional era. This is necessary because, as explained above in the quote by Van der Walt, an underestimated and sometimes overlooked aspect is the legal culture within which a court applies laws. Accordingly, it is argued that it is not only the seemingly neutral application of the requirements of remedies and the unique facts of each case that steer the court in deciding upon whether an eviction order should be granted or not. In this chapter the courts’ approach is given a

⁶ AJ van der Walt *Property in the margins* (2009) 18.

⁷ See CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 188 (citing) J Frank *Law and the modern mind* (1930) 105.

wide definition that includes not only the impact of the remedies and their requirements on the courts' approach, but also involves identifying the legal culture with which the courts apply eviction remedies in the constitutional era. This will provide a holistic view of the courts' approach to eviction remedies in light of constitutional requirements for evictions.

Bhana ascribes to legal culture a broad definition.⁸ Her definition of legal culture advances that a society's legal education and personal experiences of the law, as informed by a wide range of factors, shapes the attitude and conceptual understanding with which legal minds approach the law.⁹ These factors include the "highly theoretical legal conceptions put forward by jurisprudential scholars to 'the professional sensibilities, habits of mind [,]... intellectual reflexes' and ensuing standard practices of judges and lawyers, [and] even the more pragmatic perceptions of bureaucrats and lay persons".¹⁰ In this chapter the courts' understanding and attitude towards the right to vindicate are described through both the identification of the (a) highly theoretical conceptions of eviction remedies that courts embrace; and (b) the courts' standard practices and procedures that courts inherited from the pre-constitutional era and which now find application when courts adjudicate eviction cases in the constitutional era.

This chapter is divided into two main parts. The first part sets out the historical and the political background that led to the promulgation of PIE, as well as the philosophical framework as couched by courts that must inform the approach of courts in the application of PIE. This allows for inferences to be made about the type of legal culture that the right to vindicate in terms of PIE envisaged in the constitutional era. The first part of the chapter also sets out the theoretical underpinnings of PIE as reflected in the Act itself and developed and given flesh to in case law. This part determines the courts' actual approach to the application of the procedural and substantive

⁸ D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124. See also chapter 2, section 2.1 above.

⁹ D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124. See also chapter 2, section 2.1 above.

¹⁰ D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124, quoting Klare's description of legal culture. (Footnotes omitted). See also KE Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146 166.

requirements of PIE. This is to ascertain whether or not the required philosophical approach is indeed present when courts apply PIE in the process of eviction adjudication. This allows for inferences to be made about the nature of the legal culture of courts that is present when courts apply PIE.

The second part of the chapter focusses on determining the prescribed role and function of courts, when they apply the eviction measures as set out in PIE. Firstly, section two identifies the way in which courts are generally required to interpret the law in the constitutional era. Secondly, the section identifies the prescribed procedural approach with which presiding officers in eviction cases must abide.

Finally, the findings pertaining to (a) the philosophical underpinnings of the constitutional eviction remedy; and (b) the interpretive and procedural functions of the courts are utilised to draw conclusions about the legal culture within which courts applied eviction remedies in the pre-constitutional era as opposed to the approach courts adopt currently in post-apartheid land law in South Africa.

3 2 The constitutional eviction remedy: PIE

3 2 1 Background to the promulgation of PIE

Apartheid land law coupled with eviction legislation in the pre-constitutional era resulted in large scale evictions and relocations of non white citizens.¹¹ The Group Areas Act 41 of 1950 (“GAA”) effectively disqualified certain race groups from occupying certain areas. These unwanted occupiers were referred to as “disqualified persons” in the GAA.¹² Disqualification had the effect that a disqualified person

¹¹ In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1079-1080; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9 where both the High Court and the Constitutional Court explained the implications of the apartheid land law. See further C O’Regan “The prevention of illegal squatting act” in C Murray & C O’Regan (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 162-179 162; JM Pienaar *Land reform* (2014) 687 for an in-depth discussion of how the eviction measure PISA affected evictions in the pre-constitutional era. See also chapter 2, section 2.3 above.

¹² See M Robertson “Dividing the land: An introduction to apartheid land law” in C Murray & C O’Regan (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 122-136 126; JM Pienaar

occupying land in an area not allocated for her specific race group was guilty of an offence and could be dealt with accordingly.¹³ Once unlawfulness was established, occupiers were removed swiftly without any hassle.¹⁴ The Prevention of Illegal Squatting Act 52 of 1951 (“PISA”) criminalised squatting to this end. It ensured that the eviction process of disqualified persons and therefore unlawful occupiers could be carried out as quickly as possible through criminal prosecution and conviction followed by a default eviction order.¹⁵ Non white persons generally found themselves without any statutory or common law occupational protection, which made them vulnerable and subject to the power of the government and the rights of the white minority.¹⁶

At the end of the apartheid era, the government had succeeded in creating a South Africa segregated upon racial lines.¹⁷ The white minority generally lived in affluent areas while the black and coloured majority lived in areas allocated for black and coloured people respectively.¹⁸ In this way, the apartheid system also created separate countries, referred to as “homelands” for different race groups within South Africa.¹⁹ These results were reached, *inter alia*, by impairing the dignity of people of

“‘Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 312.

¹³ Section 23 of the Group Areas Act 41 of 1950. See also AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 260; JM Pienaar “‘Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 312; JM Pienaar *Land reform* (2014) 106-107. The designation, separation and disqualification of race groups brought about by the 1950 Act, was further reinforced in the subsequent Group Areas Act 36 of 1996.

¹⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 8. Judge Sachs J emphasised the arbitrariness of this by explaining:

“[E]ven if they had been born on the land and spent their whole lives there, persons from whom permission to remain on land had been withdrawn by new owners were treated as criminals and subjected to summary eviction.”

¹⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 8; JM Pienaar “‘Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 315.

¹⁶ S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 267.

¹⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9.

¹⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 10.

¹⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9. For a detailed discussion of how these separate areas were created see M Robertson “Dividing the land: An

colour through forced removals and relocations to poor, over-crowded areas, far from cities and work opportunities.²⁰ Non white persons could only reside in urban areas if the labour needs of the white minority required it.²¹ Accordingly, at the beginning of South Africa's constitutional democracy the aftermath of apartheid left the majority of the previously oppressed groups socially and economically marginalised. In this regard Horn J in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*²² explained the plight of the homeless in the new South Africa that led to the need for the promulgation of PIE:

“With the lifting of the racial restrictions as to where people could live and work, many of the unemployed in the former homelands migrated to the cities. They went in search of work, taking their families with them. The shortage of accommodation in the urban areas forced them to live in shack towns or squatter camps on open land. Their plight should be recognised and should be treated with awareness and understanding. Humane action is needed, not a sledgehammer.”²³

introduction to apartheid land law” in C Murray & C O'Regan (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 122-136 125-132.

²⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 10; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 98. See also A Claassens “Rural land struggles in the Transvaal in the 1980's” in C Murray & C O'Regan (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 27-65 27.

²¹ S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 267. Access to white areas based on labour needs was made possible by the Natives (Urban Areas) Act no 21 of 1923 and later on by the Blacks (Urban Areas) Consolidation Act 25 of 1945. In this regard, see M Robertson “Dividing the land: An introduction to apartheid land law” in C Murray & C O'Regan (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 122-136 131; JM Pienaar “‘Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 311-312.

²² *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE).

²³ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1079. See also JM Pienaar “‘Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 314.

3 2 2 The theoretical underpinnings of PIE

3 2 2 1 *The purpose and function of PIE*

The inclusion of section 26(3) in the final Constitution established the Constitution's commitment to the plight of the homeless and the vulnerable in the context of eviction. Section 26(3) requires that "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".²⁴ Based on this constitutionally entrenched right to non-arbitrary and court ordained evictions, PIE was promulgated to give effect to section 26(3) of the Constitution and was therefore set in place to regulate evictions in the constitutional dispensation.²⁵ With regard to residential property, PIE expressly replaced both pre-constitutional eviction remedies, namely the *rei vindicatio* and PISA.²⁶ The owner's right to evict in terms of the common law has been codified in PIE and made subject to substantive and procedural requirements to ensure that the process of evicting unlawful occupiers is not arbitrary.²⁷ Therefore, PIE is a constitutionally ordained eviction measure promulgated to ensure that the rights and interests of both the owner and the unlawful occupier are protected in the process of evictions.

Section 2 of PIE sets out the application scope of the Act. It states that PIE applies to all land in the country. However, section 1 (the definition clause) expressly excludes two categories of occupiers from the application scope of PIE. Occupiers who enjoy the procedural and substantive protection under the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and those occupiers who are protected in terms of the Interim

²⁴ Section 26(3) of the Constitution.

²⁵ Sections 26 and 25 of the Constitution. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 242; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 270; AJ van der Walt *Constitutional property law* 3 ed (2011) 91; JM Pienaar *Land reform* (2014) 661; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11.

²⁶ Section 4(1) of PIE; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 242; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 270; JM Pienaar "Unlawful occupier" in perspective: History, legislation and case law" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 316; JM Pienaar *Land reform* (2014) 688.

²⁷ CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 549.

Protection of Informal Land Rights Act 31 of 1996 (“IPILA”) are specifically excluded from the protection of PIE.²⁸ In this regard, section 2 of ESTA limits ESTA’s application scope to rural areas and particularly land used and zoned for agricultural purposes.²⁹ IPILA, in turn, regulates tenure security that includes security from evictions in rural areas.³⁰ Accordingly, the application scope of PIE is not unlimited; it is limited to private and public land in residential urban and township areas to evictions from what the unlawful occupier regards as her home.³¹ However, because PIE has national application it will also apply to evictions from agricultural land where ESTA would not find application due to the facts.³²

An eviction measure in terms of the common law is ordinarily only expected to protect the owner’s right to exclude, inherent in ownership.³³ Accordingly, the primary function

²⁸ PIE does not expressly exclude occupiers to whom the Land Reform (Labour Tenants) Act 3 of 1996 (LRA) applies. However, the LRA regulates evictions pertaining to labour tenants with labour tenancy agreements. See section 9(1)(a)-(b) of the LRA for the requirements a person has to meet before such a person will be regarded as labour tenant for purposes of LRA. For a discussion of the limitations on eviction caused by LRA see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 599; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 272; JM Pienaar *Land reform* (2014) 432-433.

²⁹ Section 2 of ESTA. To qualify for protection under ESTA an occupier has to comply with certain requirements. These are: firstly, that the occupier has to “reside on land which belongs to another person”; secondly, the occupier’s income may not exceed R5000.00 per month; and finally, the occupation must be for residential purposes and not for any personal commercial endeavours. See further *Mkangeli and Others v Joubert and Others* 2001 (2) SA 1191 (CC) paras 7-11 where the court expressly held that ESTA applies only to rural land or agricultural land. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 608-610; JM Pienaar *Land reform* (2014) 399-416.

³⁰ JM Pienaar *Land reform* (2014) 795-796. Pienaar explains that section 2(1) of IPILA provides holders of informal rights in terms of IPILA protection against eviction by providing such holders with protection against deprivation of even informal rights.

³¹ See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 248-249; JM Pienaar *Land reform* (2014) 701-712.

³² *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) is an example of a case where PIE was applied to evict a community of unlawful occupiers from farm land.

³³ CG van der Merwe *Sakereg* 2 ed (1989) 347; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 242-243; CG van der Merwe & A Pope “Property” in F du Bois (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 539; JM Pienaar *Land reform* (2014) 668. These sources show that the *rei vindicatio* had no alternate function, but to protect an

of an eviction remedy such as the *rei vindicatio* was to ensure that landowners can evict unlawful occupiers swiftly, provided the requirements were met. However, in the pre-constitutional era PISA showed that an eviction measure can also promote a secondary policy goal.³⁴ This is evident in that PISA functioned as both an eviction remedy and a measure to effect racial segregation in the apartheid era (predominantly as a spatial racial planning mechanism).³⁵

With the advent of the Constitution, parliament in its attempt to rectify the injustices of apartheid forced removals and evictions, enacted PIE.³⁶ Much like PISA, PIE also has a dual function. The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*³⁷ explained that PIE's secondary goal is exactly the opposite of what PISA primarily sought to achieve.³⁸ Sach's J explained that:

“PIE not only repealed PISA but in a sense inverted it: squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common law remedies while reducing common law protections, was reversed so as to temper common law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgment of the necessitous quest for homes of victims of past

owner's right to exclusive use and enjoyment of her property by ordering recovery of the property in the owner's favour. See chapter 2, section 2.3 above.

³⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9. See further AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 258; AJ van der Walt *Property in the margins* (2009) 60-70 where Van der Walt argues that evictions in the apartheid era had a political agenda linked to it, namely to realise racial segregation. See further JM Pienaar *Land reform* (2014) 660 where Pienaar explains that evictions together with the group areas legislation and influx control measures constituted the three pillars of apartheid. See chapter 2, section 2.3 above.

³⁵ See AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 258; AJ van der Walt *Property in the margins* (2009) 65-66; JM Pienaar *Land reform* (2014) 660.

³⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11.

³⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

³⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 12.

racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect. Thus, the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable.”³⁹

PIE operates as an eviction remedy but at the same time it must ensure the orderly resettlement of those left homeless and displaced by the apartheid regime.⁴⁰ These two opposing aims are based on two distinct constitutional clauses, namely the property clause in section 25(1) of the Constitution and the housing clause in section 26(3) of the Constitution.⁴¹

As a result, PIE is a legislative measure aimed at protecting the *status quo* whilst also promoting the transformative thrust of the Constitution.⁴² The preamble of PIE makes this objective clear. PIE states that it protects both sections 25 and 26(3) of the Constitution by prohibiting arbitrary deprivation of property and by prohibiting evictions or demolition of homes without an order of court. Furthermore, it requires that both the rights of the landowner and the unlawful occupiers, in particular children, woman, disabled persons and the elderly, are considered in eviction cases. In this way PIE regulates the eviction of unlawful occupiers in a fair manner, while also providing the owner with a mechanism to apply for an eviction order.

As is evident from the above, PIE aims to promote two constitutional rights, which in the context of evictions are also conflicting rights.⁴³ From an owner’s perspective section 25 requires protection of property rights, while section 26(3) in certain circumstances allows for the temporary infringement of some of those entitlements of

³⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 12.

⁴⁰ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1082-1083; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 12-13.

⁴¹ Section 25(1) sets out to protect property rights and section 26(3) seeks to protect persons from arbitrary evictions. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-23.

⁴² The preamble of PIE emphasis both section 25(1) and section 26(3) of the Constitution. See also JM Pienaar *Land reform* (2014) 660.

⁴³ JM Pienaar *Land reform* (2014) 661.

property.⁴⁴ From an unlawful occupier's perspective, section 26(3) protects vulnerable occupiers from arbitrary evictions and ensures that evictions take place in a humane manner. Due to the nature of these opposing rights,⁴⁵ it is of paramount importance that PIE is applied with a sensitive and balanced approach.⁴⁶ Such an approach must align with the aims and underlying philosophical ideals of PIE. This will ensure that the Act will be applied with the necessary sensitivity towards the applicable context of the parties and that an appropriate balance is struck between the opposing interests of the parties. A discussion of the *PE Municipality* judgment follows, in particular the reasoning of the court pertaining to the manner in which courts should apply PIE. This discussion will provide the basis for determining how eviction cases should be approached in the constitutional era.

3 2 2 2 *The approach to evictions in terms of PIE*

As indicated above, PIE involves the protection of two constitutional rights embodied respectively in sections 25 and 26(3) of the Constitution. In this regard, the Constitutional Court judgment in *PE Municipality* described how courts should approach eviction cases in order to ensure that the outcome of each eviction case

⁴⁴ JM Pienaar *Land reform* (2014) 661. Dhliwayo and Van der Walt argue that section 25 allows considerable room for recognition of an (inherent) limitation on the right of the owner to exclude. In this regard, see AJ van der Walt *Constitutional property law* 3 ed (2011) 91; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 204-206. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 49-50; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 16 where the Constitutional Court in both instances emphasised that the protection of individual property rights entrenched in section 25 of the Constitution is not absolute. Individual rights, including owner's property rights, under the 1996 Constitution, are all subject to societal considerations. Furthermore, the court held that section 25 must be applied in a manner that takes cognition of the history of land in South Africa.

⁴⁵ S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 273; 311-312; AJ van der Walt *Constitutional property law* 3 ed (2011) 521; JM Pienaar *Land reform* (2014) 661.

⁴⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35; *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) para 56.

protects the rights and interests of both the landowner and the unlawful occupier(s).⁴⁷ There is support in academic literature that *PE Municipality* provides courts and lawyers with a methodology for approaching and understanding the process of eviction of unlawful occupiers in terms of PIE, under the Constitution.

PE Municipality is the first case in which the Constitutional Court had an opportunity to decide on an eviction matter.⁴⁸ In this regard, the Constitutional Court took full advantage of this opportunity by providing a comprehensive account of the historical context that led to the promulgation of PIE;⁴⁹ the constitutional matrix within which PIE must be understood and interpreted;⁵⁰ and finally some context with regard to the specific provisions and requirements of PIE.⁵¹ The judgment concerned an appeal to the Constitutional Court against an order of the Supreme Court of Appeal that the unlawful occupiers should not be evicted before it had been established that the unlawful occupiers would have some tenure security where they were to be relocated to. The circumstances of the case indicated that the land which was unlawfully occupied was private land.⁵² The occupiers had been occupying the property for two to eight years.⁵³ They further submitted that the reason for their unlawful occupation was because they had no alternative accommodation.⁵⁴ Therefore, the unlawful occupiers argued that an eviction could only take place once alternative accommodation was secured by the government.⁵⁵

The court considered all relevant circumstances such as (a) the lengthy period that the occupiers occupied the land without objection; (b) the fact that neither the municipality nor the landowner was in immediate need to use the property and; (c) that they had failed to meaningfully engage with the occupiers regarding the situation; (d)

⁴⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC). See further S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 273, 311-312; AJ van der Walt *Constitutional property law* 3 ed (2011) 521; JM Pienaar *Land reform* (2014) 770-771.

⁴⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 5.

⁴⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 8-10.

⁵⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 11-25.

⁵¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 26-47.

⁵² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 1.

⁵³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 2.

⁵⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 2.

⁵⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 2.

the fact that the occupiers were a small group of people; and finally that the occupiers would become homeless if evicted. After considering all these relevant factors the court ordered that it would not be just and equitable to evict the unlawful occupiers.

Van der Walt interprets *PE Municipality* as exemplifying that the Constitution requires a fundamental shift in how courts think about property rights in eviction cases.⁵⁶ He explains that a mental shift from an abstract, and rights-based, thinking to context-sensitive and non-hierarchical thinking of property rights is required in light of the decision.⁵⁷ This shift in how courts are required to think about property rights in the context of evictions is brought about by section 26(3) of the Constitution and its corollary statute, PIE.⁵⁸ Van der Walt argues that *PE Municipality* does not only illuminate that a shift in thinking is required, but it also shows a framework aimed at shaping the courts' understanding of property rights in the context of evictions. This framework consists of the historical and constitutional context of evictions.⁵⁹ In this regard, the court indicated that the historical context of evictions refers to the eviction measures and legislation of the pre-constitutional era⁶⁰ and a proper understanding of how the relationship between sections 25(1) and 26(3) provide the constitutional context within which courts have to adjudicate eviction cases in post-apartheid South Africa.⁶¹ A proper understanding of the constitutional relationship between these two fundamental rights includes understanding that these sections are in fact interdependent (intertwined).⁶² Such an understanding of the relationship between these provisions will automatically conflict with an application of property rights in the traditional, abstract and hierarchical manner, similar to the way adjudication took place

⁵⁶ AJ van der Walt *Constitutional property law* 3 ed (2011) 521.

⁵⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13. See further AJ van der Walt *Constitutional property law* 3 ed (2011) 521.

⁵⁸ AJ van der Walt *Constitutional property law* 3 ed (2011) 521.

⁵⁹ AJ van der Walt *Constitutional property law* 3 ed (2011) 521-522.

⁶⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13. See further AJ van der Walt *Constitutional property law* 3 ed (2011) 521.

⁶¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13. See further AJ van der Walt *Constitutional property law* 3 ed (2011) 522.

⁶² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 19.

in this context in the pre-constitutional period. Therefore, a non-hierarchical and context-sensitive approach is required when PIE is applied.

Pienaar and Brickhill also support such an interpretation of *PE Municipality*. They suggest that *PE Municipality* established a new approach to land law. This new approach requires that the application of PIE takes cognisance of the historical context of South African land relations.⁶³ In other words, the vast land injustices, which occurred in accordance with colonial and apartheid land legislation, have to be taken into account when constitutional land legislative measures such as PIE, are interpreted and applied. Consequently, PIE should also be understood and applied within the constitutional context.⁶⁴ In this regard, the founding values and the rights in the Bill of Rights should constitute the constitutional context for the interpretation of PIE.⁶⁵ The values of human dignity, freedom and equality together with the constitutional principle of the rule of law must be upheld when courts interpret and adjudicate eviction cases in terms of PIE.⁶⁶ In addition, the *PE Municipality* judgment established that the African philosophy of *ubuntu* is a value central to the constitutional context for the interpretation of PIE.⁶⁷ Sachs AJ explained that:

⁶³ JM Pienaar & J Brickhill "Land" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-1 48-5.

⁶⁴ JM Pienaar & J Brickhill "Land" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-1 48-5.

⁶⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 5. Section 10 (the right to dignity), section 26 (the right to adequate access to housing), section 32 (the right of access to information) and section 33 (the right to administrative justice) also forms part of the constitutional context that any court which has the task of interpreting land legislation should take into account.

⁶⁶ JM Pienaar & J Brickhill "Land" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-1 48-5. See further *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 15, 20.

⁶⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37; JM Pienaar & J Brickhill "Land" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-1 48-6. For a discussion of the different facets of *ubuntu*, see M Pieterse "'Traditional' African jurisprudence" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 442; Y Mokgoro "Ubuntu and the law in South Africa" in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 317-323 318; T Bekker "The re-emergence of ubuntu: A critical analysis" in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 377-387 378.

“The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result. Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy.”⁶⁸

Accordingly, *ubuntu* together with the other above-mentioned founding values of the Constitution has to inform how courts understand the relationship between sections 25(1) and 26(3) of the Constitution, and ultimately how courts apply PIE. In this regard, a discussion of *ubuntu* follows to provide an idea of how *ubuntu* should be informing the courts’ application of PIE. However, this discussion does not aim to provide an in-depth analysis of *ubuntu* within the broader parameters of the law. Rather, it purports to explore *ubuntu* as an African philosophy in so far as it has been mentioned, and therefore may influence, the application of PIE within the particular context of eviction.

3 2 3 The requisite approach to the provisions of PIE

3 2 3 1 *Ubuntu*

3 2 3 1 1 The meaning of *ubuntu*

Academic literature and case law show that the meaning of *ubuntu* cannot adequately be captured in a single definition.⁶⁹ Accordingly, this part sets out to ascribe meaning

⁶⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

⁶⁹ See M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 442; Y Mokgoro “Ubuntu and the law in South Africa” in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 317-323 318; T Bekker “The re-emergence of ubuntu: A critical analysis” in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 377-387 378 for reasons why defining *ubuntu* is challenging. Pieterse argues that the difficulty courts face when attempting to

to *ubuntu* by firstly, describing the philosophical doctrine that is *ubuntuism* and then secondly, identifying the central tenets of the concept in its capacity as an African philosophy and concept applicable to South African eviction jurisprudence.

Ubuntuism as a philosophical doctrine advances that the universe and everything in the universe are metaphysical forces that work together to form a unified field of force.⁷⁰ These forces are unique in their own way; they are dependent on each other and work together, not only to survive, but to excel individually and collectively.⁷¹ As a result, human beings are also seen as individual and unique forces that interact and function inseparably from other forces in the universal field of forces.⁷² God is the creator of all forces and the creator of the causal link between all forces, because all forces are regarded to be united in the one sovereign creator they share.⁷³ In this regard, *ubuntu* functions as this causal link and energy that keeps the forces in equilibrium.⁷⁴

Pieterse suggests that this African world view, which makes up the philosophical doctrine of *ubuntu*, is central to understanding what the notion of *ubuntu* has to offer.⁷⁵ He identifies that *ubuntu* on the one hand, encapsulates universal human interdependence through solidarity, reciprocity and communalism. On the other hand, *ubuntu* offers the protection of human dignity through mutual respect, compassion and humaneness.⁷⁶

incorporate *ubuntu* into the formal structures of law, arise because they grapple with the concept as a “uni-dimensional” concept rather than a philosophical doctrine.

⁷⁰ For a more detailed explanation of the field of forces theory advanced by *ubuntuism*, see M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 445; A Shutte *Philosophy for Africa* (1993) 52-58.

⁷¹ M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 445.

⁷² A Shutte *Philosophy for Africa* (1993) 54-56.

⁷³ A Shutte *Philosophy for Africa* (1993) 53.

⁷⁴ M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 445; A Shutte *Philosophy for Africa* (1993) 54-56.

⁷⁵ M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 444.

⁷⁶ M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 445; Y Mokgoro “Ubuntu and the law in South Africa” in D Cornell & N Muvangua (eds)

The above understanding of the notion of *ubuntu* seems to be compatible with the Constitutional Court's understanding thereof. For instance, in *S v Makwanyane and Another* three judges of the Constitutional Court, namely Langa J, Mohammed J and Mokgoro J attempted to define *ubuntu*. All three definitions recognised that human inter-dependence and human dignity together with other related values underlie *ubuntu*.⁷⁷ I submit, after an analysis of the judges' definitions that all values associated with *ubuntu* flow from these two main values, namely human inter-dependence and human dignity. For example, value,⁷⁸ respect,⁷⁹ acceptance,⁸⁰ love,⁸¹ humanness,⁸² personhood,⁸³ morality⁸⁴ and compassion⁸⁵ can all be understood to flow from the central value of human dignity. Furthermore, group solidarity⁸⁶ and reciprocity⁸⁷ can be understood to flow from human inter-dependence. This approach of first identifying the central values of *ubuntu*, namely human inter-dependence and human dignity, and then identifying what subsidiary values are relevant to the case before a court, would provide a principled and coherent approach to the application of *ubuntu* in case law.⁸⁸

Ubuntu and the law: African ideals and post-apartheid jurisprudence (2012) 317-323 318. For more on the human inter-dependence aspect of *ubuntu*, see L Ackerman *Human dignity: Lodestar for equality in South Africa* (2012) 80.

⁷⁷ See *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 224-225 for Langa J's definition; para 263 for Mohammed J's definition and para 308 for Mokgoro J's definition of *ubuntu*. The definitions in the *Makwanyane* case also include other values, such as personhood, morality, compassion, humanness, love towards each other, value, respect and reciprocity.

⁷⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 224.

⁷⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 224, 378.

⁸⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 224.

⁸¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 263.

⁸² *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 263,378.

⁸³ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 378.

⁸⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 308.

⁸⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 308.

⁸⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 224, 308.

⁸⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 225, 263.

⁸⁸ See M Pieterse "'Traditional' African jurisprudence" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 444. Pieterse explains that the potential for the use of *ubuntu* in case law has been crippled by the unprincipled and incoherent application of the notion by the courts.

3 2 3 1 2 The role of *ubuntu* in the constitutional order and eviction jurisprudence

The Constitutional Court has declared that *ubuntu* constitutes a source of constitutional values.⁸⁹ In the eviction context the Constitutional Court held that *ubuntu* pervades the entire constitutional order and that the Constitution and PIE mandate courts in their application of PIE to promote the tenets of *ubuntu*.⁹⁰ In other words, the tenets of *ubuntu* are implied to form part of the values underlying the Constitution.⁹¹ This link between *ubuntu* and the values underlying the Constitution provides a starting point for determining what role *ubuntu* is deemed to play in constitutional jurisprudence. According to Fowkes, values underlying the Constitution, such as those found in the preamble and section 1 of the Constitution, have a very specific role in constitutional adjudication.⁹² The role of these values is to assist with constitutional interpretation and constitutional description of rights.⁹³ In this regard, a distinction should be drawn between the role of the values found in the preamble of the Constitution and the role of the values found in section 1 of the Constitution. The

⁸⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 365-374. This statement of the Constitutional Court was in accordance with the Interim Constitution's express recognition of the importance of *ubuntu* in the new South Africa. However, *ubuntu* has subsequently not been included in the final Constitution of the Republic of South Africa, 1996. Interestingly, *ubuntu* continues to play a significant role in South African jurisprudence, as the lower and higher courts have referred to *ubuntu* numerous times after the final Constitution came into force. See IJ Kroeze "Doing things with values: The case of ubuntu" in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 334-343 335; *S v Mandela* 2001 (1) SACR 156 (C) para 145; *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO, New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) paras 38, 51; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 69; *Masethla v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 238; *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC) para 61; *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 46.

⁹⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

⁹¹ Y Mokgoro "Ubuntu and the law in South Africa" in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 317-323 320.

⁹² J Fowkes "Founding provisions" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 13-1 - 13-66.

⁹³ See J Fowkes "Founding provisions" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 13-4 and 13-13.

preamble-values constitute constitutional values that are relevant to determine the purpose of rights in the Bill of Rights when the purposive approach to the interpretation of rights in the Bill of Rights is employed.⁹⁴ In contrast, the role of the founding values, as set out in section 1 of the Constitution, is more controversial and uncertain because of the Constitutional Court's inconsistent application thereof.⁹⁵ However, Fowkes suggests that if the section 1-values are not merely regarded as values but rather as principles, the different approaches employed by the Constitutional Court might be reconcilable.⁹⁶ He argues that values as principles are capable of bearing and transposing obligations on rights in the Bill of Rights when these principles are used to interpret such rights.⁹⁷

In *PE Municipality* the court confirmed that the function of *ubuntu* in eviction cases is interpretive of nature when it held that “[ubuntu] combines individual rights with an *communitarian* philosophy” and that “[i]t is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our

⁹⁴ See *S v Mhlungu* 1995 (2) SACR 277 (CC) para 112; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 72-73. See also, J Fowkes “Founding provisions” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 13-3 where Fowkes illuminates that the preamble of the Constitution does not constitute in itself a source of enforceable rights and duties. For more on the interpretative function of the preamble, see I Currie and J de Waal *The Bill of Rights handbook* 6 ed (2013) 136-140.

⁹⁵ See J Fowkes “Founding provisions” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 13-9 – 13-24. Fowkes sets out the two different approaches followed by the court. He shows that the court in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 23 expressly held that the provisions in section 1 do not constitute enforceable rights but that their role is only interpretive in nature. In contrast, the court in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 46-47 approached and applied the relevant section 1-values as if they ascribed to the relevant right in the Bill of Rights certain obligations. Fowkes reconciles these two approaches by suggesting that section 1-values constitute obligation creating principles when these values are used to interpret rights in the Bill of Rights.

⁹⁶ See J Fowkes “Founding provisions” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 13-9 – 13-24.

⁹⁷ See J Fowkes “Founding provisions” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 13-12; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) paras 65-67; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 46-47.

evolving new society of the need for human inter-dependence, respect and concern.”⁹⁸ From the first dictum an inference can be made that courts should consider *ubuntu* in their interpretation of the relevant individual rights, namely sections 25(1) and 26(3) of the Constitution. The second dictum further supports the suggestion that *ubuntu* is an important constitutional value to consider, especially where two rights stand in conflict with each other. Pienaar and Brickhill support this contention and suggest that *PE Municipality* established that the African philosophy of *ubuntu* is a value central to the constitutional context.⁹⁹ Accordingly, the role of *ubuntu* is to assist the court with its interpretation of the provisions of PIE, especially the interpretation of what justice and equity would require in a specific eviction case.¹⁰⁰

The question that now remains is how *ubuntu* should be applied in the interpretation exercise of the court. More specifically: Should *ubuntu* be treated as a preamble-value or as a section 1-value? In *PE Municipality* the court expressly stated that in our constitutional dispensation *ubuntu* must be employed to ascribe to individual rights a *communitarian* nature.¹⁰¹ At the least, this means that when courts in eviction cases interpret what justice and equity require in a particular case, courts are mandated to take *ubuntu* into consideration when they interpret the relevant individual rights. In this regard, they are required to ensure that the formal structures of the law and the outcome of the cases reflect compassion and grace.¹⁰² Accordingly, *ubuntu* has the ability to not only dictate which values must be considered but also has the capacity to place duties on the parties, and the court, in eviction cases.¹⁰³ For example, the court might order parties to mediate or it might require the owner to be patient for a

⁹⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

⁹⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37. See also JM Pienaar & J Brickhill “Land” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-1 48-6. For a discussion on the different facets of *ubuntu*, see M Pieterse “Traditional African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 442.

¹⁰⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 36-37. The court held that the Constitution and PIE require that the tenets of *ubuntu* should pervade any court’s conclusion on what justice and equity require in a given eviction case.

¹⁰¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37. Sachs AJ held:

“It combines individual rights with a communitarian philosophy.”

¹⁰² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 36-37.

¹⁰³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 36-37.

while rather than deciding to endorse an eviction, immediately.¹⁰⁴ Evidently, the notion of *ubuntu* is not a mere interpretive aid; its role in eviction jurisprudence is the same as that of the founding values or founding “principles” in the courts’ interpretation exercise.¹⁰⁵

3 2 3 1 3 Nature of *ubuntu* in eviction jurisprudence

As already identified above, *ubuntu* encapsulates human inter-dependence and human dignity. Accordingly, its aims as a philosophical doctrine and principle are to advance human inter-dependence and human dignity within the context that it is used. *Ubuntu* is used as an interpretive principle in eviction jurisprudence and its function is therefore to serve as an interpretive tool when a court has to establish the appropriate relationship between sections 25(1) and 26(3). As a result, the aim of *ubuntu* in the eviction context is to ensure that the courts’ understanding of the constitutional matrix, in which it has to balance opposing interests, protects human inter-dependence as well as the human dignity of all parties involved.

In terms of *ubuntu* individualism and communalism are in themselves inter-dependent of each other.¹⁰⁶ Pieterse shows that *ubuntu* does not automatically favour the community over the individual, or the other way around.¹⁰⁷ Rather, it illuminates that the interest of the individual can only adequately be protected if the community’s interest is also protected. Accordingly, the survival of the one leads to the survival of the other.¹⁰⁸ Mokgoro’s description of *ubuntu* supports this view.¹⁰⁹ It shows that one can only claim dignity for oneself if one acknowledges and respects the dignity of

¹⁰⁴ See *Occupiers of Mooiplaats v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC).

¹⁰⁵ J Fowkes “Founding provisions” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 13-24.

¹⁰⁶ M Pieterse “Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 444.

¹⁰⁷ M Pieterse “Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 443-444.

¹⁰⁸ Y Mokgoro “Ubuntu and the law in South Africa” in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 317-323 317.

¹⁰⁹ Y Mokgoro “Ubuntu and the law in South Africa” in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 317-323 318.

others.¹¹⁰ Accordingly, each person is clothed with dignity and that should be reflected in the relationships of members of society. This element of dignity is central to the philosophy of *ubuntu*, the Constitution and PIE.¹¹¹

In the eviction paradigm these signal qualities of *ubuntu* oppose the purely individualistic and neo-liberal capitalistic approach that has been a salient character of eviction remedies and adjudication.¹¹² *Ubuntu's* communal nature challenges the liberal individual nature of our legal system.¹¹³ It requires one to look at the legal system and its relationships from a different point of departure: starting at “us” and then ending with “I”. The point of departure that focusses on society is the complete opposite of the point of departure that focusses solely on the individual owner. This is because the philosophy of *ubuntu* advances that an individual will excel only if her community excels.¹¹⁴ Accordingly, *ubuntu* has the potential to eliminate the harsh effects of a purely individualistic approach to legal issues by identifying and illuminating the reciprocities and inter-dependencies in relationships, whilst also protecting individual rights because of the human dignity component thereof.

Accordingly, when courts are applying PIE and looking for an appropriate balance between sections 25 and 26(3) they should give effect to the nature of *ubuntu*, which means that courts should balance the opposing interests in the spirit of *ubuntu*. The spirit of *ubuntu* calls for an understanding that all forces are dependent on each other, therefore all relevant circumstances must be considered and weighed against each other to ensure that the core values of human dignity and human inter-dependence are recognised and advanced in each individual eviction case.

¹¹⁰ L Ackerman *Human dignity: Lodestar for equality in South Africa* (2012) 80.

¹¹¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

¹¹² M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 448.

¹¹³ See A Shutte *Philosophy for Africa* (1993) 90-91; M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 448; P Lenta “Just gaming? The case for postmodernism in South African legal theory” (2001) 17 *SAJHR* 173 180.

¹¹⁴ M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 445; L Ackerman *Human dignity: Lodestar for equality in South Africa* (2012) 80.

3 2 3 1 3 *Ubuntu*, socialism, communitarianism and humanitarianism

Both the High Court in *Peoples Dialogue* and the Constitutional Court in *PE Municipality* referred to some western philosophies in the context of evictions.¹¹⁵ As a result, this subsection sets out very briefly what these philosophical doctrines are and whether or not they are comparable with the philosophical doctrine of *ubuntu*.

In *Peoples Dialogue* the court characterised PIE as a socialistic, welfare-orientated and humanitarian legislative measure.¹¹⁶ Horn AJ in *Peoples Dialogue*¹¹⁷ described PIE as an:

“[E]ssentially socialistic [...] piece of welfare legislation formulated upon humanitarian lines.”¹¹⁸

Firstly, a socialistic-orientated legislative measure could refer to legislation based on the principles of socialism or that aims to advance the goals of socialism. Socialists strive for the advancement of equal distribution of wealth by placing the economy under public ownership.¹¹⁹ Although socialism takes different forms, a detailed explanation of the different types of socialism will not be of value to this discussion.¹²⁰ However, in line with the philosophy of *ubuntu*, it might have been the court’s intention in *Peoples Dialogue* to refer to socialism in its communal sense rather than its economic sense. Hence, the emphasis on *welfare* in its dictum. Interestingly, Pieterse shows that even the communal aspect of western socialism differs from the communal

¹¹⁵ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37; *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1082.

¹¹⁶ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1082.

¹¹⁷ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1082.

¹¹⁸ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1082.

¹¹⁹ T Metz “Justice and the law: Liberals, redistribution, capitalists and their critics” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 382-411 400.

¹²⁰ For a more detailed discussion of the basic tenets of socialism, see T Metz “Justice and the law: Liberals, redistribution, capitalists and their critics” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 382-411 400-401.

aspect of *ubuntu*.¹²¹ This difference is evident in that Western socialism concerns itself with the relationship between individuals and property while *ubuntu* concerns itself with the relationships between people.¹²² However, African socialism is a type of socialism that contains a deep rooted communal aspect.¹²³ African socialism is the philosophy which links socialism with community and solidarity.¹²⁴ It is founded on the ideology of a unified, non-racial, one-party, welfare society.¹²⁵ This broader African ideology, much like *ubuntu*, advances the idea that the starting point must be the collective and not the individual. However, it does not regard the protection of individual human rights as taboo.¹²⁶ It recognises the need for the protection of individual rights because of the importance of protecting each person's human dignity.¹²⁷ Accordingly, for African socialism the protection of individual rights is central to the protection of human dignity. Similar to *ubuntu*, the human dignity concept inherent in African socialism is far removed from an individualistic ideology. African socialism can accordingly be said to be a synonym of *ubuntu*.

Secondly, humanitarianism refers to the human morality in favour of showing empathy, care and love and the provision of aid to the most vulnerable.¹²⁸ It is a philosophical doctrine that acknowledges the inherent human dignity of all beyond race or borders and the importance of protecting such dignity.¹²⁹ These basic tenets of

¹²¹ M Pieterse "'Traditional' African jurisprudence" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 444.

¹²² M Pieterse "'Traditional' African jurisprudence" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 444.

¹²³ L Praeg *A report on ubuntu* (2014) 139.

¹²⁴ A Sanders "On African socialism and the rule of law" (1982) 15 *CILSA* 299 300; L Praeg *A report on ubuntu* (2014) 139.

¹²⁵ A Sanders "On African socialism and the rule of law" (1982) 15 *CILSA* 299 300; L Praeg *A report on ubuntu* (2014) 143.

¹²⁶ A Sanders "On African socialism and the rule of law" (1982) 15 *CILSA* 299 304; L Praeg *A report on ubuntu* (2014) 139.

¹²⁷ A Sanders "On African socialism and the rule of law" (1982) 15 *CILSA* 299 304; L Praeg *A report on ubuntu* (2014) 143.

¹²⁸ C Douzinas "The many faces of humanitarianism" 2007 *Parrhesia Journal* 1 4.

¹²⁹ C Douzinas "The many faces of humanitarianism" 2007 *Parrhesia Journal* 1 4.

humanitarianism tie in with the ideals of *ubuntu* in that *ubuntu* also advocates for the protection of human dignity by means of a caring and compassionate society.¹³⁰

Thirdly, the philosophy referred to in *PE Municipality* and which ties in with all the above values is communitarianism.¹³¹ Communitarian philosophies in their most basic form can be described as community- rather than individual-focussed.¹³² A communitarian theorist, MacIntyre, explains that communitarianism is premised on the idea that the “individual’s achievement of her common good is inseparably linked to the achievement of the shared goods of practices and contributing to the common good of the community as a whole”.¹³³ Hence the advancement of the community’s good as a point of departure. Human inter-dependence is also a salient feature of the ideology of communitarianism.

The above discussion has indicated that African socialism, humanitarianism and communitarianism all share the basic tenets of *ubuntu*. In this way, it can be inferred that the reference to these philosophical doctrines supports and reinforces the importance of *ubuntu* in eviction adjudication.

Accordingly, courts are called upon to apply PIE in a manner that will ensure that all parties are treated equally and with dignity. In light of all the above ideologies, it seems that courts are mandated to ensure that the approach advocated by PIE is not only visible in their dealings with the parties before them, when adjudicating eviction cases, but also that the result and consequences of their orders resonate with the ideals of *ubuntu*. PIE has a built-in mechanism to ensure that these values are achieved. This mechanism is found in the requirement of “just and equitable” in sections 4 and 6 of PIE. A court may only grant an eviction order if it is satisfied that such an order would be just and equitable in the circumstances of the case.¹³⁴ In light of the above what is just and equitable in practical terms is a court judgment that reflects the values of

¹³⁰ M Pieterse “‘Traditional’ African jurisprudence” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 445.

¹³¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 25.

¹³² K van Marle “Communitarian and civic republic theories” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 412-437 412.

¹³³ K van Marle “Communitarian and civic republic theories” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 412-437 417.

¹³⁴ Sections 4 and 6 of PIE.

ubuntu (human inter-dependence and human dignity). A court order will only be able to adequately protect both parties' interests if the court applies a context-sensitive approach to PIE evictions. Accordingly, *ubuntu* as philosophical underpinning and interpretive aid, in eviction cases, is supposed to reinforce and support a context-sensitive and balanced approach to evictions.

The section below considers both the procedural and substantive requirements of PIE in order to establish whether the approach courts employ to the application of PIE reflects the above-mentioned values of *ubuntu*. In light of the above, a context-sensitive approach will be indicative of whether courts apply PIE with the underlying philosophy of *ubuntu*.

3 2 3 2 *The requirements of PIE*

The basic principles of PIE have been laid down by courts over the last sixteen years.¹³⁵ In this section both the procedural and substantive requirements of PIE will be set out as developed in case law. This will be used to determine the type of attitude and thought framework employed by the court when confronted with difficult questions pertaining to the application and scope of PIE. The hypothesis is that a context-sensitive approach will be indicative of whether courts apply PIE within the constitutional framework in the constitutional era.

¹³⁵ The most important cases that laid down the basic principles discussed in this section are *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE); *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA); *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA); *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952, Johannesburg Situated at 124 Kerk Street Johannesburg* (0/04599) [2011] ZAGPJHC 3 (17 February 2011); *Kanescho v Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D); *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).

3 2 3 2 1 Threshold requirements

PIE primarily has four threshold requirements. These are: *locus standi*; the application scope of PIE; the service of a notice of motion and joinder of interested parties. The section below discusses all of the above threshold requirements with the view to determining the type of approach that courts have endorsed when considering the threshold requirements of PIE.

(a) *The standing requirement*

Section 4(6) establishes the first hurdle for a private owner looking to evict unlawful occupiers. This is the threshold requirement for *locus standi* in terms of PIE. In order for a person to apply for an eviction order in terms of PIE she must firstly be able to prove that she has *locus standi*. In other words, that she is the person in charge of the property or the owner of the property.¹³⁶ Secondly, it must be established that the occupiers are indeed unlawful.¹³⁷ The satisfaction of these two requirements will allow an owner or person in charge of property to institute proceedings in terms of PIE. However, proof these two requirements do not guarantee that an eviction order will be granted.

The requirement that the applicant should be the owner of property in order to evict unlawful occupiers, has not been significantly altered by PIE. There are only two small changes to this requirement. The first one is that the owner is no longer the only person with *locus standi* to institute an eviction application, as was the case with the application of the pre-constitutional eviction remedies.¹³⁸ PIE provides that the person in charge is also able to institute an eviction application.¹³⁹ The inquiry pertaining to whether or not the applicant is the owner or person in charge is a primary standing question. Accordingly, if the applicant fails to prove that she is the owner of the land

¹³⁶ Section 4(1) of PIE; JM Pienaar *Land reform* (2014) 717; *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006) para 15.

¹³⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 36.

¹³⁸ See chapter 2, section 2.2 above.

¹³⁹ Sections 4(1) and 6 of PIE; JM Pienaar *Land reform* (2014) 717; *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006) para 15.

or person in charge of the land, the court will hold that she does not have standing to rely on PIE for an eviction order in her favour.¹⁴⁰

Case law has shown that the same approach to proving ownership for purposes of establishing *locus standi* in the pre-constitutional era applies in the constitutional era.¹⁴¹ In *Red Stripe Trading 68 CC v Mahlomola*¹⁴² the applicant was a purported cessionary of certain rights in the land, and not the owner of the land.¹⁴³ The court in this case referred back to the common law rules to ascertain whether the applicant had *locus standi* to apply for an eviction order in terms of PIE. Subsequently, the court investigated the requirements for proving ownership under the common law *rei vindicatio*.¹⁴⁴ It found that where the applicant could not prove a real right (ownership) or a contractual right (permission from the owner to be in charge of the land) the applicant had no *locus standi* and could not rely on PIE for the relief sought.¹⁴⁵ In practical terms, ownership of immovable property is proven by furnishing the court with the deed of registration in which the applicant's name is reflected as owner.¹⁴⁶

The *locus standi* of a person in charge of the property looking to evict unlawful occupiers is also subject to pre-constitutional common law rules pertaining to contract law and property law.¹⁴⁷ An applicant who institutes an eviction application in terms of

¹⁴⁰ *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006) para 14-16; JM Pienaar *Land reform* (2014) 718.

¹⁴¹ See *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006)); *Red Stripe Trading 68 CC v Khumalo* (31039/04) [2005] ZAGPHC 31 (23 March 2005).

¹⁴² *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006) para 18.

¹⁴³ *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006) para 14.

¹⁴⁴ *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006) para 9.

¹⁴⁵ *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006) para 9.

¹⁴⁶ CG van der Merwe *Sakereg* 2 ed (1989) 347-348; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 244.

¹⁴⁷ *Red Stripe Trading 68 CC v Khumalo* (31039/04) [2005] ZAGPHC 31 (23 March 2005). See *Hendricks v Hendricks and Others* 2016 (1) SA 511 (SCA) paras 6-7 where the court held that the appellant's common law habitation right conferred on her the necessary legal authority as required in terms of PIE to provide or refuse to provide consent to persons wanting to reside on the property. As a

PIE on the basis of the allegation that she is in charge of the property, will have to prove that she had permission from the registered owner to be in charge of property. In other words, the applicant must show that she had been granted the legal authority to give permission to another person to enter or reside upon the owner's land.¹⁴⁸ Interestingly, in *Hendricks v Hendricks and Others*¹⁴⁹ the court held that a person in charge in terms of a right of habitation does have *locus standi* to evict and can even evict the owner of such property in terms of PIE, in the event where the owner occupies the property without the consent of the holder of the right of habitation.¹⁵⁰

The second change pertaining to the requirement that the applicant must prove ownership or a legal right to be in charge of property is with regard to the weight of such rights. Ownership only qualifies an owner to apply for an eviction order in terms of PIE.¹⁵¹ It is no longer the only deciding factor for whether a court should grant an eviction order or not.¹⁵² *PE Municipality* has indicated that *ubuntu* underlies PIE.¹⁵³ As mentioned already, *ubuntu* encapsulates the universal values of human interdependence, solidarity and communalism.¹⁵⁴ Accordingly, the values underlying the notion of *ubuntu* have expressly been built into the structure and provisions of PIE. PIE provides us with an eviction remedy that does not prioritise the protection of

result, the appellant with a right to habitation is a person in charge in terms of PIE and has *locus standi* to apply for the eviction of any persons occupying the property without her permission.

¹⁴⁸ In terms of section 1 of PIE a person in charge of land is defined as "a person who has legal authority or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question".

¹⁴⁹ 2016 (1) SA 511 (SCA).

¹⁵⁰ *Hendricks v Hendricks and Others* 2016 (1) SA 511 (SCA) paras 6-7. The court explained that the occupier's right to habitation of the house constituted a limited real right which accordingly limited the owner's right to occupy her property. Therefore, where the owner decides to occupy the said property that she has burdened by extending a right to habitation to another, the owner's occupation would be unlawful where she does so without consent of the holder of the habitation right. The holder of the right to habitation would have the legal authority to evict the owner from the said property in terms of PIE. See also JM Pienaar *Land reform* (2014) 719-720.

¹⁵¹ *FHP Management (Pty) Ltd v Theron and Another* 2004 (3) SA 392 (C) 401.

¹⁵² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

¹⁵³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

¹⁵⁴ See chapter 3, section 3.2.2 above. M Pieterse "Traditional' African jurisprudence" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438-462 441.

ownership entitlements. Rather, PIE requires the court to have due regard to broader societal considerations acknowledging ideals like human inter-dependence while also striving to protect the human dignity of all parties involved.¹⁵⁵ Sachs J in *PE Municipality* held that:

“[the c]onstitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not [to be] arbitrarily [...] deprived of a home. The expectations that ordinarily go with title could clash head on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.”¹⁵⁶

The dictum reiterates the context-sensitivity that PIE requires where all relevant considerations are taken account of and factored into the courts ultimate decision. Furthermore, it shows that the hierarchical approach has been replaced with a context-sensitive approach.

Overall, the above discussion of the *locus standi* threshold requirement indicates that courts approach questions of standing with a context-sensitivity. This is evident in that the protection of PIE is extended to people in charge and by eliminating the direct relationship between proving ownership and a court order in a landowner’s favour.

(b) *The unlawfulness question*

PIE replaced all eviction remedies that were available to owners to evict unlawful occupiers in the pre-constitutional context.¹⁵⁷ Much like its predecessor, PISA, PIE

¹⁵⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32.

¹⁵⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32.

¹⁵⁷ Section 4(1) of PIE provides that “[n]otwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.” This subsection will consider the unlawfulness

applies only to the eviction of unlawful occupation of residential land, therefore requiring unlawfulness before owners can rely on PIE to obtain eviction orders.¹⁵⁸ After the promulgation of PIE the requirement of unlawful occupation created considerable uncertainty amongst courts,¹⁵⁹ specifically with regard to the category of persons that would qualify as unlawful occupiers.¹⁶⁰ This uncertainty can be ascribed to the fact that PIE does not expressly state whether or not persons such as tenants holding over, where consent to occupy was revoked, would qualify as unlawful occupiers for purposes of PIE. Courts had to give content to what the legislator meant with “unlawful occupier” in section 1 of PIE.¹⁶¹ At first courts decided to interpret unlawful occupation of land narrowly.¹⁶² This was illustrated in *ABSA Bank v Amod*¹⁶³ and confirmed in *Ellis v Viljoen*.¹⁶⁴ In both instances the respective courts held that unlawful occupiers did not refer to tenants holding over and that PIE only had classical squatting cases in mind.¹⁶⁵ This stance was later rejected by the majority of the Supreme Court of Appeal

requirement as the threshold requirement for PIE to apply to a given case. The substantive aspects of the unlawfulness requirement in PIE will be discussed in section 3.2.3.2.2 below.

¹⁵⁸ Section 4(1) of PIE. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32. The court held that “the existence of unlawfulness is the foundation for the inquiry” into unlawful occupation of land. See also JM Pienaar “Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 316-327; JM Pienaar *Land reform* (2014) 702-709 for a detailed discussion of the requirement of unlawfulness.

¹⁵⁹ See AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law” (2002) 18 *SALJ* 386. See *ABSA Bank v Amod* 1999 (2) All SA 423 (W); *Ellis v Viljoen* 2001 (4) SA 795 (C); *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA).

¹⁶⁰ JM Pienaar *Land reform* (2014) 691.

¹⁶¹ JM Pienaar *Land reform* (2014) 690.

¹⁶² AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law” (2002) 18 *SALJ* 387.

¹⁶³ *ABSA Bank v Amod* 1999 (2) All SA 423 (W).

¹⁶⁴ *Ellis v Viljoen* 2001 (4) SA 795 (C).

¹⁶⁵ In *ABSA Bank v Amod* 1999 (2) All SA 423 (W) para 11 the court held that “[s]ection 4 of the 1998 Act limits the common-law right of an owner of land to evict an unlawful occupier from his or her land. An unlawful occupier in turn means ‘a person who occupies land without the express or tacit consent of the owner’. In the context of the Act and notwithstanding the definition of ‘evict’ the meaning I give to these words is that the person referred to is a person who has without any formality or right moved on to vacant land of another and constructed or occupied a building or structure thereon. Had it been the intention of the legislature to affect the common-law right of

in *Ndlovo v Ngcobo and Bekker and Another v Jika*,¹⁶⁶ where the court held that all eviction applications concerning unlawful occupiers of dwellings, residential property or property used for shelter, including tenants holding over, must be subject to the procedures and requirements set out in PIE.¹⁶⁷ The court explained that the starting point for the interpretation of PIE should be the spirit and purport of the Constitution. PIE is aimed at protecting the most vulnerable of persons from being arbitrarily evicted from their homes. Therefore, it would be contrary to the aims of PIE if tenants, holding over, are excluded from the definition of unlawful occupiers for purposes of PIE. In some instances tenants hold over because of their poor financial positions. As a result, judicial oversight in these instances is of paramount importance.¹⁶⁸ Accordingly, after *Ndlovu*, any person seeking to evict unlawful occupiers from residential premises has to institute proceedings in terms of PIE and is not able to rely on the *rei vindicatio* to obtain an eviction order.

The court decision to include tenants holding over in the protective ambit of PIE was based on the social and historical context of South Africa. Accordingly, the approach exhibited by the court in *Ndlovo* can be described as context-sensitive.

(c) *The service of the notice of motion requirement*

The service aspect of an eviction application in terms of PIE was received with a great deal of uncertainty, primarily because the new procedure prescribed by PIE deviated from the procedural rules that applied under the pre-constitutional eviction remedy, the *rei vindicatio*. The *rei vindicatio*, which an owner could institute to obtain a court order

property owners, to which I have referred, the definition of unlawful occupier would have included a person who, having had a contractual right to occupy such property, is now in unlawful occupation by reason of the termination of the right of occupation. The absence of such a provision must affect the extent to which it can be said that the 1998 Act was intended to affect persons' common-law right to determine who may occupy their immovable property in terms of agreements." This was confirmed in *Ellis v Viljoen* 2001 (4) SA 795 (C) 801.

¹⁶⁶ *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA).

¹⁶⁷ *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) para 23.

¹⁶⁸ *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) para 16.

for the eviction of unlawful occupiers,¹⁶⁹ was subject to action proceedings. However, the PIE Act now compels an owner or person in charge to institute eviction proceedings against unlawful occupiers in accordance with PIE's requirements and procedures.¹⁷⁰

There are two possible forms of court proceedings in terms of the South African common law. The first possibility is action (or trial) proceedings and the second is application (or motion) proceedings.¹⁷¹ An owner who instituted proceedings for the eviction of unlawful occupiers in terms of the *rei vindicatio* was required to institute action proceedings in accordance with section 29(1) of the Magistrates' Court Act 32 of 1944 ("MCA") and the Uniform Rules of Court.¹⁷² All action proceedings were subject to these procedural requirements.

However, with the advent of the Constitution and the promulgation of PIE the whole procedural landscape for the eviction of unlawful occupiers changed. PIE requires that

¹⁶⁹ See chapter 2 section 2.2 above.

¹⁷⁰ *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) para 1; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

¹⁷¹ JTM Paterson *Eckard's principles of civil procedure in the magistrate courts* (2005) 42. There are fundamental differences between these two types of proceedings. On the one hand action proceedings provide for the resolution of material disputes pertaining to the facts that can only be resolved by a court. In this regard, action proceedings provide for the service of summons, together with the particulars of claim within which the cause of action, that gives rise to the proceedings, is set out. The defendant then has an opportunity to file opposing documents that may lead to a trial during which the parties provide oral evidence. Application proceedings, on the other hand, commence when the applicant files and serves the notice of motion with the applicant's affidavit attached to the notice. This may be followed by the respondent filing an answering affidavit. A date for hearing is set down in a motion court and the matter is decided on the basis of the facts in front of the court as contained in the affidavits.

¹⁷² Section 29(1)(b) of the MCA directs the owner to follow action proceedings, which starts with the issue of an ordinary summons in accordance with Form 2 and subsequent service on the defendant. This form, together with Rules 5 and 6 of the Uniform Rules of Court, requires the summons to disclose certain information to the defendant. The service of the summons can occur in different ways, such as personal service, service upon an agent, service at a residence, service at the defendant's place of employment, service at the defendant's *domicilium citandi* or service by registered post. The defendant will then have the opportunity, within ten days, to enter appearance and then file her opposing plea. This is followed by the exchange of documents until a date is set for a hearing. See JTM Paterson *Eckard's principles of civil procedure in the magistrate courts* (2005) 80, 81, 100-101.

an owner follow application proceedings as opposed to the action proceedings an owner would have followed under the *rei vindicatio*.¹⁷³ Section 4(1) to 4(5) of PIE and Rule 6 of the Uniform Rules of Court, are peremptory and set out the procedural requirements an applicant has to follow pertaining to the service of the notice of motion in order to ensure eviction.¹⁷⁴ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases*¹⁷⁵ is a case in which the court explained how the PIE eviction procedure for service of the notice of motion should be applied in practice.¹⁷⁶ Kruger J identified general rules applicable and distinguished between three scenarios. These were unopposed eviction applications, partly opposed eviction applications and fully opposed eviction applications.¹⁷⁷ In all these instances, Rule 6 of the Uniform Rules of Court, together with Form 2A of the First Schedule, are peremptory and the fourteen-day-period required in section 4(2) of PIE finds application.¹⁷⁸

¹⁷³ This shift from action proceedings to application proceedings may have implications for an owner and her right to exclude. Courts have held that PIE has placed more burdensome procedures on an owner, which in turn negatively impacts an owner's right to exclude. See in this regard *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1081; *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) para 47.

¹⁷⁴ *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) para 11; *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 5. Section 4(5)(a) - (d) provides that:

“(5) The notice of proceedings contemplated in subsection (2) must-

- (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.”

¹⁷⁵ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 11.

¹⁷⁶ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 12.

¹⁷⁷ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 10.

¹⁷⁸ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) paras 4, 6, 11. The application procedure starts with the applicant serving a Form 2A notice of motion on the respondent and the registrar of the court. A partly opposed eviction application would be instituted in the situation where the unlawful occupier responds to the notice of motion by filing a notice of intention to defend but fails to follow through. In this situation the same process and requirements explained above apply. After the applicant receives a notice of intention to defend, the applicant has to wait a

The court in *Kanescho* gave flesh and clarity to the service provisions of PIE by setting out the above procedural steps in these three different scenarios. The court highlighted the aims of PIE and indicated that PIE's procedural requirements pertaining to the service of pre-hearing application documents are different from normal application proceedings.¹⁷⁹ In this regard, PIE is not merely promulgated to provide for the prohibition of unlawful evictions. Instead, it is also promulgated to provide unique procedures for such evictions.¹⁸⁰ This finding was followed by a confirmation that section 4(2) of PIE, which requires an extra fourteen-day notice period before the hearing, is a preemptory provision.¹⁸¹ As a result, people should be afforded more opportunity to prepare for their case where such persons could possibly be evicted from their homes.¹⁸² Therefore, PIE provides for a justifiable extended process. The court also highlighted the requirements for the notice prescribed in section 5 of PIE.¹⁸³ The court further declared that where an applicant follows a procedure void of any of the specifics contained in section 5 of PIE or fails to follow section 4(2), such an

minimum of fifteen days for the unlawful occupiers to file their responding affidavits. If the respondents fail to file their affidavits, the applicant can only then approach the court for a section 4(2) authorisation. This section explicitly requires the court to serve written and effective notice of the hearing on the unlawful occupiers and the municipality with jurisdiction fourteen days before the hearing. This notice is in addition to the Rule 6 notice in accordance with the Uniform Rules of Court. In other words, Rule 6 and section 4(2) do not refer to the same notice of motion. Accordingly, at this stage the applicant would be able to approach the court for such process to commence. The hearing will then be scheduled to commence fourteen days after the section 4(2) authorisation took place. The content of the section 4(2) notice is set out in section 4(5)(a)-(d) of PIE. A fully opposed eviction application refers to the situation where the unlawful occupiers filed all the necessary documentation for them to defend in accordance with the procedural rules. In other words, the unlawful occupiers reacted to the notice of motion by timeously filing a notice of intention to defend and then timeously filing their responding affidavits as well. At this stage the applicant will be able to file a replying affidavit not more than ten days after receiving the unlawful occupiers' responding affidavit. When the pleadings close, the applicant will then be able to approach the court for a section 4(2) authorisation, so that a date can be set for the hearing.

¹⁷⁹ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 3.

¹⁸⁰ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 3.

¹⁸¹ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 14.

¹⁸² *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 6; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

¹⁸³ Section 5 of PIE provides for urgent eviction applications.

applicant's application will be procedurally defective.¹⁸⁴ Only after the applicant followed the procedures of PIE, will she be entitled to approach the court for an eviction order.¹⁸⁵

There are a number of cases that indicate the extent to which applicants are able to deviate from the service and notice rules and still meet the procedural requirements of PIE. In *Cape Killarney Property Investments (Pty) Ltd v Mahamba*,¹⁸⁶ the court held that the procedural requirements of PIE (which include the requirements of the Uniform Rules) are peremptory and must be followed strictly.¹⁸⁷ Accordingly, this finding of the court demands strict adherence to the requirements of PIE with no room for flexibility. However, the same court held in *Unlawful Occupiers, School Site v City of Johannesburg*¹⁸⁸ that deviation from the procedural requirements is acceptable to the extent that the procedures followed still give effect to the aims of PIE for service and notice.¹⁸⁹ The question of whether the procedures followed by the applicant indeed give effect to the aims of PIE, can only be answered with reference to the circumstances of the particular case to be adjudicated by the court.¹⁹⁰ This flexible approach was also followed in *Kanescho* where the court reiterated that the procedures followed by applicants must give effect to the express goals of PIE in relation to procedure.¹⁹¹ Accordingly, procedural fairness for purposes of PIE is also subject to a context-sensitive analysis. The underlying idea is that the respondents (a)

¹⁸⁴ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1081.

¹⁸⁵ *FHP Management (Pty) Ltd v Theron and Another* 2004 (3) SA 392 (C) 401.

¹⁸⁶ *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) para 11.

¹⁸⁷ *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) para 11.

¹⁸⁸ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

¹⁸⁹ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

¹⁹⁰ *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) para 28.

¹⁹¹ *Kanescho Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D) para 3. The High Court in *Kanescho* had to decide whether a procedural practice for the service of documents was consistent with PIE. The court held that the developed practice was not a valid practice because it did not give effect to the provisions and underlying purposes of PIE. Section 4(4) of PIE sets out the procedural aims of PIE. See also S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 272.

must know that the case is instituted against them so that (b) they can prepare accordingly.

(d) *The joinder of interested parties-requirement*

Joinder in the context of PIE has also been a procedural aspect that has increasingly enjoyed attention by the courts since the promulgation of PIE.¹⁹² This is not because joinder is an express requirement in terms of PIE, but rather because the effective operation and application of PIE in some instances requires that interested parties be joined to eviction proceedings.¹⁹³ Joinder plays an important role in ensuring that the quality and quantity of information presented to the court allows the court to adequately adhere to its constitutional duty to have regard to *all relevant circumstances*.¹⁹⁴ Furthermore, joinder also impacts on the eventual execution of an eviction order, where relevant. The question would be whether joinder of the local municipality is always a procedural requirement when dealing with eviction from privately owned land. As a point of departure, the joinder of a party would only be necessary if the party has or would have a direct or substantial interest in the outcome of the case.¹⁹⁵ Therefore, if it is clear from the facts of the case that the municipality would not have an interest, joinder would not be necessary.¹⁹⁶ Joinder is required by PIE to ensure that all relevant

¹⁹² The joinder of interested parties to eviction cases is not a pre-requisite of PIE. However, case law has shown that joinder of interested parties plays an important role in eviction cases, especially because PIE requires the court to take into consideration all relevant circumstances so as to come to a just and equitable outcome in each case. See *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W); *Sailing Queen Investments v Occupants of La Colleen Court* (4480 / 07) [2008] ZAGPHC 15 (25 January 2008); *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) paras 6-9.

¹⁹³ *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) paras 6-9. See also S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 286.

¹⁹⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32.

¹⁹⁵ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 37.

¹⁹⁶ See *Drakenstein Municipality v Hendricks* 2010 (3) SA 248 (WCC) para 25. Bignault J held that "Not one of the *Cashbuild*, *Sailing Queen* or *Shorts Retreat* cases is therefore authority for the proposition that the municipality must be joined in all cases, even where reporting to the court or mediation is not required".

circumstances would be placed before the court. In eviction jurisprudence there have been a number of judgments turning on the question of whether or not the municipality should always be joined to private eviction proceedings. *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others*¹⁹⁷ dealt with this question. Joinder was ordered by the Supreme Court of Appeal after the court *a quo* ordered the eviction of a community of unlawful occupiers, who had nowhere else to go.¹⁹⁸ This order was made in favour of the applicant-owner without the court having adequate information before it, specifically with regard to the availability of alternative accommodation.¹⁹⁹ The Supreme Court of Appeal stressed that the joinder of the municipality in this case was of utmost importance because of the substantial interest the municipality had in the matter.²⁰⁰ This substantial interest is found in its constitutional duty to provide temporary suitable alternative accommodation in these circumstances and because the municipality is in possession of information regarding its ability to provide such accommodation.²⁰¹ Furthermore, the court reiterated that such joinder is also important in this case because joinder could allow for mediation to be considered, which the court deemed appropriate in the circumstances of the case.²⁰² Accordingly, courts would only be in a position to make just and equitable orders, if the relevant municipalities are joined to the proceedings.

After *Daisy Dear Investments*, subsequent cases developed the question even further. They indicated that the joinder of the relevant municipality with jurisdiction in a particular case is mandatory in the context where the unlawful occupiers in a specific

¹⁹⁷ *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) para 16; *Drakenstein Municipality v Hendricks* 2010 (3) SA 248 (WCC) paras 21-25.

¹⁹⁸ *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) para 3.

¹⁹⁹ *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) para 5.

²⁰⁰ *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) para 11.

²⁰¹ *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) para 13.

²⁰² *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 (4) All SA 410 (SCA) para 10.

case require alternative accommodation.²⁰³ In other words, where the obligations of section 4(7) come into play because of the municipality's constitutional and statutory obligations to provide alternative temporary accommodation, joinder may very well be a necessary requirement in the case.²⁰⁴ This procedural step plays an important role in eviction cases because it enables courts to take all relevant circumstances into account in order to ultimately come to conclusions about whether it would be just and equitable to grant eviction orders. It is in these cases that justice and equity would require a pro-active municipality to explore the possibilities of mediation and alternative temporary accommodation.

All of the above procedural aspects that essentially form the threshold requirements for the application of PIE highlight the context-sensitive approach the courts employ in the constitutional era when confronted with procedural questions in terms of PIE. The need for a context-sensitive approach can most probably be ascribed to the very real tension between the owner's rights and the constitutional rights of the occupiers. These rights are the right to one's property and the right not to be arbitrarily evicted from one's home, which in turn encompasses the protection of human dignity, access to adequate housing, access to justice and the right to a fair trial. Already at this stage it is becoming apparent that a shift has taken place from the former abstract approach of courts to eviction cases, even in the case of the appropriate procedural protocol, to an approach that is very aware, sensitive and responsive to the realities of the parties before it.²⁰⁵ In the section below the substantive requirements of PIE will be considered in order to determine whether the context-sensitive approach, which the section above has shown to be instrumental to the courts approach to PIE's procedural requirements, is also present in the courts application of the substantive requirements of PIE.

²⁰³ *Drakenstein Municipality v Hendricks* 2010 (3) SA 248 (WCC) para 21, *Oelofson v Gwebu* 2010 (5) SA 241 (GNP) para 25; *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 37; JM Pienaar *Land reform* (2014) 725-748.

²⁰⁴ *Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952, Johannesburg Situated at 124 Kerk Street Johannesburg* (0/04599) [2011] ZAGPJHC 3 (17 February 2011) para 11.

²⁰⁵ See chapter 2, section 2.4.3 above.

3 2 3 2 2 Substantive requirements

PIE has a number of substantive requirements that must be satisfied before an applicant is able to succeed with an application for eviction. These substantive requirements are regulated by sections 4 and 6 of PIE. Section 4 sets out the substantive requirements for an eviction application by an owner and section 6 provides the substantive requirements for an eviction application by an organ of state. This section will only be focussing on evictions by private owners (section 4). The section below considers the substantive requirements of PIE with the view of determining whether courts apply PIE's substantive provisions with context-sensitivity.

(a) *The unlawfulness requirement*

While unlawfulness is a threshold requirement for the PIE to be utilised in principle, it is furthermore a substantive matter that has to be dealt with during trial as well. It is a threshold requirement as there are various other eviction mechanisms that may be utilised in theory. Unlawful occupation narrows it down and sheds light on the utilisation of PIE in particular as opposed to ESTA, rental evictions or labour tenancy eviction legislation. However, having established unlawfulness in principle in order for PIE to be utilized, has not provided any insight as to the particular case of unlawfulness on the particular facts at hand. To that end it is also a substantive issue that has to be dealt with by the court. Here it must be proven that there was neither consent (tacit or explicit) nor any other right in law to occupy the particular property. Arguably, there may be some overlap regarding unlawfulness between the threshold and the actual substantive requirements that have to be met in any given case.

An *unlawful* occupier in terms of PIE is someone who occupies the owner's land for residential purposes without the tacit or explicit consent of the owner or person in charge of the land or without a right in law to occupy the property. PIE expressly states that the person or persons in the position to give consent is the owner or person in charge of land, and that consent can either be expressly or tacitly furnished.²⁰⁶ In the situation where this consent is lacking the occupiers will be deemed to be unlawful for

²⁰⁶ Consent in terms of section 1 of PIE is defined as "express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question".

purposes of PIE. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*²⁰⁷ is the first Constitutional Court judgment that dealt with the unlawfulness requirement in detail.²⁰⁸ In *Joe Slovo* the state sought to evict a community of occupiers, who had allegedly unlawfully occupied an informal settlement on state-owned land.²⁰⁹ After providing basic services to the occupants the state sought their eviction because of its plans to upgrade the informal settlement to provide housing for those in need in terms of its housing project.²¹⁰ Accordingly, the occupiers had to vacate the land so the upgrading could take place. The central issue in *Joe Slovo* was whether or not the occupiers of the *Joe Slovo* informal settlement were indeed unlawful occupiers for purposes of PIE.²¹¹ On the facts of the case the court was not in agreement about (a) whether consent was established; (b) if consent was established, when such consent was established; and (c) whether it was revoked.²¹² The judges seemed to have been in agreement that the question of unlawfulness showed consent to be the key determinant of the unlawfulness question.²¹³ There is still uncertainty as to whether or not a broad approach to consent must be followed due to Yacoob J's and Moseneke DCJ's contradictory statements in this regard.²¹⁴ The court's point of

²⁰⁷ 2010 (3) SA 454 (CC).

²⁰⁸ JM Pienaar *Land reform* (2014) 691.

²⁰⁹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 9; JM Pienaar *Land reform* (2014) 691-692.

²¹⁰ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 8; JM Pienaar *Land reform* (2014) 691-692.

²¹¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 3.

²¹² *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC). The case concerned five different judgments of which three of the judgments agreed that on the facts the occupiers had initial consent until it was revoked at a later stage; one judgment held that consent was never given and another judgment found that on the facts the government provided consent to the occupiers, but that such consent was subject to a suspensive condition.

²¹³ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 4, 49, 145, 180, 280, 349; JM Pienaar "Unlawful occupier' in perspective: History, legislation and case law" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 318-326; JM Pienaar *Land reform* (2014) 691-699.

²¹⁴ Moseneke DCJ held that consent must be cast in wide terms in accordance with the Constitution. Yacoob J was satisfied that as PIE already provided extensive protection, consent need not also be cast in wide terms. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and*

departure was that if the state had granted the occupiers consent, their occupation could not be unlawful and as a consequence, PIE would not find application in the particular case.²¹⁵ Therefore, if consent could be proven, it would mean that the occupiers would have a defensible right to be in occupation of the land.²¹⁶ In this regard, consent can be express or tacit consent. Yacoob J explained that express consent is where two or more parties are involved in the granting of and receiving of consent in terms of an express agreement.²¹⁷ In contrast, tacit consent is consent that is derived from the actions of the parties, because no written or oral agreement exists. Tacit consent also constitutes an agreement, but the agreement must be proven by reference to the circumstances surrounding the alleged agreement. The test for the existence of such an agreement is that the only possible inference that can be drawn from the evidence is that consent was in fact granted.²¹⁸ Therefore, the intention to grant consent should be clear from the circumstantial evidence.²¹⁹

Accordingly, occupiers will always be regarded as unlawful where they occupy land without the express or tacit consent from the owner of the property. Express consent will require that two parties expressly (in writing or orally) grant and receive consent, respectively. Tacit consent will require the court to determine whether consent is the only possible inference that can be drawn from the facts of the case.

Others 2010 (3) SA 454 (CC) 67-71, 145; JM Pienaar “Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 318-319; JM Pienaar *Land reform* (2014) 693.

²¹⁵ See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) paras 38, 144; JM Pienaar *Land reform* (2014) 691-692.

²¹⁶ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 51; JM Pienaar “Unlawful occupier’ in perspective: History, legislation and case law” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 318-319; JM Pienaar *Land reform* (2014) 692.

²¹⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) paras 49, 150-151.

²¹⁸ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 74.

²¹⁹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para 77. It is clear that all the judgments applied a process of inference on the facts of the case in order to establish whether consent was granted.

(b) *The “just and equitable” requirement*

The final substantive hurdle for an applicant to cross in order to succeed with an eviction application is the requirement that the eviction can only be granted if it is just and equitable in the circumstances. In this regard, courts are enjoined to only grant an eviction order when they are satisfied that it would be just and equitable in the particular case to do so.²²⁰

This requirement was considered for the first time in *PE Municipality*.²²¹ The court provided an explanation of what just and equitable means in the eviction context by highlighting the complex diametrical fundamental needs and interests it regulates.²²² The court held that PIE aims to ensure that equilibrium can be reached between the opposing interests in the case, namely the plight of the homeless on the one hand, and the property rights of owners on the other. As explained, these rights are entrenched in section 26(3) and section 25 of the Constitution respectively. The eviction process in terms of the new constitutional order essentially provides a process for the orderly removal of informal settlements.²²³ However, PIE cannot ensure the orderly resettlement of occupiers if it is applied in a legalistic manner because every resettlement would be unique and would require a unique arrangement to ensure that the removal is fair and orderly. Accordingly, PIE essentially requires that courts apply the provisions of PIE in such a way that will ensure that the outcomes of eviction cases are always just and equitable for all concerned.²²⁴

The court in *PE Municipality* went on to describe what the phrase “just and equitable” entails. It emphasised that the granting of an eviction order would not be just and equitable for purposes of PIE if it only took one of the parties’ circumstances into consideration.²²⁵ Justice and equity therefore require of the court to follow a sensitive and balanced approach pertaining to all parties involved and all factors placed before

²²⁰ Section 4(4)(d) of PIE.

²²¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

²²² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

²²³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

²²⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

²²⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

it.²²⁶ The court also held that it will be necessary for the court to delve into considerations it has never taken into account before in order to reach a just and equitable decision.²²⁷ These considerations may include morality, fairness, social values and the circumstances of all the parties involved in the case.²²⁸ It is essential for courts in this regard to accept that, where PIE is involved, the rule of law and equality are not in conflict with each other, but are complementing and reinforcing each other.²²⁹ Lastly, the requirement of just and equitable enjoins courts to approach eviction cases in line with the *ubuntu* philosophy.²³⁰

In light of the court's understanding of the just and equitable requirement in *PE Municipality*, it is clear that compliance with this substantive requirement is to a large extent not in the owner's control. With regard to this specific requirement, the owner can simply seek to disclose to the court the relevant information that she has pertaining to the circumstances relevant in the case.²³¹ An assessment and balancing of the circumstances will then lead the court to a conclusion on whether or not an eviction order in the specific circumstances would be just and equitable. It is the duty of the court to consider all relevant factors, to do the balancing exercise and decide the case.²³² Therefore, the function of courts in balancing out the competing interests is an integral part of this substantive requirement. The approach courts employ to this balancing exercise is accordingly also part of the standard of justice and equity in a given case.

If the above argument is accepted it cannot be disputed that the approach of courts to the requirement of "just and equitable" in PIE is of paramount importance to ensure that the outcome of eviction cases indeed ensures a constitutionally-required level of

²²⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35.

²²⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

²²⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

²²⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35.

²³⁰ See chapter 3, section 3.2.3.1 above. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35.

²³¹ In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 30 the court stated that "it is for the applicant to ensure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order".

²³² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

justice and equity. Three cases provide insight into the courts' actual philosophical approach to eviction cases in the constitutional context under PIE. The *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another*²³³ ("Modderklip HC") case is significant because it illustrates how the High Court approached the application of PIE before the instructive judgment of *PE Municipality. Voster v Van Niekerk*,²³⁴ *Daisy Dear Investments* and *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*²³⁵ are significant on the other hand because they will allow for an evaluation of the High Courts' approach to the requirement of just and equitable after *PE Municipality*. Specific emphasis is placed on the High Court cases so as to ascertain whether these lower courts indeed followed the lead of the Constitutional Court in *PE Municipality*.

Modderklip HC concerned an application brought by a private owner (Modderklip) for an eviction order in terms of section 4(6) of PIE against some 15 000 unlawful occupiers.²³⁶ The application for eviction by the owner was a result of a notice served on the owner by the Municipality, in terms of section 6(4) of PIE, which instructed the owner to institute eviction proceedings.²³⁷ This resulted in the owner instituting the eviction proceedings in the Cape High Court.

The court considered the requirements of section 4(6) of PIE.²³⁸ It reiterated that section 4(6) of PIE only allows a court to grant an eviction order if it is convinced that it is just and equitable to do so after taking all relevant circumstances of the case into

²³³ 2001 (4) SA 385 (W).

²³⁴ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC 9 (5 February 2009).

²³⁵ 2013 (1) SA 583 (GSJ).

²³⁶ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 388.

²³⁷ Section 6(4) of PIE provides that an organ of state (municipality) can require, by way of a written notice, that the owner or person in charge of the land institute eviction proceedings against unlawful occupiers on such land. *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 389.

²³⁸ Section 4(6) of PIE provides that:

"[i]f an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."

account.²³⁹ Circumstances forwarded by the respondents to the court included: that they were previously occupants of the Chris Hani informal settlement from where they were also evicted by the former Benoni Town Council;²⁴⁰ that they were under the mistaken impression that the land had been purchased by the Town Council;²⁴¹ that they would be rendered homeless if evicted from the strip of land;²⁴² and that there were children, elderly people, pregnant woman and single mothers amongst them.²⁴³

Factors that the court considered that favoured the applicant's case were: that the applicant at common law is entitled to the exclusive use of its property;²⁴⁴ that the applicant had been deprived of the economic use of a very substantial portion of its property;²⁴⁵ that the informal settlement held a danger of increased crime rates and health and safety risks;²⁴⁶ and the large size of the encroachment on the owner's rights and its fast growing pace.²⁴⁷

The court did a balancing exercise taking all the factors as mentioned into consideration to reach an order which to its mind constituted a just and equitable one and granted the eviction order.²⁴⁸ The court further held that it was giving sufficient aid and consideration to the unlawful occupiers by giving them a justifiable period in which to find alternative accommodation.²⁴⁹ According to the court, all the factors purportedly indicated that an eviction order would be just and equitable in the particular case. Arguably, the finding of the court can be ascribed to the pre-constitutional legal culture that might have informed the court's reasoning in this case.²⁵⁰ The court's bias towards

²³⁹ The preamble of PIE emphasises both sections 25(1) and 26(3) of the Constitution.

²⁴⁰ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 392.

²⁴¹ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 392.

²⁴² *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 393.

²⁴³ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 393.

²⁴⁴ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 390.

²⁴⁵ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 390.

²⁴⁶ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 391.

²⁴⁷ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 391.

²⁴⁸ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 395.

²⁴⁹ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 395.

²⁵⁰ See chapter 2, section 2.5 above for a summary of the type of legal culture that dominated eviction adjudication in the pre-constitutional era.

the owner was evident in the way it thought about and considered each factor.²⁵¹ Furthermore this bias is also evident in the emphasis the court placed on the economic value of the property, the importance of protecting the owner's property, while not reiterating the circumstances of the occupiers in the same way.

This judgment seems to be an example of how the shadow of the common law still dominates judicial reasoning even where legislation exists that was specifically enacted to give effect to the Constitution. It illustrates how common law principles and doctrines still play a leading role when some courts in the constitutional era attempt to exercise their discretion to come to a just and equitable solution. This is in direct conflict with the idea of how eviction cases should be adjudicated under the Constitution as set out in *PE Municipality*. As already explained, *PE Municipality* was seminal in indicating the type of philosophical approach that a court should adopt in its application of the provisions of PIE.²⁵² Very importantly, the approach should be informed by the values of *ubuntu* which automatically calls for context-sensitivity, as opposed to a hierarchical and mechanical analysis, which seems to be the approach adopted in *Modderklip*.²⁵³ This hierarchical approach is evident in the fact that the court gave far more weight to the owner's interests than those of the unlawful occupiers.

²⁵¹ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 393-395. The court's finding on the factors placed before it for the respondents' (occupiers') case, in the final instance, weighed in favour of applicant. The court refuted the occupiers' allegation that they were under the impression that the land belonged to the state. Accordingly, the court accepted that the alleged implied permission to live on the land was therefore also unsound. It held that the occupiers had no reasonable grounds to believe that the Town Council owned the land and gave them permission to occupy it. As a result, the court held that the occupiers occupied the land with the knowledge that they were doing so unlawfully. Accordingly, it found that this was a consideration that weighed against the occupiers and in favour of the owner. The second consideration the respondents raised, which at the end swayed the court in favour of the applicant, was the argument made in relation to the homelessness of the respondents. The court held that this factor cannot carry weight because the court was not furnished with all the information regarding the possibility of alternative accommodation. The duty to bring such information before it, according to the court, rested on the respondents who failed to provide the relevant information. Finally the court held that the percentage of households headed by women, children, disabled persons and elderly people were too small to have sufficient weight to favour the respondents' case substantially.

²⁵² See chapter 2, section 2.2 above.

²⁵³ See chapter 2, section 2.2 above.

This does not mean that an eviction order may never be granted in favour of an applicant owner. An approach where courts attribute the appropriate weight to the relevant rights, interests and circumstances of the parties could require that a court grant an eviction application or it might require that the court refuse to grant such an order.²⁵⁴

Despite the court in *PE Municipality* giving more flesh to the way in which courts should approach the requirement of “just and equitable” for purposes of determining whether an eviction order should be granted, some courts continue to fail in this regard.²⁵⁵ Cases that illustrate this contention even more pertinently are *Voster, Daisy Dear Investments* and *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*.

In *Voster*, the owner of a house sought the eviction of two elderly persons aged 92 and 83 respectively.²⁵⁶ The owner relied on section 4 of PIE for the eviction application.²⁵⁷ The unlawful occupiers based their defence on an alleged usufruct that the applicant owner agreed to at the time the occupiers moved into the house.²⁵⁸ However, the court found that no such usufruct existed. Accordingly, the court had to determine whether the eviction of the respondents in this case would be just and equitable in terms of PIE, as no legal basis existed for their occupation.²⁵⁹ In this regard the court referred to section 4(7) that enjoins the court to take the interests and needs of the elderly into account.²⁶⁰ The court then held that because the occupiers were elderly persons, it would not be just and equitable to grant an eviction order against them.²⁶¹ Accordingly, the eviction order was denied on the basis that the occupiers were elderly, in line with section 4(2).

The requirement that courts may only grant an eviction order if it is just and equitable to do so, mandates the court to take *all* relevant circumstances into account when

²⁵⁴ AJ van der Walt *Constitutional property law* 3 ed (2011) 522.

²⁵⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

²⁵⁶ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC 9 (5 February 2009) para 11.

²⁵⁷ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC 9 (5 February 2009) para 9.

²⁵⁸ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC 9 (5 February 2009) para 5.

²⁵⁹ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC 9 (5 February 2009) para 12.

²⁶⁰ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC 9 (5 February 2009) para 12.

²⁶¹ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC 9 (5 February 2009) para 12.

exercising its discretion to grant or refuse an eviction order.²⁶² The court in *Voster* failed to take all relevant circumstances into account because it only took one factor into account. In the process the court arguably also failed to undertake a proper balancing exercise as required in this context. Accordingly, where a court does not consider all relevant circumstances the consequences are firstly, that the outcome will not be just and equitable and secondly, non-compliance with the provisions of PIE by the court. In light of the above, the approach followed by the court can also be described as mechanical (like the court's approach in *Modderklip HC*) because of the absence of a proper, contextual balancing exercise.

The mechanical approach followed by the court in *Voster* cannot be reconciled with what PIE with its underlying idea of *ubuntu* aims to achieve in the eviction context. *Ubuntu* requires a context- and community sensitive approach, as its very nature acknowledges the context of each individual and how people relate to and depend on each other in a community. When read in this light, PIE requires that both parties are protected by focussing on regulating the relationship between an owner and an unlawful occupier.²⁶³ It is of utmost importance that the dignity of both parties involved is protected in order to ensure that the dignity of the community is also safeguarded. For this reason, the court has to approach its task with the philosophy of *ubuntu* in mind, where the starting point is community and the goal is the best outcome for all. The goals of PIE will not be achieved if the court only prioritises entitlements or interests in a more or less hierarchical fashion.²⁶⁴

Daisy Dear Investments concerns a case in which a private landowner sought to evict about 2000 unlawful occupiers in terms of PIE.²⁶⁵ The eviction application was sought as a result of a demand from the Msunduzi Municipality for the owner to evict the occupiers.²⁶⁶ The occupiers were a large community and most of the occupiers

²⁶² Sections 4(6) and 4(7). See further *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23; AJ van der Walt *Constitutional property law* 3 ed (2011) 525.

²⁶³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

²⁶⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13.

²⁶⁵ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 JDR 0675 (GNP) para 3.

²⁶⁶ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 JDR 0675 (GNP) para 4.

occupied the land for more than five years.²⁶⁷ Furthermore, the community consisted of poor and unemployed people and the households were mostly headed by women.²⁶⁸ The High Court had to determine whether in the circumstances of the case an order in favour of eviction would be just and equitable. What becomes apparent from this case is the crucial role courts play to make sure an eviction order is only ordered if it is genuinely just and equitable to do so. The court in this case ordered the eviction of the unlawful occupiers without having due regard for the provision of PIE. The court did not ensure that it had all the relevant factors relevant to the case placed before it. It also failed to ascertain why all the relevant circumstances were not placed in front of it, so it could be in a position to determine whether or not it must order the parties to bring such evidence.²⁶⁹ Furthermore, the court did not consider the availability of alternative land for the occupiers to relocate to and it perhaps too easily accepted the municipality's report to be sufficient information regarding the unlawful occupiers.²⁷⁰ The court also did not consider whether or not mediation could have resolved the dispute.²⁷¹ The court's approach in *Daisy Dear Investments* is evident of the complete absence of the philosophical framework that ideals like *ubuntu* could have provided in the circumstances. As explained above, *ubuntu* requires that courts employ a context-sensitive approach. Where the court fails to take all relevant considerations into account, it will not be in a position to reach a solution that would protect the dignity of all people involved and the decision made by the court will not comply with the standard of justice and equity that an eviction order requires.

In *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*²⁷² the court had an interesting approach to the "just and equitable" requirement

²⁶⁷ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 JDR 0675 (GNP) para 4.

²⁶⁸ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 JDR 0675 (GNP) para 3.

²⁶⁹ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 (4) All SA 410 (SCA) para 6.

²⁷⁰ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 (4) All SA 410 (SCA) para 7.

²⁷¹ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 (4) All SA 410 (SCA) para 9.

²⁷² 2013 (1) SA 583 (GSJ).

in PIE. The *Newtown* case concerned an application for the eviction of a large number of persons from the housing complex called Newtown Urban Village, which was erected to provide affordable rental accommodation to persons with low income.²⁷³ As the defendants were not lawful tenants the provisions of PIE found application and the owner instituted eviction proceedings in terms of PIE.²⁷⁴ Accordingly, the court had to decide whether or not it would be just and equitable to evict the unlawful occupiers.²⁷⁵ The court's *ratio* suggests that what PIE requires of courts and owners is unrealistic and impossible. This impossibility is found in (a), the meaning of just and equitable and (b), the broad discretion the court has in order to make such determination.²⁷⁶ It held that it is extremely difficult to ascribe a meaning to the phrase "just and equitable".²⁷⁷ Furthermore, Willis J explained that this broad discretion PIE gives courts is "grossly unfair to judges" because it renders the function of the court, with regard to eviction adjudication, "unworkable".²⁷⁸

As a result, the court in its investigation as to what just and equitable means turned to familiar territory, namely the Companies Act.²⁷⁹ The Companies Act ascribed an objective meaning to justice and equity and the court in accordance with this understanding held that a reasonable man, objectively speaking, might come to different conclusions as to what would be just and equitable on the facts of a case.

²⁷³ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) paras 1-3.

²⁷⁴ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) para 19.

²⁷⁵ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) para 21. For an detailed discussion of the requirement of "just and equitable" in the *Newtown* case see JM Pienaar "The law of property" in N Botha, J Heaton & C Schulze (eds) *Annual survey of the South African law* (2012) 717 768-772.

²⁷⁶ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) paras 26 and 36.

²⁷⁷ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) para 26.

²⁷⁸ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) para 33.

²⁷⁹ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) para 4.

Therefore, the court suggested that templates should be created for courts to follow so as to prevent different possible outcomes.²⁸⁰

The approach exhibited by the court in *Newtown* with regard to PIE's just and equitable requirement reflects pre-constitutional conservatism and positivistic thinking. This is evident firstly, in Willis J's undertone throughout the entire judgment. Secondly, the pre-constitutional conservatism and positivistic thinking is also evident in his reference to Company law to ascribe meaning to just and equitable. This clear ignorance of the *PE Municipality* constitutional matrix as interpretive framework ignores the historical and constitutional context within which the provisions of PIE and the discretion of the court must be understood and interpreted.²⁸¹ In this regard, the court chose familiarity and certainty above the context-sensitive and *ubuntu*-laden approach mandated by the Constitutional Court.²⁸²

Overall, the discussion of both the procedural and the substantive requirements of the eviction remedy PIE affirms that *ubuntu* is generally the *ratio* underlying PIE and its purposes. This has become evident by way of the context-sensitive approach courts endorsed in their application of PIE's procedural and substantive provisions in various cases. Unfortunately, this is only a half truth. The theme of context-sensitive adjudication is not always followed by courts in eviction cases; this inconsistency came out strongly in the discussion of courts' approach to PIE's "just and equitable" requirement.

²⁸⁰ See chapter 3, section 3.2.2.2 above. *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) para 52. See further AJ van der Walt *Constitutional property law* 3 ed (2011) 521; JM Pienaar & J Brickhill "Land" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS 6 2014) 48-1 48-5.

²⁸¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-16.

²⁸² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

3 3 The judicial function and its procedural approach to PIE

3 3 1 The interpretive function of the court

In the pre-constitutional era, interpretation of statutes occurred with the assistance of the common law cannons for statutory interpretation.²⁸³ This section will analyse how the Constitution and PIE impact on the interpretive function of courts in the eviction paradigm. A description of each of the conventional cannons will follow as well as a brief explanation of the constitutional guidelines that developed in light of the Constitution. Finally, an analysis of the courts' approach to specifically the interpretation of PIE will be embarked on to determine how the guidelines for the interpretation of the Constitution impact on interpretation in the eviction context.

The conventional cannons for statutory interpretation are *inter alia* literalism, intentionalism, purposivism, judicial activism, objectivism and the linguistic turn.²⁸⁴ Literalism concerns the interpretation exercise of ascertaining the meaning of the text from the *ipsissima verba* in which the text is laid down, irrespective of an illogical or absurd result.²⁸⁵ However, if the result of the literalist approach is absurd and contrary to common sense, the golden-rule finds application, which allows the court to modify the words to avoid absurdity.²⁸⁶ This modification would be directed by the statute as a whole.²⁸⁷ Intentionalism concerns the interpretive exercise of ascribing a meaning to the text that reflects the intention of the legislator.²⁸⁸ Purposivism in turn concerns the legislative exercise of attributing a meaning to the text that will reflect the purpose that the legislation seeks to achieve.²⁸⁹ The purpose is found in the context of the legislative measure that the text forms part of. Judicial activism advances an interpretation theory where judges can ascribe a just meaning to a statutory provision or phrase where necessary.²⁹⁰ Objectivism deals with the interpretation exercise where meaning is

²⁸³ See chapter 2, section 2.4 above. See further HR Hahlo & E Khan *The South African legal system and its background* (1968) 178; LM du Plessis *Re-interpretation of statutes* (2002) 92.

²⁸⁴ LM du Plessis *Re-interpretation of statutes* (2002) 89-119.

²⁸⁵ LM du Plessis *Re-interpretation of statutes* (2002) 93.

²⁸⁶ LM du Plessis *Re-interpretation of statutes* (2002) 94.

²⁸⁷ LM du Plessis *Re-interpretation of statutes* (2002) 94.

²⁸⁸ LM du Plessis *Re-interpretation of statutes* (2002) 94.

²⁸⁹ LM du Plessis *Re-interpretation of statutes* (2002) 96.

²⁹⁰ LM du Plessis *Re-interpretation of statutes* (2002) 97.

ascribed to statutory text on the basis that the text takes up an objective existence separate from the intention of the legislator after promulgation.²⁹¹ The statutory text retrieves its meaning from the concrete situations within which it is applied.²⁹² Lastly, the linguistic turn contends that any interpretation exercise of the court will always consist of subjective preferences because of the choices courts must make when interpreting text.²⁹³ These conventional cannons are not all peremptory precepts for the interpretation of statutory text, although Du Plessis points out that some cannons have a peremptory status.²⁹⁴ These are cannons that are based on the intention of the legislator and also on the clear and unambiguous language theories.²⁹⁵

In the pre-constitutional era courts did not have a fixed approach to (a) which cannons they applied and (b) how they applied these cannons.²⁹⁶ It was common for courts to use different cannons in different cases and also to use a combination of cannons as opposed to only one at a time.²⁹⁷ However, despite the courts' inconsistent use of the cannons, Du Plessis points out that the dominant approach followed by the South African courts in the pre-constitutional era was the literalist-cum-intentionalist approach.²⁹⁸ The literalist-cum-intentionalist approach entails the pursuit of the real intention of the legislator by interpreting the language used in the text.²⁹⁹ Accordingly, it is a combination of intentionalism and the literalism theories of interpretation. As a result courts generally in the pre-constitutional eviction paradigm relied on the literalist-cum-intentionalist approach to interpretation when faced with interpretive questions.³⁰⁰ The reliance on this cannon of interpretation, in particular, must be ascribed to the

²⁹¹ LM du Plessis *Re-interpretation of statutes* (2002) 98.

²⁹² LM du Plessis *Re-interpretation of statutes* (2002) 98.

²⁹³ LM du Plessis *Re-interpretation of statutes* (2002) 100.

²⁹⁴ LM du Plessis *Re-interpretation of statutes* (2002) 83.

²⁹⁵ LM du Plessis *Re-interpretation of statutes* (2002) 83.

²⁹⁶ GE Devenish *Interpretation of statutes* (1992) 52.

²⁹⁷ LM du Plessis *Re-interpretation of statutes* (2002) 101.

²⁹⁸ LM du Plessis *Re-interpretation of statutes* (2002) 100.

²⁹⁹ LM du Plessis *Re-interpretation of statutes* (2002) 107.

³⁰⁰ In the pre-constitutional judgment of *Venter v R* 1907 TS 914-915, Innes J confirmed that the accepted approach for statutory interpretation is the *literalist-cum-intentionalist* approach.

political background at the time, together with the strong influence of positivism on the judiciary.³⁰¹

The advent of the new legal and constitutional dispensation in South Africa brought about a new interpretation paradigm.³⁰² The Constitution with its entrenched Bill of Rights requires separate interpretation rules for the interpretation of the Constitution. Constitutional interpretation entails the process of pinning down the meaning of a provision in the Constitution.³⁰³ Within the Constitution, there are two provisions that give direction in this regard, namely sections 39(2) and 239. Section 39(2) is the interpretation clause and holds that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights”. Section 239 is the definition clause and defines national and provincial legislation.

These provisions do not provide complete guidelines for the interpretation exercise.³⁰⁴ The Constitutional Court together with the Supreme Court of Appeal have developed guidelines for the interpretation of the Constitution in general, the rights in the Bill of Rights and legislation promulgated to give effect to the Constitution.³⁰⁵ These principles all flow from the Constitutional Court’s dictum in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* that the “language of the constitutional text must be interpreted generously, purposively and in context.”³⁰⁶ This dictum however is not without limitation.³⁰⁷ The constitutional guidelines for interpretation limit constitutional interpretation but also provide content to such constitutional interpretation. Currie and De Waal identify the first guideline for interpretation to be found in the role of the text. This guideline advances that the point of departure for the interpretation of the constitutional text is literalism. In terms of

³⁰¹ CJR Dugard “The judicial process, positivism and civil liberty” (1971) 88 *SALJ* 181 184-185. See chapter 2 above.

³⁰² LM du Plessis *Re-interpretation of statutes* (2002) 133.

³⁰³ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 133.

³⁰⁴ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 134.

³⁰⁵ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 135.

³⁰⁶ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 32.

³⁰⁷ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 135.

literalism, meaning can be found in the text as it stands.³⁰⁸ However, this textual approach should not be viewed in the conventional textual sense found in the literalism theory. The court in *Makwanyane* made this clear when it held that the literal meaning of the text is acceptable only if it reflects the values of the Constitution.³⁰⁹ Accordingly, in terms of the *role of the text* guideline the starting point for constitutional interpretation is the literal meaning of the text, but only to the extent that it confirms the Constitution's values.³¹⁰

The second guideline for the interpretation of constitutional text, identified by Currie and De Waal is called *purposive interpretation*.³¹¹ Purposive interpretation involves the exercise of searching for the purpose of the provision in question and ascribing to it a meaning that would give effect to the identified purpose. The Constitution is based on foundational values.³¹² Therefore the purpose will generally also be found in protecting specific values and interests. Currie and De Waal point out that this identification process can be difficult and will almost always require the court to make a value judgment.³¹³ This means that the court will have to decide which values and interests the specific provision aims to protect and which one the provision specifically does not protect. This will require a further interpretation of the individual values in light of the specific text.³¹⁴

³⁰⁸ LM du Plessis *Re-interpretation of statutes* (2002) 93.

³⁰⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 9.

³¹⁰ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 136.

³¹¹ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 136.

³¹² I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 136.

³¹³ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 137.

³¹⁴ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 15 where Sachs J provides an explanation of how property rights have to be interpreted and understood in the constitutional era. See further AJ van der Walt *Constitutional property law* 3 ed (2011) 29; JM Pienaar *Land reform* (2014) 175 for an explanation of how property rights should be interpreted in the constitutional context. They highlight the tension that exists within the property clause itself and the tension between other reform-orientated legislation and property rights. However, they also indicate that this tension is conducive to provide sound constitutional interpretations of the property clause.

The third constitutional interpretation guideline is called the generous interpretation-guideline.³¹⁵ The basic idea behind this guideline was set out in *S v Zuma*.³¹⁶ In *Zuma* the court explained that when interpreting a provision in the Constitution, the use of the generous interpretation-guideline is supposed to ensure that the individual gets the full measure of protection from the rights and freedoms entrenched in the Constitution.³¹⁷ In other words, the guideline allows for the court to ascribe to a provision in the Constitution a broad interpretation rather than a narrow interpretation. However, the generous interpretation-guideline is subject to the condition that the text must in principle allow for such broad interpretation.³¹⁸

The fourth and final interpretive guideline for the interpretation of the Constitution is the context-guideline.³¹⁹ This guideline advances that the meaning of the constitutional text is found in the contextual matrix within which it is used.³²⁰ Context, however, is not a free standing and isolated guideline; context is used in conjunction with purposivism. In other words, the contextual matrix of a constitutional provision will help to determine the purpose of the constitutional provision.³²¹ This contextual matrix can refer to a number of things, namely the historical and political backgrounds as well as the context advanced by the text itself.³²²

Section 39(2), together with section 1 of the Constitution, establishes the supremacy of the Constitution and the single system of law principle. The single system of law principle is based on these two provisions and holds that the Constitution is the highest law from which all other laws such as the common law, customary law and statute law must flow.³²³ These sources of law can in no circumstances develop separately and parallel to the Constitution. It is of paramount importance that these sources conform

³¹⁵ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 138.

³¹⁶ *S v Zuma* 1995 (2) SA 642 (CC).

³¹⁷ *S v Zuma* 1995 (2) SA 642 (CC) para 14.

³¹⁸ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 139.

³¹⁹ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 140.

³²⁰ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 140.

³²¹ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 140.

³²² I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 141.

³²³ *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44. See also AJ van der Walt *Property and constitution* (2012) 21.

to the spirit, purport and objectives of the Constitution. Accordingly, this new leg of interpretation, called constitutional interpretation, impacts directly on statutory interpretation.³²⁴

PIE is a statute that aims to regulate the eviction of unlawful occupiers from their homes. PIE must also conform to the spirit, purport and objects of the Constitution, in line with section 39(2) of the Constitution. The modes of interpretation as developed for purposes of the interpretation of the Constitution impact on the interpretation of statutes, due to the single system of law principle explained above. Du Plessis explains the implications of the single system of law principle on statutory interpretation and identifies two consequences of this principle. Firstly, the rule means that all statutes are subject to the Constitution and secondly, it means that statutes must be read in light of, and in line with, the Constitution.³²⁵

Section 39(1) demands the interpretation of statutes in a manner that promote the constitutional values of an open and democratic society based on freedom and equality.³²⁶ The question that arises is what this means for the conventional cannons of interpretation that directed statutory interpretation in the pre-constitutional era. In other words, it remains interesting to consider the extent to which the conventional interpretive approach to the interpretation of statutes of the pre-constitutional era has been changed by the Constitution. Du Plessis argues that the approach to the interpretation of a statute in the constitutional era depends on the nature of the legislative measure before the court for interpretation.³²⁷ He suggests that the conventional cannons are still employed, together with the literalist-cum-intentionalist approach to the cannons where the legislative measure that requires interpretation is a “normal” statute dealing with neutral issues.³²⁸ However, when a statute that regulates constitutional issues is interpreted, the new constitutionally-inspired guidelines should be employed by the court. PIE is exactly such a constitutionally-inspired legislative measure. It was promulgated to give effect to section 26(3) and

³²⁴ LM du Plessis *Re-interpretation of statutes* (2002) 133.

³²⁵ LM du Plessis *Re-interpretation of statutes* (2002) 133.

³²⁶ I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 146.

³²⁷ LM du Plessis *Re-interpretation of statutes* (2002) 144.

³²⁸ LM du Plessis *Re-interpretation of statutes* (2002) 144.

section 25(1) of the Constitution.³²⁹ The nature and origin of PIE accordingly indicate that PIE should be interpreted with constitutionally-inspired cannons of interpretation on the basis of Du Plessis' argument.

Since the promulgation of PIE courts have been called upon to interpret the provisions of PIE. In this regard, *Ndlovu v Ngcobo; Bekker and Another v Jika*,³³⁰ *PE Municipality and Changing Tides* are especially indicative of how courts have approached its new interpretive function in the eviction context.

Ndlovu concerned two cases with almost identical facts. In both disputes the applicants applied for the eviction of the unlawful occupiers in terms of the *rei vindicatio*. The occupier in *Ndlovu* was a tenant of the applicant who failed to move out of the leased premises after his lease had terminated.³³¹ The occupier in *Bekker* lost ownership of the property in a sale in execution but refused to move out of the premises after the property was transferred to the new owner.³³² The applications for the eviction of the respective occupiers were successful in the lower courts and led to the combined *Ndlovu* appeal.³³³ On appeal, the occupiers insisted that PIE, and not the *rei vindicatio*, was applicable to their situation. Consequently, the court had to pronounce on the question of whether unlawful occupiers for purposes of PIE only included squatters (who were *ab initio* unlawful occupiers) or whether it also included tenants and mortgagees holding-over (whose occupation was initially lawful, but subsequently became unlawful).³³⁴ Accordingly, the court had to interpret the term "unlawful occupier" in PIE to determine the category of occupiers that PIE aims to include in its ambit.

The court's approach to the interpretation of the concept "unlawful occupier" in the text of PIE consisted of four distinct steps.³³⁵ In the first step the court identified and pointed out the textual framework in which the term appeared and then identified the precise

³²⁹ S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 271.

³³⁰ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).

³³¹ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 1.

³³² *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 1.

³³³ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 2.

³³⁴ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 1.

³³⁵ See chapter 3, section 3.2.3.2.1 above for a discussion of "unlawfulness" as a threshold requirement.

status of the occupiers.³³⁶ The second step in the interpretation exercise of the court was to determine the ordinary meaning of the phrase “unlawful occupier”.³³⁷ It held that textually PIE applies to unlawful occupiers in general.³³⁸ After it established what the ordinary meaning of unlawful occupier was, it commenced with its third step. In this regard, the court looked for internal and external indicators of what parliament intended unlawful occupiers to mean. The internal exercise consisted of the court identifying various other sections in PIE where the phrase “unlawful occupiers” is also used.³³⁹ However, because the provisions in which the phrase appeared in the text were vague and contradictory, the court had to resort to external indicators of parliament’s intention.³⁴⁰ The court’s external exercise looked at the motivation behind the enactment of PIE based on the history of South Africa and how this particular class of occupiers, namely occupiers holding over, linked up with the historical context and reason for PIE’s promulgation.³⁴¹ Furthermore, the court reiterated that the Constitution mandates courts to interpret legislation so that it promotes the spirit, purport and objects of the Bill of Rights.³⁴² Section 26(3) of the Constitution was then identified as representative of the spirit, purport and objects of the Bill of Rights in the interpretation exercise of what is meant by unlawful occupiers for purposes of PIE.³⁴³ In light of section 26(3) and the historical origins of PIE the court could not find any reason as to why the legislator would have intended that vulnerable tenants should not also enjoy the protection of PIE.³⁴⁴ Accordingly, the court interpreted unlawful

³³⁶ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) paras 4-5.

³³⁷ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 5.

³³⁸ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 11.

³³⁹ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 6.

³⁴⁰ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 7.

³⁴¹ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) paras 11-14.

³⁴² *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 16.

³⁴³ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 16.

³⁴⁴ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 21.

occupiers in a generous manner to ensure that all unlawful occupiers (except those expressly excluded from the ambit of PIE)³⁴⁵ will fall under protection of PIE.³⁴⁶

The above analysis shows firstly, that the court in *Ndlovu* as a starting point employed one of the traditional interpretive strategies, namely the literalist-cum-intentionalist approach. However, in the court's application of the literalist-cum-intentionalist approach, it applied the textual guideline for constitutional interpretation. Accordingly, the court made the interpretation obtained *via* the conventional cannon subject to constitutional scrutiny. In this regard, the court employed the constitutional interpretive guideline of purposivism when it looked at internal and external factors to determine what the legislator meant with the concept of unlawful occupiers. It also applied the contextual and generous interpretation guidelines when it held that the words *unlawful occupier* had to be interpreted widely after taking the historical and political background of PIE and the group seeking PIE's protection into account. Accordingly, *Ndlovu* illustrates how courts use a combination of the conventional cannons for interpretation and the constitutional guidelines developed for the interpretation of constitutional text.

As alluded to above, *PE Municipality* concerns an eviction application brought by the state against unlawful occupiers of privately owned land.³⁴⁷ In *PE Municipality* the Constitutional Court paved the way for the interpretation of sections 25 and 26(3) of the Constitution and PIE in eviction cases.³⁴⁸ The court's approach to the interpretation of PIE commenced with an overview of the historical background with which the provisions of PIE and section 26(3) of the Constitution must always be read. In this regard, the court elaborated on the harsh consequences of the apartheid regime and specifically the PISA, specifically in relation to how it marginalised people of colour by allowing evictions at the absolute discretion of the state and private owners.³⁴⁹ The court stressed the importance of interpreting PIE and the relevant sections in the

³⁴⁵ See chapter 3, section 3.2.2 above.

³⁴⁶ The categories of persons expressly excluded from the ambit of PIE are: Occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 and occupiers whose occupation is protected by the Interim Protection of Informal Land Rights Act 31 of 1992.

³⁴⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 1.

³⁴⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 7.

³⁴⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 8.

Constitution with this historical background as well as the present-day consequences thereof in mind.³⁵⁰ After explaining the pre-constitutional eviction paradigm and its harsh effects, the court proceeded in highlighting how PIE aims to eradicate those injustices and invert the effects of PISA.³⁵¹ The historical background as well as the aims of PIE can accordingly be described as the court's starting point for the interpretation of PIE. After establishing the historical background and aims of PIE, the court proceeded in setting out the constitutional matrix for the interpretation of PIE. It identified that the constitutional matrix within which PIE must be interpreted is: firstly, the values of human dignity, equality and freedom that underpin the whole Constitution; secondly, section 25 of the Constitution; and thirdly, section 26(3) of the Constitution.³⁵² In terms of the underlying values, the court reiterated that the scope ascribed to these rights is informed by the values of human dignity, equality and freedom. These rights only exist in so far as they affirm the values of human interdependence, solidarity, community and human dignity. Accordingly, these values are of utmost importance for the interpretation of section 25 and section 26 and, as a result, also for the interpretation of PIE.³⁵³ The court went on to give content to these rights respectively. It held that section 25 aims to promote both the protection of existing property rights and the public interest.³⁵⁴ This dual function gives rise to an inherent tension. However, the court held that the tension is not necessarily problematic. The tension should be instructive when interpreting section 25.³⁵⁵ The court then analysed section 26(3) and established that it is important to interpret section 26(3) together with section 25 of the Constitution. When these provisions are read together they establish the constitutional approach to "land hunger, homeless[ness] and the protection of property rights".³⁵⁶ The court concluded that this

³⁵⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 10.

³⁵¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 12.

³⁵² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-16.

³⁵³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 15.

³⁵⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 16.

³⁵⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 16. See further AJ van der Walt *Constitutional property law* 3 ed (2011) 29; JM Pienaar *Land reform* (2014) 175. Van der Walt and Pienaar both argue that the built-in tension found in section 25 should be understood to be a creative tension as it aims to provide context for the interpretation of the section.

³⁵⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 20.

constitutional approach affirms that land reform rights are defensive rather than affirmative rights, that eviction may occur even if the result of an eviction order is that the occupier loses her home and concrete and case specific solutions must be sought in particular instances.³⁵⁷

The approach of the court in *PE Municipality* reflects the context-guideline for constitutional interpretation. This is evident in that the court considered the historical and political background of PIE as well as the context advanced by the text self.

In *Transnet Ltd v Nyawuza and Others*,³⁵⁸ a case decided after *PE Municipality's* instructive judgment on the constitutional matrix was handed down, the High Court was faced with the decision of whether PIE indeed conferred on the court a discretion to grant or refuse to grant an eviction order.³⁵⁹ The court had to interpret PIE to determine whether or not the discretion existed. In this regard, the court started its interpretive exercise by identifying the provisions in PIE that referred to such discretion. The court then ascribed to these provisions their ordinary meaning. After establishing the ordinary meaning, the court turned to the Constitution and its impact on the interpretation of statutes. It held that the Constitution requires that the spirit, purport and objects thereof should always be promoted when courts interpret PIE.³⁶⁰ Furthermore, the court identified that in the eviction context the promotion of the spirit, purport and objects of PIE is simultaneously the promotion of section 26(3).³⁶¹

The approach of the court in *Transnet* is similar to the approach followed by the court in *Ndlovu*. Firstly, the court in *Transnet* applied the literalist-cum-intentionalist conventional interpretive cannon. Its second step was to test the interpretation against the values of the Constitution and applicable provisions of the Bill of Rights. The above analysis of courts' approach to the interpretation of PIE, in the constitutional context, shows that courts still apply the dominant pre-constitutional interpretative canon when it interprets PIE. In other words, the literalist-cum-intentionalist conventional interpretive canon as illustrated in *Ndlovu* and *Transnet* is still applied in the

³⁵⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 20-23.

³⁵⁸ *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D).

³⁵⁹ *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D).

³⁶⁰ *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D) 108.

³⁶¹ *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D) 108.

constitutional era. However, the court seems to apply this conventional canon in conjunction with the constitutional guidelines. This is necessary due to the express mandate on courts in section 39(1) to interpret statutes to promote the constitutional values of an open and democratic society based on freedom and equality.³⁶² Accordingly, courts use a combination of the conventional canons for interpretation and the constitutional guidelines developed for the interpretation of constitutional text when interpreting PIE.

This finding shows that courts are mandated in their interpretation of certain provisions of PIE to not only look at the written text, but to also consider the historical as well as the constitutional context within which the text was promulgated. This conclusion is important for my research because it provides an indication that the courts are also mandated in terms of the Constitution to be sensitive to context in their interpretation of PIE.

3 3 2 The role of the court

Procedural requirements and practices that define the court's role in the adjudication of disputes have a direct bearing on how courts approach and apply remedies in general and therefore also eviction remedies in particular.³⁶³ As already explained and established in the previous chapter, the English civil procedure law regulated a number of procedural aspects in the pre-constitutional era: namely; the role of courts; the hierarchy of courts; and the scope of the courts' powers and jurisdiction.³⁶⁴ The defining feature of the common law tradition in the sphere of procedural law was the adversarial approach to court proceedings.³⁶⁵ The adversarial approach required courts to play a passive and neutral role when adjudicating disputes.³⁶⁶

³⁶² I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 146.

³⁶³ D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124.

³⁶⁴ See chapter 2, section 2.4 above. HJ Erasmus "The interaction of substantive law and procedure" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 141-161 146.

³⁶⁵ See chapter 2, section 2.4 above.

³⁶⁶ See chapter 2, section 2.4 above. PJ Schwikkard & SJ van der Merwe *Principles of Evidence* 2 ed (2002) 9.

The adversarial approach to court proceedings remained the standard for court proceedings when the Constitution came into force. However, section 26(3) of the Constitution together with PIE now mandates the court in the context of PIE eviction cases to embrace a new role for itself.³⁶⁷ The court in *PE Municipality* described this new approach and emphasised the different dimensions thereof. An analysis of the instructions given to the judiciary in *PE Municipality* pertaining to the role of the courts in eviction cases follows in order to determine what this constitutionally mandated deviation from the adversarial approach to court proceedings entails.

In *PE Municipality* the Constitutional Court expressly held that PIE changed the way the law regulates the eviction of unlawful occupiers drastically. This drastic change to the regulation of unlawful occupation and evictions requires the court to step into a new role for purposes of its approach to and application of PIE. In this regard, the court in *PE Municipality* pointed out that two major features of the prescribed role of the courts in eviction cases have changed. These are that (a) the function of the courts in the eviction of unlawful occupiers has changed and (b) the end goal, which the court must work towards in eviction cases, has also changed.

Firstly, the courts' function in the application of PIE is to embody a balance between unlawful occupation of land and illegal evictions. In other words, courts have to establish an appropriate relationship between sections 25(1) and 26(3) of the Constitution in each individual eviction case.³⁶⁸ This appropriate relationship will warrant that the outcome of eviction cases would be just and equitable for all parties involved.³⁶⁹ For this purpose courts have been given wide powers in eviction cases.³⁷⁰ This balancing function of the courts is in no way similar to the function the courts had when they were called on to adjudicate eviction cases in the pre-constitutional context.³⁷¹ In the pre-constitutional era courts were only concerned with establishing what rights were involved and which parties' rights were the strongest.³⁷² Accordingly,

³⁶⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13.

³⁶⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 19; AJ van der Walt *Constitutional property law* 3 ed (2011) 522.

³⁶⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13.

³⁷⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 22.

³⁷¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

³⁷² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32.

the judicial function was to establish a hierarchical arrangement between the opposing interests of the parties and apply them in a more or less mechanical fashion based on the facts at hand.³⁷³ In contrast, PIE requires of courts to balance the competing interests in a manner that takes account of all relevant factors and interests and not simply to arrange rights from strongest to weakest to determine who has the strongest right.³⁷⁴ During this contextual, balancing exercise courts are enjoined to consider all relevant circumstances. The court in *PE Municipality* explained further what *having regard to all the circumstances* would constitute and held that to have regard, the court has to give each and every relevant factor its proper weight as appropriate in the circumstances of the case.³⁷⁵ After the court has given weight to all relevant factors, the court must make a decision on the basis of which parties' considerations weigh heavier so that it is able to judge what would be just and equitable in each individual case.³⁷⁶

Secondly, the goal of courts in proceedings for the eviction of unlawful occupiers is to make sure that the outcome of the eviction order is just and equitable for all concerned.³⁷⁷ Justice and equity is accordingly the standard that every eviction order must comply with. The court in *PE Municipality* indicated that the wide power PIE ascribes to courts is primarily aimed at enabling courts to make such an order.³⁷⁸ However, with this wide power courts also have certain obligations. The first obligation is to take account of all relevant circumstances.³⁷⁹ This includes the obligation on courts to go beyond the facts of the case in some instances and devise innovative ways to procure all relevant factors needed to make an order that would be just and equitable for all.³⁸⁰ Secondly, PIE obliges the court to have regard to extrinsic factors to guide it to a just and equitable outcome.³⁸¹ Thirdly, the court must ensure that the

³⁷³ See chapter 2, section 2.2.2 above. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

³⁷⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

³⁷⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32.

³⁷⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32.

³⁷⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13.

³⁷⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 22.

³⁷⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

³⁸⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32.

³⁸¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

eviction and relocation are done in a fair and orderly way. In this regard, an eviction and relocation will only be fair if a plan of resettlement accompanies an eviction order.³⁸² Finally, PIE requires of the court to embark on a process of active judicial management.³⁸³

This new mandate on courts has in a recent Constitutional Court judgment been reaffirmed and reiterated. *Pitje v Shibambo and Others*³⁸⁴ concerned an appeal to the Constitutional Court after the High Court and Supreme Court of Appeal refused to grant leave to appeal to Mr Pitje, an elderly person of ill-health, against whom an eviction order was granted on the basis of double sale principles.³⁸⁵ The Constitutional Court affirmed that PIE is not discretionary and that courts are obliged to apply the provisions of PIE where a case concerns the question of eviction.³⁸⁶ The court reiterated that courts are furthermore obliged to be pro-active and manage the proceedings, especially where the parties failed to base their case on PIE and failed to present all the relevant circumstances to the court.³⁸⁷

The new role and functions ascribed to the court under PIE require the court to step out of its comfort zone and beyond its normal functions. Also, it clashes head on with the manner in which courts approached and applied PIE in the pre-constitutional era. The constitutional eviction paradigm leaves no room for mechanical application of substantive requirements. The hierarchical arrangement of rights in adversarial court proceedings that result in uninvolved and passive presiding officers has been terminated.

3 4 Concluding remarks

It is clear from this chapter that the advent of the Constitution, specifically with the inclusion of sections 25(1) and 26(3), brought about a fresh perspective and

³⁸² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 34.

³⁸³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35.

³⁸⁴ (144/15) [2016] ZACC 5 (25 February 2016).

³⁸⁵ *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016) paras 1, 14.

³⁸⁶ *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016) para 17.

³⁸⁷ *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016) para 19.

conceptual understanding of the way courts adjudicate eviction cases in the new constitutional dispensation.³⁸⁸ PIE now governs the eviction of unlawful occupiers and it has changed what is generally required of courts when they seek to find an appropriate eviction remedy. The commencement of PIE paved the way for accommodating philosophies that advance the values of human inter-dependence, solidarity, community and the protection of human dignity, all of which potentially have a bearing on the owner's right to evict. However, PIE does not expressly state that these values must be aspired to when the Act is applied. It is by means of interpretation that the watershed decision in the context of eviction law, *PE Municipality*, expressly held that the values of *ubuntu* must inform the courts' approach to the application of PIE.³⁸⁹ The chapter has shown that where courts employ a context-sensitive approach the objectives of *ubuntu* are reached.

The analysis of the courts' actual approach to the procedural and substantive requirements of PIE in the constitutional context showed that courts have not always been consistent in their approach to evictions in the constitutional era, even after the landmark decision in *PE Municipality*. This remains the case, despite the fact that PIE has changed the procedural landscape for evictions drastically, as reiterated in the *Pitje* case. This is evident in the shift from action proceedings to application proceedings. Furthermore, the explicit changes to the application proceedings for PIE make the procedural requirements of PIE sensitive to the context and circumstances of occupiers.³⁹⁰ An analysis of case law pertaining to the requirements for *locus standi*; the application scope of PIE (specifically in relation to who qualifies as unlawful occupiers); service of documents and joinder of interested parties showed that courts are called upon, even when they deal with issues pertaining to the application scope or procedure (like the service of the notice of motion and joinder questions) to follow a context-sensitive approach to ensure that the aims of PIE are always kept in mind and reached.³⁹¹

³⁸⁸ CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2* 2 ed (2010) para 137.

³⁸⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

³⁹⁰ Section 4 of PIE.

³⁹¹ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 4 SA 199 (SCA) para 22.

The section on the substantive requirements of PIE also indicated that courts have to apply the substantive requirements of PIE with the same context-sensitivity as inspired by the values of *ubuntu*. However, case law has revealed that the courts' application of the substantive requirements of PIE is sometimes void of the philosophical ideals of *ubuntu*, precisely because of the absence of such a context-sensitive approach.

The second part of the chapter provided an explanation of how the interpretive function of the court has changed as a result of the advent of the Constitution.³⁹² It became apparent that courts are still applying the dominant traditional canon of statutory interpretation, namely the literalist-cum-intentionalist approach. However, the courts are now mandated to combine the pre-constitutional canon for statutory interpretation with constitutional guidelines when it seeks to interpret PIE. This was illustrated in the judgments of *Ndlovu* and *Transnet*. In this regard, it seems as though section 26(3) and PIE require the procedural approach of the court to change from adversarial in nature to more managerial and pro-active.³⁹³

In light of the analysis done in this chapter, it seems as though the courts' application of the eviction remedy in terms of PIE should be context-sensitive, flexible and also principled so as to advance the ideals of *ubuntu* and similar philosophies. However, it is apparent that not all courts, when confronted with the PIE, apply the Act in the same fashion. Accordingly, a conclusion can be made that the courts' approach to the application of the provisions of PIE should be context-sensitive, flexible, proactive and involved.

³⁹² I Currie & J de Waal *The Bill of Rights handbook* 6 ed (2013) 146.

³⁹³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 39.

Chapter 4: A critical analysis of the impact of the Constitution on eviction remedies

4 1 Introduction

The aim of this chapter is to critically analyse the impact of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) on eviction remedies. This will entail a critical analysis of the shift from the pre-constitutional eviction paradigm to the constitutional eviction paradigm, with a specific focus on how a landowner’s right to evict and how the courts’ approach to eviction remedies have been affected by section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”).

This chapter is divided into two main parts. The first part aims to provide a contextual background for the critical analysis. The contextual background consists of a summation and comparison of chapters two and three’s primary findings pertaining to (a) eviction remedies available in the two different dispensations; and (b) the manner in which courts approached eviction remedies in the pre-constitutional era and the manner in which courts are expected to approach eviction remedies in the constitutional era.

The second part of the chapter sets out to critically analyse the above-mentioned findings of chapters two and three. The purpose of the critical analysis is to (a) determine to what extent section 26(3) of the Constitution and PIE have transformed the eviction landscape pertaining to the broader purposes of the PIE and the concomitant role of courts in this regard; (b) whether or not courts are succeeding with applying and approaching PIE as mandated by the broader purposes and concomitant role of courts; and (c) if not, what the potential implications are for landowners in light of the relatively strong position landowners had in the pre-constitutional era.

With the above purposes in mind the second part sets out to explore firstly, whether the transformed role of courts is comparable to the role of courts and broader purpose of equitable discretions ascribed to courts in private law disputes generally. Secondly, the chapter explores the differences between the equity discretions and the purposes

of equity in private law disputes with the just and equitable discretion in PIE in order to determine the ways in which the PIE discretion is different and the reasons for these differences. Thirdly, after establishing the differences between the discretions courts are enjoined to exercise within private law equity on the one hand and the just and equitable standard in PIE on the other hand, the chapter explores, based on chapter three's findings, whether the courts are applying PIE within this new framework and whether any failure to do so can be ascribed to pre-constitutional legal culture. The critical analysis explores the implications of the scenario where courts fail to apply PIE as mandated by the broader purposes for eviction law on specifically landowners' property rights. Here, the focus falls on the consequences for landowners only (and not unlawful occupiers) in light of the relatively strong position of landowners in the pre-constitutional era.

4 2 Contextualisation

4 2 1 The approach of courts

4 2 1 1 *Chapter two findings: The courts' approach in the pre-constitutional era*

In chapter two it became apparent that courts in the pre-constitutional era approached eviction cases in a very particular manner. This manner was the result of the natural law understanding and institution of ownership developed by Grotius and the pandectists, and subsequently adopted into the South African common law.¹ Natural and moral law form the basis of the subjective rights doctrine within private property law.² Characteristics such as completeness, individuality and abstractness were ascribed to the conceptual understanding of ownership due to the subjective rights doctrine, which caused the right to evict to be regarded as absolutely exclusive.³ South

¹ See chapter 2, section 2.2.2 above. See also JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694; AJ van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *THRHR* 303 318.

² See chapter 2, section 2.2.1 above. See also WB le Roux "Natural law theories" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25-61 40.

³ See chapter 2, section 2.2.2 above. See also P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 89-96.

African case law considered in chapter two indicates: firstly, how this absolute right to exclude informed the requirements of the *rei vindicatio*; and secondly, how this approach entrenched the characteristics of ownership.⁴ Therefore, the underlying rationale of the *rei vindicatio* remedy relates directly to the characteristics of completeness, individuality and abstractness of ownership.⁵ Furthermore, the statutory eviction remedies that were available to owners of land in the pre-constitutional era were based on the same conceptual foundation upon which the *rei vindicatio* was based.⁶

The acceptance of this supposedly absolute form of exclusivity of ownership led to the pre-constitutional acceptance by South African courts (and society) of what Van der Walt describes as the “normality” assumption.⁷ The normality assumption refers to where the normal state of affairs entails the situation where the owner of immovable property is always in occupation of her property unless the owner consents to a temporary deviation from such a state.⁸ In other words, the theoretical framework that makes up the rights paradigm not only informed the rules, requirements and principles of the pre-constitutional eviction remedies, but also informed the courts’ doctrinal, rhetorical and logical assumptions and beliefs behind the application of the remedy.⁹ Therefore, courts in the pre-constitutional era approached the application of the eviction remedies with a robust and conservative attitude.¹⁰

In chapter two, the analysis of the judicial function and the courts’ procedural approach to eviction remedies showed that courts were very passive and uninvolved in eviction

⁴ See chapter 2, section 2.2.3 above. See also P Dhlwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 89-96; *Chetty v Naidoo* 1974 (3) SA 13 (A) 16; *Van der Merwe v Webb* (1883-1884) 3 EDC 97; *Jeena v Minister of Lands* 1955 (2) SA 380 (A).

⁵ See chapter 2, section 2.2.2 above. See further in this regard *Chetty v Naidoo* 1974 (3) SA 13 (A) 16; *Van der Merwe v Webb* (1883-1884) 3 EDC 97; *Jeena v Minister of Lands* 1955 (2) SA 380 (A).

⁶ See chapter 2, section 2.3.2 above. See *Vena v George Municipality* 1987 (4) SA 29 (C) 43.

⁷ See chapter 2, section 2.2.2 above. See further AJ van der Walt *Property in the margins* (2009) 58.

⁸ See chapter 2, section 2.2.2 above. See further AJ van der Walt *Property in the margins* (2009) 58; AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation” 2002 *TSAR* 254 257.

⁹ See chapter 2, section 2.2.2 above.

¹⁰ See chapter 2, section 2.5 above.

cases.¹¹ In the first instance, the passive and uninvolved approach is ascribed to the status of positivism as the jurisprudential guide of courts for the interpretation of legal texts.¹² Positivism as a jurisprudential guide, created the institution of judicial formalism in courts' application of both statutory and common law eviction remedies.¹³ This remained the case despite the fact that courts may have had a more creative interpretive function at their disposal.¹⁴

In the second instance, the adversarial approach to court proceedings, which became part of the South African civil procedural law due to British occupation, furthermore contributed to the passive and uninvolved stance of the court.¹⁵ The adversarial approach expressly required of courts not to get too involved in the proceedings.¹⁶

Accordingly, the institution of ownership, based on the natural legal philosophical notions of completeness, individuality and abstractness, together with the courts' jurisprudential guide that was informed and directed by positivist legal philosophy and the adversarial system caused courts to approach the application of eviction remedies in a conservative, objective, formalistic and passive manner.¹⁷ As will become evident from the discussion below, these observations about the underlying assumptions courts harboured about the owner's right to evict allow for particular deductions to be made about the courts' approach to the eviction remedies. More specifically, the

¹¹ See chapter 2, section 2.4 above.

¹² See chapter 2, section 2.4 above. CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 183; D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 127.

¹³ See chapter 2, section 2.4 above. See also CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 184-185; D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 127.

¹⁴ See chapter 2, section 2.4 above. See also *Daniels v Daniels* 1958 (1) SA 513 (A) 522; CJR Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181 183.

¹⁵ See chapter 2, section 2.4 above. See also HJ Erasmus "The interaction of substantive law and procedure" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 141-161 146.

¹⁶ See chapter 2, section 2.4 above. See also PJ Schwikkard & SJ van der Merwe *Principles of Evidence* 2 ed (2002) 9 and JRL Milton "Ownership" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694.

¹⁷ See chapter 2, section 2.5 above; *Khuzwayo v Dludla* 2001 (1) SA 714 (LCC); *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468 (W).

underlying assumptions that dominated pre-constitutional courts in their thinking and application of eviction remedies seems to have had a significant, if not direct, impact on the way in which courts adjudicate eviction cases currently, in the new constitutional dispensation.

4 2 1 2 Chapter three findings: The courts' approach in the constitutional era

Chapter three revealed that the advent of the Constitution gave rise to a new conceptual understanding of ownership; a conceptual understanding that emphasises the law's inherent power to limit ownership.¹⁸ In the context of eviction, the perspective and conceptual understanding that ownership is not absolute,¹⁹ together with section 26(3) of the Constitution and PIE, directly impact on the owner's ability to vindicate her immovable property from unlawful occupiers in specific circumstances.²⁰ It paved the way for philosophies that advance the values of human inter-dependence, solidarity, community and the protection of human dignity to inform the application of the owner's right to evict. However, because PIE does not expressly state that these values must be aspired to in the application of the Act, except for inferences that can be made from the just and equitable requirement, the watershed decision in the context of eviction law, *PE Municipality*, expressly held that the values of *ubuntu* must inform the court's approach to the application of PIE.²¹

In chapter three, the analysis of the judicial function and the prescribed procedural role of courts, showed the following: Firstly, that the dominant traditional cannon of

¹⁸ See chapter 3, section 3.2.2 above. See also CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2 2 ed* (2010) para 154.

¹⁹ CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2 2 ed* (2010) para 154; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 102.

²⁰ See chapter 3, section 3.2.2 above. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); CG van der Merwe "Things" in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2 2 ed* (2010) para 154; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 140; P Dhliwayo & AJ van der Walt "The notion of absolute and exclusive ownership" 2017 (forthcoming) 19.

²¹ See chapter 3, section 3.2.2 above. See further *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

interpretation, namely the literalist-cum-intentionalist approach, is no longer necessarily the dominant interpretive tool that courts apply in eviction cases. Courts in the constitutional era now apply a combination of the literalist-cum-intentionalist approach and the constitutional guidelines when interpreting PIE.²² Furthermore, the chapter showed that section 26(3) and PIE have required the court to take up a managerial and pro-active character in eviction adjudication.²³

Accordingly, the above summation of chapter three indicates that courts in the constitutional era are required to apply eviction remedies in a context-sensitive manner informed by the philosophy of *ubuntu*. This approach must be evident in the way courts approach procedural and substantive aspects of eviction as well as its approach to its own interpretative and judicial role in eviction cases.

4 2 1 3 *Comparison of findings*

Chapter two showed that the conceptual understanding of ownership in the pre-constitutional era led to rights-based eviction remedies. These remedies only focussed on protecting a landowner's rights and freedoms in a very robust manner. Evidence of this is found in that courts always sought to protect and entrench the characteristics of completeness, individuality and abstractness together with the exclusivity entitlement more or less as a point of departure whenever ownership was challenged in eviction cases.²⁴

However, it became clear in chapter three that the Constitution and its entrenched Bill of Rights required, at least on a theoretical level, limitations on ownership to be much more prominent, so as to allow for constitutionally mandated transformation.²⁵ As indicated in chapter three, the concept of ownership in contemporary times is defined

²² See chapter 3, section 3.3.1 above. See also LM du Plessis *Re-interpretation of statutes* (2002) 83-98; *Ndlovu v Ngcobo*; *Bekker and Another v Jika* 2003 (1) SA 113 (SCA); *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D).

²³ See chapter 3, section 3.3.2 above. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 39; *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016).

²⁴ *Vena v George Municipality* 1987 (4) SA 29 (C); *Chetty v Naidoo* 1974 (3) SA 13 (A); *Van der Merwe v Webb* (1883-1884) 3 EDC; *Jeena v Minister of Lands* 1955 (2) SA 380 (A).

²⁵ See chapter 3, section 3.2.2 above. P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 101.

as the most complete private right that a person can have in relation to a thing,²⁶ with which the owner is able to do with her thing anything she wants to, provided she exercises her rights within the limits of the law.²⁷ In contemporary South Africa, the last part of the concept of ownership (the laws limiting power) have specifically been entrenched in the Constitution. This is evident in the interaction between the rights in the Bill of Rights, as well as legislative measures aimed at the enforcement of the constitutionally ordained limitations in the public interest.²⁸ This new understanding of the concept of ownership therefore endorses a much more socialistic approach to ownership.²⁹

Accordingly, a number of shifts have taken place. Firstly, a shift in the conceptual understanding of ownership has occurred. Ownership, in view of the Constitution can no longer be regarded as absolutely complete and absolutely exclusive, but is rather accepted to be inherently limited.³⁰ Subsequently, while the characteristics of completeness and exclusivity still form part of ownership, they too are subject to limitation.

Secondly, the remedy available for eviction of unlawful occupiers has been turned on its head.³¹ The change in emphasis with regard to the conceptual understanding of ownership (from hardly any limitation to inherent limitation) and the underlying foundations of ownership, brought about significant changes to the remedies available for the eviction of unlawful occupiers. The promulgation of PIE, to give effect to section

²⁶ CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2* 2 ed (2010) para 151.

²⁷ See chapter 3, section 3.2.2 above. See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2* 2 ed (2010) para 151.

²⁸ See I Currie & J De Waal J *The Bill of Rights handbook* 6 ed (2013) 150-175 where the authors discuss how constitutionally entrenched rights can be limited. See for instance the Rental Housing Act 50 of 1999.

²⁹ See chapter 3, section 3.2.2 above. See also CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2* 2 ed (2010) para 154.

³⁰ CG van der Merwe “Things” in WA Joubert & JA Faris (eds) *LAWSA Vol 27 Part 2* 2 ed (2010) para 151. See further P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 102; P Dhliwayo & AJ van der Walt “The notion of absolute and exclusive ownership” 2017 (forthcoming) 19.

³¹ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 48.

26(3) of the Constitution, replaced both the common law *rei vindicatio* and the legislative measure, the Prevention of Illegal Squatting Act 52 of 19751 (“PISA”). This means that landowners now have to employ PIE to evict unlawful occupiers from land, where such occupiers use the occupied building or structure as their homes.³² Furthermore, section 26(3) transformed the function of an eviction remedy with the promulgation of PIE. PIE is an eviction remedy that does more than what is expected of a traditional clear-cut eviction remedy such as the *rei vindicatio*. The *rei vindicatio* only entrenched and protected the owner’s rights; the focus was therefore solely on the owner’s ability to ward off interference with her property, more or less absolutely. PIE not only sets out to protect the owner’s right to exclusive use and enjoyment of her property, but also sets out to protect unlawful occupiers from being evicted from their homes in an arbitrary manner, in other words, without a court order.³³ The Act provides this protection through the substantive and procedural provisions contained in it to ensure that the interests of unlawful occupiers in eviction applications will always be considered.³⁴ Accordingly, a shift in the function of eviction remedies in South African law has also taken place with the promulgation of PIE.

Finally, these above-mentioned alterations to eviction laws ultimately necessitate a change in the manner in which courts approach the application of eviction remedies. *PE Municipality* has indicated that courts are required to take up a transformed role in eviction cases.³⁵ Chapter three has further showed that this means that the approach of courts to the substantive and procedural aspects of PIE must always reflect the values and principles of *ubuntu*, which necessitates sensitivity to the context in each case.³⁶ Furthermore, the way in which courts interpret the eviction legislative measure PIE and the procedural role the court takes up, must also reflect these values and principles. Clearly, the Constitution mandates a shift in eviction cases from the

³² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 39; *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (25 February 2016); PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* 5 ed (2006) 247; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 271; JM Pienaar *Land reform* (2014) 688.

³³ The preamble of PIE emphasises both sections 25(1) and 26(3) of the Constitution.

³⁴ See chapter 3, section 3.2.3 above.

³⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

³⁶ See chapter 3, section 3.2.2 above.

conservative, robust, formalistic and reserved court to a court that is open, flexible, involved and context-sensitive.

These findings show that section 26(3) has drastically changed the regulation of evictions and the courts' role in eviction adjudication. Courts have a very different role now than what was expected of them in the pre-constitutional era. One signal aspect of the changed role of courts is the discretion PIE has vested courts with to grant or refuse eviction applications based on justice and equity. This new task of courts ostensibly seems rather comparable to equitable discretions courts are expected to exercise in common law. If this assumption is true, it could mean that what courts are expected to do in terms of PIE does not constitute a new style of adjudication; however, if the courts' discretion in terms of PIE is not comparable to equity discretions then it means that the just and equitable discretion in terms of PIE requires courts to embrace a new approach to the adjudication of eviction cases. In this regard, the section below explores whether or not the just and equitable discretion contained in PIE is comparable and similar to equity discretions at common law.

4 3 Critical analysis

4 3 1 PIE in an equity paradigm

4 3 1 1 The history of equity in South Africa's private law

Justice and equity are expressly required in the substantive requirements of PIE.³⁷ Accordingly, equity is a central part of the outcome courts must aim to achieve in eviction cases. This inevitably leads to the question of what equity means in the context of PIE and whether South African courts are familiar with equitable remedies and their application.

The South African legal system, although a mixture of English procedural law and Roman-Dutch law, never inherited the distinction between courts of law and courts of

³⁷ See chapter 3, section 3.2.3.2 above. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

equity from the English procedural system.³⁸ Zimmerman points out that one of the reasons why the reception of the separate equitable jurisdictions did not take place, is because the South African Roman-Dutch law was accepted to be inherently equitable.³⁹ Accordingly, Roman-Dutch law has equitable principles built into its foundations and the need for a separate doctrine of equity was purportedly superfluous.⁴⁰ However, although South African law did not receive the equitable jurisdictions, it inherited some of the English law's equitable legal rules and institutions. This is evident in a number of English equitable doctrines that can be found in South African private law.⁴¹ Accordingly, the South African private law contains the built-in equity principles of the Roman-Dutch law alluded to by Zimmerman, together with some of the English equitable doctrines.

An example of an equitable principle of Roman-Dutch law is the principle of *bona fides*. In contract law the requirement of *bona fide* (good faith) is an equitable concept that impacts generally on contractual rules.⁴² South African courts have in practical terms

³⁸ HR Hahlo & E Khan *The South African legal system and its background* (1968) 178; R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 217.

³⁹ R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217 218. See further HR Hahlo & E Khan *The South African legal system and its background* (1968) 137; *Estate Thomas v Kerr and Another* (1903) 20 SC 354; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 606.

⁴⁰ R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 218. See further HR Hahlo & E Khan *The South African legal system and its background* (1968) 137; *Estate Thomas v Kerr and Another* (1903) 20 SC 354; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 606.

⁴¹ Estoppel is an equitable doctrine that forms part of the South African legal system. See R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 227; *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Sunday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 411. Another example of an equitable doctrine that migrated from English law to South African law is the contractual remedy rectification of a written contract. See R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 227; *Van der Byl v Van der Byl & Co* (1899) 16 SC 388; *Weinerlein v Goch Buildings Ltd* 1925 AD 297; *Meyer v Merchants' Trust Ltd* 1942 (AD) 244; *Mouton v Hanekom* 1959 (3) SA 35 (A); *Benjamin v Gurewitz* 1973 (1) SA 418 (A).

⁴² See *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 653.

allowed this equitable concept to shape and inform the law of contract, but have yet to confirm its application as a free standing principle.⁴³ However, good faith not only impacts the rules and institutions of contract law, it also influences the courts' approach to certain contractual disputes. For example, when courts are confronted with the exercise of interpreting contracts, good faith qualifies as a relevant criterion where a term in a contract proves to be ambiguous.⁴⁴

An example of an equitable defence of English law that successfully migrated into the South African law is the doctrine of estoppel. This doctrine not only finds application in contract law, but also in the law of property. Interestingly, it is available to a defendant as a defence against the owner's *rei vindicatio*.⁴⁵ Yet, it will only be available where particular conduct on the owner's part can be shown by the defendant.⁴⁶ In this regard, the standard requirements of the doctrine of estoppel find application. These are: firstly, that the owner of property must have acted culpably.⁴⁷ Secondly, that the owner created an impression that ownership of the property has been transferred to

⁴³ R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 241.

⁴⁴ R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 241; *Trustee, Estate Cresswell & Durbach v Coetzee* 1916 14 AD 19.

⁴⁵ See chapter 2, section 2.2.1. See further CG van der Merwe *Sakereg* 2 ed (1989) 372; JC Sonnekus & JL Neels *Sakereg vonnisbundel 2* ed (1994) 472-474; R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 260; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 255; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 549. The most important cases in which the principles of estoppel have been confirmed and applied are *Michelsen v Aaronson and Bakkie* 1914 TPD 158; *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C); *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A); *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 161-162.

⁴⁶ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 255.

⁴⁷ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 256.

the occupier, upon which the occupier relies.⁴⁸ Thirdly, that the occupier is exercising physical control with ownership intent, to the occupier's disadvantage.⁴⁹ The satisfaction of these requirements of the doctrine of estoppel will lead to a court ordering against an owner's *rei vindicatio* and in favour of the occupier on the basis of equity.

Accordingly, equitable remedies and doctrine are part of the South African mixed legal system as a result of both Roman-Dutch and English law equity principles and rules.

4 3 1 2 *Meaning of equity in the context of PIE evictions*

The natural law foundations of South African Roman-Dutch law require that the starting point for ascribing a definition to "equity" first enjoins one to set out what equity in natural law means. In this regard, Snyders explains that:

"Man uses knowledge and reason to formulate alternatives. Compassion, when given rein, often affects the choice. Where the choice is both reasonable and compassionate, the result is equity."⁵⁰

Equity amounts to that which would be fair and just. However, justice and fairness in a democratic society is generally tantamount to what the society appreciates as just and fair. It therefore is a result of the society's values and normative stances on specific issues. The Constitution, with its enshrined Bill of Rights, constitutes the normative decision South Africa made to promote certain values.⁵¹ Consequently, section 26(3) and PIE inform what equity requires in the context of evictions.

⁴⁸ See *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A) 743. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 256.

⁴⁹ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 256.

⁵⁰ RN Snyders "Natural law and equity" in RA Newman (eds) *Equity in the world's legal systems* (1973) 33 43.

⁵¹ T Metz "Justice and the law: Liberals, redistribution, capitalists and their critics" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 382-411 386; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-23.

In chapter three attributes ascribed to the phrase “just and equitable” by the court in *PE Municipality* were identified and discussed.⁵² This discussion brought to light that the requirement of just and equitable in PIE enjoins courts to approach eviction cases with an *ubuntu* philosophy.⁵³ The advent of the Constitution, together with its entrenched Bill of Rights and its clear goals of unifying South Africans, healing the divisions of the past and at the same time protecting existing rights and interests, require more equitable considerations, especially in those instances where fundamental rights and interests clash.

Ubuntu has been positioned as an interpretative tool to ensure fair and just results by ensuring that the values of *ubuntu* are present in orders made by courts.⁵⁴ In the context of PIE, *ubuntu* has been referred to by the highest court of the country.⁵⁵ This comes as no surprise as the common law rules and principles for eviction favoured the owner and were accordingly found to lack adequate protection of the fundamental right of unlawful occupiers under section 26(3) of the Constitution not to be arbitrarily evicted from their homes.⁵⁶ As a result, PIE is an equitable remedy and the equity required by PIE is encompassed in the values underlying *ubuntu* and the Constitution.

Bennett compares equity in English law to the notion of *ubuntu* in South African law.⁵⁷ In this comparison Bennet focusses on the points on which equity and *ubuntu* are similar and comparable.⁵⁸ He points out that equity was developed in English law to counter the harsh consequences of the mechanical application of rigid common law rules to ensure fair results.⁵⁹ He highlights that the philosophy of *ubuntu* in its most

⁵² See chapter 3, section 3.2.3.2 above.

⁵³ See chapter 3, section 3.2.3.2 above. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35.

⁵⁴ TW Bennet “Ubuntu: An African equity” in F Diedrich (ed) *Ubuntu, good faith and equity* (2011) 3-23 11-15.

⁵⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

⁵⁶ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 16.

⁵⁷ TW Bennet “Ubuntu: An African equity” in F Diedrich (ed) *Ubuntu, good faith and equity* (2011) 3-23 3.

⁵⁸ TW Bennet “Ubuntu: An African equity” in F Diedrich (ed) *Ubuntu, good faith and equity* (2011) 3-23 3.

⁵⁹ TW Bennet “Ubuntu: An African equity” in F Diedrich (ed) *Ubuntu, good faith and equity* (2011) 3-23 3.

simple form also requires that fairness and justice dictate the outcome of any clash of interests.⁶⁰ In this way, Bennet identifies that the aim of both the English notion of equity and *ubuntu* in South African law is to ensure that fairness and justice prevail in each individual case. He advocates for the application of *ubuntu* as an African equitable principle because of the striking similarities between *ubuntu* and English equity.⁶¹ Bennett describes how in private law the full potential of *ubuntu* as an equitable principle has yet to be explored in South African law.⁶² My submission is that South African courts certainly have to take note of the equitable character of *ubuntu* in eviction cases when they apply PIE. However, *ubuntu* requires more than what common law equity requires. Equity in South Africa is restricted to the boundaries formal common law provides; *ubuntu* is an equity that justifies the pushing of such boundaries. In this regard, the section below explores whether common law equity can be equated to *ubuntu* equity as contained in PIE.

4 3 1 3 *PIE discretion and common law discretion*

There are a number of property law constructs that allow courts to exercise an equitable discretion in relation to: (a) building encroachment cases; (b) right of way of necessity cases; and (c) unjustified enrichment cases. The aim of the discussion is to determine whether parallels can be drawn between the instances where equitable solutions are sought at common law and the scope of justice and equity in terms of PIE.

(a) The courts' equitable discretion: Building encroachment

The first property law construct discussed here is found in neighbour law, more specifically the law on building encroachments. The situation might arise where an

⁶⁰ TW Bennet "Ubuntu: An African equity" in F Diedrich (ed) *Ubuntu, good faith and equity* (2011) 3-23 3.

⁶¹ TW Bennet "Ubuntu: An African equity" in F Diedrich (ed) *Ubuntu, good faith and equity* (2011) 3-23 3.

⁶² TW Bennet "Ubuntu: An African equity" in F Diedrich (ed) *Ubuntu, good faith and equity* (2011) 3-23 15.

owner's building projects or encroaches on his neighbour's property without the neighbour's consent.⁶³ In these circumstances the court is vested with an equitable discretion to ensure fair outcomes in these cases.⁶⁴

A lot of uncertainty existed in early case law, as to whether this above-mentioned discretion indeed formed part of the South African law of encroachment. Contradictory case law exists in which some courts denied that such an equitable discretion exists in South African law, while others insisted on such a discretion.⁶⁵ The opponents of the discretion rejected the contention that the equitable discretion found application in South African law on the basis that the discretion is found in English law and English equity principles.⁶⁶ The argument that South African law received Roman-Dutch

⁶³ CG van der Merwe *Sakereg* 2 ed (1989) 201; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 256; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 122; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 483; AJ van der Walt *The law of neighbours* (2010) 132. See further case law in which the courts held that a building encroachment that causes a physical intrusion on a neighbouring owner's land constitutes an infringement of the neighbouring owner's property right to exclusive use and enjoyment of her property: *Pike v Hamilton, Ross & Co* (1853-1856) 2 Searle 191; *Cape Town Municipality v Fletcher and Cartwrights Ltd* 1936 CPD 347; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

⁶⁴ CG van der Merwe *Sakereg* 2 ed (1989) 202; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 254; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 123; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 484; AJ van der Walt *The law of neighbours* (2010) 145. The court in *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 139 confirmed that courts have a discretion pertaining to the type of relief ordered in building encroachment cases. This stance was confirmed in case law, namely *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 26-28; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21.

⁶⁵ *Hornby v Municipality of Roodepoort-Maraiburg and Another* 1918 AD 278; *De Villiers v Kalson* 1928 EDL 217; *Town Council of Roodepoort-Maraiburg v Posse Property (Pty) Ltd* 1932 WLD 78 87; *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd and Another* 1971 (2) SA 397 (W) 405 are examples of early case law in favour of the existence of the discretion to award compensation rather than removal of an encroaching structure in South African law while *Higher Mission School v Grahamstown Town Council* 1924 EDL 354, 366 is an example of case law not in favour of such a discretion.

⁶⁶ See *Higher Mission School v Grahamstown Town Council* 1924 EDL 354; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O). See also AJ van der Walt *The law of neighbours* (2010) 146.

property law and not English property law principles was made in this regard.⁶⁷ The confusion and uncertainty as to whether or not this discretion found application in South African law persisted until the case of *Rand Waterraad v Bothma en 'n Ander*⁶⁸ brought certainty in this regard.⁶⁹ In *Rand Waterraad* the court concluded that South African courts indeed have a discretion in encroachment cases to keep the encroachment in place in exchange for compensation, or to order demolition of the encroachment.⁷⁰ The court reasoned that equity requires that such discretion exists in encroachment cases.⁷¹ In this regard, the court found that equity forms part of neighbour law rules. Furthermore, Roman and Roman-Dutch authors explained how important it is that courts in their application of positive law ensure equitable outcomes.⁷² Accordingly, *Rand Waterraad* is the leading case that confirms that courts have an equitable discretion in encroachment disputes.⁷³

The equitable discretion in encroachment cases is triggered when exceptional circumstances arise that require the court to decide on the type of remedy to award the owner on whose property the encroachment is found.⁷⁴ In this regard, the court

⁶⁷ *Higher Mission School v Grahamstown Town Council* 1924 EDL 35; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

⁶⁸ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

⁶⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130-138. This case was subsequently confirmed and applied in *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 26-28; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21. See also Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 38-40.

⁷⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130-138; Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 38-40.

⁷¹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138.

⁷² *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130-138.

⁷³ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 26-28 and *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21 confirmed *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130-138.

⁷⁴ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 26-28 and *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21; Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 39.

could order one of two things.⁷⁵ Firstly, the court could order that the encroachment should be removed by way of an interdict.⁷⁶ The second possible order the court may make in certain circumstances is to order that the encroachment should be left in place, but that the encroacher pay compensation to the encroached-upon owner.⁷⁷ In

⁷⁵ CG van der Merwe *Sakereg 2* ed (1989) 202 is of the opinion that the court can only make one of two orders. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 122; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 483-484 who hold that the court can order one of three remedies namely: removal; compensation or the transfer of the encroachment to the encroached-upon owner. The latter possible order was granted in three early cases, namely *Christie v Haarhoff* (1886-1887) 4 HCG 349 353, *Van Boom v Visser* (1904) 21 SC 360; *Garland v Wellink* 1957 PH J4 (W). However, Pope and Van der Merwe are of the opinion that transfer of the encroached upon land to the encroaching owner is incidental to when the court orders damages to the encroached upon owner. The award of damages may include the value of the encroached upon land, transfer costs and in some instances a *solatium*. Furthermore, Van der Walt argues that the transfer of the encroaching structure together with the encroached upon land of the encroached upon owner to the encroaching owner will generally be problematic where no agreement to that effect can be reached. See AJ van der Walt *The law of neighbours* (2010) 133-135. Accordingly, the order of compensation and transfer of the encroached upon land can be described as one remedy rather than two separate remedies.

⁷⁶ H de Groot *Inleidinge tot de Hollandsche rechtsgeleertheyd* (1631 translated by RW Lee *The jurisprudence of Holland* 1926, hereafter referred to as "Grotius") 2.34.8; CG van der Merwe *Sakereg 2* ed (1989) 202; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 122; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 483-484; AJ van der Walt *The law of neighbours* (2010) 133-135; Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 39; *Pike v Hamilton, Ross & Co* (1853-1856) 2 Searle 191; *Van Boom v Visser* (1904) 21 SC 360; *Cape Town Municipality v Fletcher and Cartwrights Ltd* 1936 CPD 347; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 26-28; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130-139.

⁷⁷ CG van der Merwe *Sakereg 2* ed (1989) 202; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 122; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 484; AJ van der Walt *The law of neighbours* (2010) 133-134; *Hornby v Municipality of Roodepoort-Maraisburg and Another* 1918 AD 278; *De Villiers v Kalson* 1928 EDL 217; *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78 87; *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd and Another* 1971 (2) SA 397 (W) 405; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281

deciding between these two possibilities the court has regard to all relevant circumstances in order to ascertain which possibility will be most equitable on the facts and circumstances of the case.⁷⁸

Similarities between the equitable discretion available to courts in encroachment cases and the equitable discretion available to courts in their application of PIE in eviction cases exist. These are: firstly, in PIE and encroachment cases the discretion allows the court to decide between (possibly two) potential orders. The encroachment discretion allows the court to order either demolition of the structure or that compensation be awarded to the affected owner instead of demolition.⁷⁹ Similarly, the court's discretion in terms of PIE allows the court to grant an eviction linked to conditions, or to refuse an eviction order.⁸⁰

Secondly, both discretions are exercised on a case by case basis by balancing opposing interests. PIE expressly recognises and mandates this balancing exercise.⁸¹

(C) para 32; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130-139.

⁷⁸ CG van der Merwe *Sakereg* 2 ed (1989) 202; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 122-123; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 483-484; Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 39; *Hornby v Municipality of Roodepoort-Maraiburg and Another* 1918 AD 278; *De Villiers v Kalsou* 1928 EDL 217; *Town Council of Roodepoort-Maraiburg v Posse Property (Pty) Ltd* 1932 WLD 78 87; *Naude v Bredenkamp* 1956 (2) SA 448 (O); *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd and Another* 1971 (2) SA 397 (W) 405; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 32-34; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21.

⁷⁹ See chapter 4, section 4.3.2.3 above. See further CG van der Merwe *Sakereg* 2 ed (1989) 202; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 122; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 483-484; AJ van der Walt *The law of neighbours* (2010) 133-135; Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 43; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 26-28; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21.

⁸⁰ See chapter 4, section 4.3.3.1 below. Sections 4 and 6 of PIE.

⁸¹ Sections 4 and 6 of PIE. See the watershed eviction case *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 13, 23, 33, 33, 35, 37, 48-58 and the recent case *Pitje v*

The common law balancing exercise in encroachment cases can be derived from the way in which courts have exercised their discretion in case law.⁸²

Thirdly, the exercise of the discretion in both contexts exists in order to ensure that the outcomes in the respective cases are equitable. PIE expressly requires that the court must ensure that justice and equity prevail in eviction cases.⁸³ This same idea comes out in *Rand Waterraad* where the court held that this discretion in encroachment cases exists because equity requires it.⁸⁴ In other words, equity must be the guiding principle in encroachment disputes.

Finally, another similarity between the discretion exercised by courts in encroachment cases and the discretion that exists in the application of PIE eviction cases, concerns the interests affected in the respective situations. In both situations the court has to decide whether the circumstances justify a limitation of an owner's right to exclusive use and enjoyment of her immovable property.⁸⁵

However, the differences between these discretions are fundamental. The main difference between the equitable discretion exercised by the court in encroachment and PIE eviction cases respectively, is found in the source of law from which the discretion originates. PIE's equitable discretion has its origins in the Constitution and in PIE that is specifically promulgated to give effect to the Constitution, while the

Shibambo and Others (144/15) [2016] ZACC 5 (24 February 2016) paras 17-21 where the Constitutional Court reiterated the role of courts in their application of PIE.

⁸² *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 40-43; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) paras 48-51.

⁸³ Sections 4 and 6 of PIE.

⁸⁴ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138-139. See also *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) para 27; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21.

⁸⁵ With regard to the discretion of courts in encroachment cases, see CG van der Merwe *Sakereg* 2 ed (1989) 201; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 121-122; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 484; AJ van der Walt *The law of neighbours* (2010) 13. With regard to the right in PIE eviction cases see *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 390; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 33.

equitable discretion in encroachment cases finds its origin in the common law. Due to this difference, other fundamental differences crop up. In the first place, courts received a new role in eviction cases in the constitutional era. They are called upon to exercise this equitable discretion in a pro-active manner.⁸⁶ The common law discretion available to courts in encroachment situations however, does not specifically, or perhaps expressly, include this element of pro-activeness and confines the exercise of the discretion to specific situations and circumstances.⁸⁷

Secondly, the fact that PIE was promulgated to give effect to the Constitution has the implication that a court's role in the exercise of its discretion in terms of PIE cases is not confined to common law principles of ownership, but to broader constitutional principles.⁸⁸ The circumstances that a court is mandated to take into consideration in PIE eviction cases refer to circumstances pertaining to the owner and the unlawful occupier who has no rights in the land, but has a constitutional access to housing right.⁸⁹ In contrast, when a court is considering the circumstances to exercise its equitable discretion in encroachment cases, such a court has regard to the ownership rights of two neighbouring property owners.⁹⁰ In other words, both parties have a

⁸⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 36, 39; *Machele and Others v Mailula and Others* 2010 (2) SA 275 (CC) para 15; *Arendse v Arendse* 2013 (3) SA 347 (C); *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (24 February 2016) paras 17-21.

⁸⁷ See *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138 for the list of principles and considerations that should direct a court in the exercise of its equitable discretion. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 121-125; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 484 for a discussion of some of these considerations.

⁸⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 11-12 where the Constitutional Court held that "PIE not only repealed PISA but in a sense inverted it: squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights".

⁸⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23 where the Constitutional Court held that "[t]he judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case".

⁹⁰ CG van der Merwe *Sakereg* 2 ed (1989) 201; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 122; CG van der Merwe & A Pope "Property" in F du Bois

recognised property right. Accordingly, the factors taken into account in terms of PIE are much broader because of the constitutional dimension and the difference in status between the two parties involved.

(b) The courts' equitable discretion: Right of way of necessity

Another property law construct that allows for an equitable discretion is found in the law of servitudes. The law of servitudes differentiates between two types of servitudes, namely personal servitudes and praedial servitudes.⁹¹ Praedial servitudes are in turn divided into two further types of servitudes, namely rural and urban servitudes.⁹² The praedial servitude that will be focussed on in this discussion is the right of way of necessity, which can be created by way of agreement or by way of a court order.⁹³ A court ordered right of way of necessity is significant because it is created by a forced transfer of rights, by way of a court order, when a court exercises its discretion in favour of the dominant tenement owner after taking all relevant factors into

(ed) *Wille's principles of South African law* 9 ed (2007) 405-729 483; AJ van der Walt *The law of neighbours* (2010) 132.

⁹¹ J Voet *Commentarius ad Pandectas* (1829 translated by P Gane *Commentary on the Pandect* 1958, hereafter referred to as "Voet") 1.1.20; Voet 8.1.2; CG van der Merwe *Sakereg* 2 ed (1989) 459; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 527; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 321; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 592; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 15; *Dreyer v Letterstedt's Executors* (1864-1867) 5 Searle 88 99; *Maclear Divisional Council v Norton* 1918 CPD 16 23; *Lorentz v Melle* 1978 (3) SA 1044 (T) 1049-1050.

⁹² Voet 8.1.3; CG van der Merwe *Sakereg* 2 ed (1989) 479; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 326; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 597 and TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 18.

⁹³ CG van der Merwe *Sakereg* 2 ed (1989) 485; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 715; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 328; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 598; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation, Stellenbosch University (2013) 26. *Wilhelm v Norton* 1935 EDL 143; *Van Rhyne and Others NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521 (WCC) paras 15-16.

consideration.⁹⁴ The basis for this discretion is set out in the case of *English v CJM Harmse Investments CC and Another*.⁹⁵ In *English* the court explained that an interference with ownership rights should take place only if fairness and reasonableness, necessitate and require such interference.⁹⁶ In this regard, fairness and reasonableness are dictated by public policy.⁹⁷ Furthermore, the court held that the servitude of right of way of necessity constitutes such circumstances in which reasonableness and fairness necessitate the creation of a right by way of a court order.⁹⁸

In the first place the court has a discretion to establish the right of way of necessity by means of a court order⁹⁹ where the circumstances indicate that it is reasonably necessary for such right of way of necessity even if its establishment goes against the owner's will.¹⁰⁰ The ultimate decision of the court rests on weighing up the respective

⁹⁴ CG van der Merwe *Sakereg* 2 ed (1989) 490-491; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 328; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 71-72, 171.

⁹⁵ 2007 (3) SA 415 (N).

⁹⁶ *English v CJM Harmse Investments CC and Another* 2007 (3) SA 415 (N) 422. See also CG van der Merwe & JM Pienaar "The law of property (including servitudes)" 2007 *ASSAL* 961-1038 1028; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 83.

⁹⁷ Anonymous "Way of necessity: *Hancock v Henderson*" (1965) 25 *Maryland Law Review* 254-259 258; MD Southwood *The compulsory acquisition of rights* (2000) 106; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 83, 123.

⁹⁸ *English v CJM Harmse Investments CC and Another* 2007 (3) SA 415 (N) 423. See also TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 83.

⁹⁹ CG van der Merwe *Sakereg* 2 ed (1989) 485; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 328; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 25-26.

¹⁰⁰ CG van der Merwe *Sakereg* 2 ed (1989) 485; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 716; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 328; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 25-26; *Wilhelm v Norton* 1935 EDL 143; *Beukes v Crous & 'n Ander* 1975 (4) SA 215 (NK).

interests of the parties.¹⁰¹ This weighing exercise is then followed by a decision to confirm or not to confirm the right of way of necessity.

In the second place, the court has a discretion to alter a right of way of necessity.¹⁰² The justification for alteration of the right of way of necessity is based on the existence of changed circumstances which necessitate a change in the right of way of necessity.¹⁰³ The discretion must be exercised with due regard to the opposing interests and especially the changed circumstances. Accordingly, a balance must be struck between the respective interests of the parties. In this regard, the court will exercise its discretion in favour of the interest that weighs the heaviest.

There are a number of similarities between the discretion exercised by courts in the context of the right of way of necessity cases, and the discretion exercised by courts in the PIE eviction cases. Firstly, the discretion in both instances always gives the court a choice between two different potential orders. In the second place, both discretions turn on what the circumstances of the case require. In other words, the discretion of a court to grant a right of way of necessity and the PIE eviction discretion both require courts to approach and apply its discretion in a context-sensitive manner. Thirdly, it is evident that the right of way of necessity discretion and the PIE eviction discretion require of the court to balance the respective opposing interests of the parties in order to come to a conclusion that is mutually beneficial. Fourthly, the discretion in both instances has the same goal. This goal is to ensure that the court

¹⁰¹ *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 675; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 330; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 38-39. Raphulu coins the weighing up exercise as a "balancing of convenience" exercise.

¹⁰² CG Hall & EA Kellaway *Servitudes* 3 ed (1973) 78; CG van der Merwe *Sakereg* 2 ed (1989) 491; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 330; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 50-51; *Wynne v Pope* 1960 (3) All SA 1 (C).

¹⁰³ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 330; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 50-51; *Naude v Ecoman Investments* 1994 (3) SA 95 (T) 99; *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA). The guideline principles laid down in *Linvestment CC v Hammersley and Another* should be followed for purposes of considering amending a right of way of necessity.

order will reach equitable results. Finally, both the discretions allow for a limitation on an owner's right to exclusive use and enjoyment of her property.

Although the above similarities exist between the court's discretion to grant a right of way of necessity and the court's discretion in the context of the PIE eviction cases, fundamental differences can also be identified. Similar to the court's exercise of its common law discretion in encroachment cases, the court's discretion in the context of the right of way of necessity cannot completely be equated to the court's discretion in eviction cases. The reasons are: firstly, that the discretion of the court in the right of way of necessity cases is a common law discretion, while the discretion that the court has in terms of PIE eviction cases is a constitutional discretion; secondly, that the court in eviction cases is mandated to take up a managerial and pro-active role, while this is not pertinently required of courts when they exercise common law discretions; and finally, that the court's discretion in PIE eviction cases is subject to broader constitutional considerations and principles rather than common law principles and rules only.

(c) The courts' equitable discretion: Unjustified enrichment

The law of unjustified enrichment also vests the court with an equitable discretion comparable to the discretion that exists in terms of PIE. This discretion applies to the adjudication of a specific enrichment claim called the *condictio ob turpem vel iniustam causam*. The *condictio ob turpem vel iniustam causam* enrichment action can be instituted in the event where a party to an illegal agreement has lost economic benefits to the advantage of another.¹⁰⁴ Unjustified enrichment law is aimed at restoring economic benefits to those who have lost benefits to another without there being a legal justification for such loss, and concomitant benefit.¹⁰⁵ The generally accepted

¹⁰⁴ W de Vos *Verrykingsaanspreeklikheid in die Suid Afrikaanse reg* 3 ed (1987) 158; D Visser *Unjustified enrichment* (2008) 442; JC Sonnekus *Unjustified enrichment in South African law* (2008) 140; JE du Plessis *The South African law of unjustified enrichment* (2012) 197; *Jajbhay v Cassim* 1939 AD 537; *Padayachey v Lebeso* 1942 TPD 10; *Osman v Reis* 1976 (3) SA 710 (C).

¹⁰⁵ W de Vos *Verrykingsaanspreeklikheid in die Suid Afrikaanse reg* 3 ed (1987) 158; JC Sonnekus *Unjustified enrichment in South African law* (2008) 3. Sonnekus explains that "[t]he norms of the law of

requirements that must be met for a claimant to succeed with a *condictio ob turpem vel iniustam causam* are: firstly, that ownership must have passed in the transfer; secondly, that the agreement that led to the transfer must be an unlawful agreement; and finally, that the claimant must claim for the return of the transferred benefit.¹⁰⁶ It is in terms of this last requirement that the court has a discretion to make a decision on the basis of policy and fairness considerations.¹⁰⁷ The last requirement invokes the *par delictum* rule of contract law. This rule dictates that the party who institutes the *condictio ob turpem vel iniustam causam* must show that she is free of turpitude (dishonourable or illegal conduct).¹⁰⁸ However, the *par delictum* rule is not applied in an inflexible manner. In *Jajbhay v Cassim*¹⁰⁹ the court confirmed that courts have a discretion to relax the *par delictum* rule so as to prevent injustices from occurring in order to promote fairness and equity.¹¹⁰

What can be taken from the above brief discussion is that whether or not a claimant would succeed with a claim for purposes of the *condictio ob turpem vel iniustam causam* essentially depends on the court's assessment of what fairness dictates in the

enrichment are invoked once no relevant legal ground can be identified for sustaining the patrimonial transfer".

¹⁰⁶ D Visser *Unjustified enrichment* (2008) 441-453; JC Sonnekus *Unjustified enrichment in South African law* (2008) 132; JE du Plessis *The South African law of unjustified enrichment* (2012) 197-204; *Jajbhay v Cassim* 1939 AD 537; *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 15.

¹⁰⁷ D Visser *Unjustified enrichment* (2008) 453; JE du Plessis *The South African law of unjustified enrichment* (2012) 204-205; *Jajbhay v Cassim* 1939 AD 537; *Padayachey v Lebeso* 1942 TPD 10 12; *Osman v Reis* 1976 (3) SA 710 (C) 712; *Lende v Goldberg* 1983 (2) SA 284 (C) 286.

¹⁰⁸ D Visser *Unjustified enrichment* (2008) 443; JC Sonnekus *Unjustified enrichment in South African law* (2008) 140; JE du Plessis *The South African law of unjustified enrichment* (2012) 204-205; *Jajbhay v Cassim* 1939 AD 537; *Padayachey v Lebeso* 1942 TPD 10 12; *Osman v Reis* 1976 (3) SA 710 (C) 712; *Lende v Goldberg* 1983 (2) SA 284 (C) 286.

¹⁰⁹ 1939 AD 537.

¹¹⁰ *Jajbhay v Cassim* 1939 AD 537; *Padayachey v Lebeso* 1942 TPD 10 12; *Osman v Reis* 1976 (3) SA 710 (C) 712; *Lende v Goldberg* 1983 (2) SA 284 (C) 286. See further JE du Plessis *The South African law of unjustified enrichment* (2012) 205.

specific case before it. This assessment is in the form of a discretion exercised with guidelines found in enrichment law.¹¹¹

There are a few similarities between the discretion as applied in the context of the *par delictum* rule in an enrichment claim, and the discretion of courts in PIE eviction cases. Firstly, both remedies allow the court to decide between two different options with distinct consequences based on the context of each case. Secondly, both discretions have the same purpose, namely to ensure equitable outcomes in each individual case. Finally, these discretions require that courts apply a context-sensitive approach to each case in order to ascertain what fairness and equity require in the particular case.

However, these two discretions are not completely the same. They are fundamentally different in the same way that the courts' discretion in both encroachment and right of way of necessity cases, illustrated above, differs from the courts' discretion in terms of PIE. Again, the source of law, the mandate of the court and the principles applicable to the discretion are not the same in the context of the *par delictum* rule in an enrichment claim as the discretion required of courts in terms of PIE. Accordingly, what is apparent from the above discussion of the three identified common law discretions, in the law of property and the law of unjustified enrichment, is that these discretions have certain similarities with the courts' discretion in the context of evictions in terms of PIE. However, the differences, between these private law discretions and the court's discretion in terms of PIE, highlight that the discretion of courts in terms of PIE is fundamentally different from the other discretions. PIE requires more of courts than what private law rules pertaining to the exercise of the discretion of courts mandate.

4 3 2 PIE in a human rights-paradigm

The above discussion relating to the discretion courts have in terms of PIE and the common law revealed that the distinguishing characteristics of these discretions render them irreconcilable. In PIE eviction cases the source of the discretion is the

¹¹¹ See D Visser *Unjustified enrichment* (2008) 449; JE du Plessis *The South African law of unjustified enrichment* (2012) 205 for more on these guidelines.

Constitution.¹¹² This means that PIE was promulgated primarily to give effect to constitutional provisions. The fact that PIE is a constitutionally-ordained legislative measure is the primary consideration from which the unique character of PIE flows. It is also the basis on which it is distinguished from common law discretions that are based on common law principles grounded in equity.

In the first place, PIE protects constitutional rights and is therefore subject to broader constitutional imperatives.¹¹³ In particular, PIE gives effect to sections 25 and 26(3) of the Constitution.¹¹⁴ Both these rights require regard for broad societal considerations and human rights. In line with this observation, Pienaar argues that PIE has added a human rights paradigm to the way in which evictions must be dealt with.¹¹⁵ This human rights approach allows for factors other than property rights to be considered in eviction cases.¹¹⁶ Interestingly, these factors do not refer to existing property rights only, but rather refer to the unique circumstances of the most marginalised and vulnerable in order to protect their fundamental rights, including human dignity, equality and a right to a fair trial.¹¹⁷ These considerations allow for an outcome where existing private law rights are considered as equal to other relevant factors in eviction cases.¹¹⁸ Accordingly, Van der Walt identifies that PIE challenges the foundations of

¹¹² Sections 26(3) and 25 of the Constitution. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 242; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 270; AJ van der Walt *Constitutional property law* 3 ed (2011) 521-522; JM Pienaar *Land reform* (2014) 661; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11.

¹¹³ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 242; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 270; AJ van der Walt *Constitutional property law* 3 ed (2011) 521-522; JM Pienaar *Land reform* (2014) 661; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11. These broader societal considerations are described by the court in *PE Municipality* as the constitutional matrix.

¹¹⁴ See chapter 3, section 3.2.2.1 for a discussion of the dual function of PIE.

¹¹⁵ JM Pienaar *Land reform* (2014) 667-669.

¹¹⁶ JM Pienaar *Land reform* (2014) 668; AJ van der Walt *Constitutional property law* 3 ed (2011) 521-522.

¹¹⁷ AJ van der Walt *Property in the margins* (2009) 151.

¹¹⁸ AJ van der Walt *Property in the margins* (2009) 149, 151, 154; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 254; S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 274; AJ van der Walt *Constitutional*

the traditional civil law property regime.¹¹⁹ The same cannot be said with regard to the common law discretions that are based on equity principles as discussed above. The courts' discretions in terms of encroachment, the right of way of necessity and enrichment claim cases are all founded in the common law. These discretions do not apply to anything beyond the relationship between property right holders. The objective of these discretions is therefore ordinarily to balance competing private law rights,¹²⁰ which applicable policy is usually found in law and economics so that efficient outcomes are reached. Accordingly, the discretions exercised in these cases are common law discretions, aimed at achieving the most economically viable outcomes.¹²¹ As a result, these discretions do little to challenge the existing property regime, instead, they entrench the hierarchical relationship between rights and no rights in that they only concern disputes between parties with existing property rights and the concomitant protection of economic interest and efficiency. In other words, where a right weaker than ownership is allowed to trump ownership, it is because the balance of convenience dictates that such an outcome is the most efficient.¹²²

property law 3 ed (2011) 521-522; JM Pienaar *Land reform* (2014) 668; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 48; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 16, 23.

¹¹⁹ AJ van der Walt *Property in the margins* (2009) 73.

¹²⁰ Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 62-63; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 38-39.

¹²¹ Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 62-63; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 38-39. See for example the factors the court took into consideration in: *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 13; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) para 40.

¹²² The balance of convenience refers to the balancing of the inconvenience both parties may suffer respectively in order to determine which inconvenience is greater than the other. See further Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 155; TN Raphulu *The right of way of necessity: A constitutional analysis* LLM dissertation Stellenbosch University (2013) 90; *English v CJM Harmse Investments and Another* 2007 (3) SA 415 (N) 421.

Furthermore, the fact that PIE is constitutionally ordained and operates in a human rights paradigm has an implication for the role of courts in eviction cases. As explained by the landmark decision *PE Municipality*, the court has a central role to fulfil in PIE eviction cases.¹²³ Courts are required to be pro-active in eviction proceedings in order to ensure that the relevant considerations are presented to it.¹²⁴ Such an approach to evictions will ensure that the most vulnerable and marginalised are protected against arbitrary evictions. In contrast, the common law regulates the prescribed role of the court through the adversarial system. The adversarial system as explained above prescribes that courts take up a passive and uninvolved managerial role.¹²⁵ Accordingly, when courts apply common law discretions they are ordinarily restricted to the pleadings of the case and may only apply practice rules to the proceedings and applicable substantive rules to the legal issues.

Badenhorst, Pienaar and Mostert identify a list of the objectives of PIE on the basis of eviction case law. They observe that PIE purports (a) to regulate evictions, (b) to provide just and equitable outcomes by balancing competing interests to ultimately protect and advance human rights, (c) to provide those unlawful occupiers facing potential eviction a fair trial, (d) to provide substantive and procedural protection to unlawful occupiers, (e) to repeal the PISA and (f) to amend the common law. These objectives of PIE indicate the strong commitment PIE has to ensuring that the eviction of unlawful occupiers occurs within a human rights paradigm as opposed to a pure property rights paradigm. PIE's reference to equity does not refer to equity in the common law sense, because common law equity sets out to only mediate opposing property rights in a property rights paradigm. Instead, the just and equitable requirement in PIE refers to a much broader notion of equity, one where fundamental human rights as enshrined in the Bill of Rights are central to the question whether an eviction order can be granted. This should be the approach courts endorse when applying the provisions of PIE to ensure that eviction cases are adjudicated as mandated by the Constitution.

¹²³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 36, 39.

¹²⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 36, 39; *Machele and Others v Mailula and Others* 2010 (2) SA 275 (CC) para 15; *Arendse v Arendse* 2013 (3) SA 347 (C); *Pitje v Shibambo and Others* (144/15) [2016] ZACC 5 (24 February 2016) paras 17-21.

¹²⁵ See chapter 2, section 2.5 above.

Interestingly, chapter three reveals the fact that, practically, the courts' actual approach to PIE's procedural and substantive requirements in the constitutional context is not always completely in line with the constitutional standard of eviction.¹²⁶ The section on the application of the procedural requirements of PIE has indicated that PIE provides a landowner with an application procedure. This application process is regulated by the provisions of PIE and by the application procedure as set out in the Uniform Rules of Court.¹²⁷ Furthermore, an analysis of case law pertaining to the threshold requirements namely standing, unlawfulness, service of documents and joinder of interested parties indicates that courts are called upon, even when they deal with threshold questions, to follow a context-sensitive approach.¹²⁸ Chapter three also showed that *ubuntu* in addition requires that courts apply the substantive requirements of PIE with the same context-sensitive approach so as to advance the just and equitable requirement entrenched in PIE.¹²⁹ However, case law has highlighted that the courts' application of the substantive requirements of PIE sometimes lacks context-sensitivity and the values advanced by the philosophical framework of *ubuntu*.¹³⁰ The section below will determine to what extent the courts' failure to apply PIE within a human rights paradigm as the Constitution mandates relates to courts' pre-constitutional legal culture.

¹²⁶ See chapter 3, section 3.3.1 above.

¹²⁷ Section 4 of PIE.

¹²⁸ See chapter 3, section 3.2.3.1 above. *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

¹²⁹ See chapter 3, section 3.2.2 above. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

¹³⁰ See chapter 3, section 3.2.3.2 above. See *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 395; *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 (4) All SA 410 (SCA) para 3; *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC (5 February 2009) para 12.

4 3 3 Legal culture and eviction remedies

As previously explained, with regard to Bhana's definition of legal culture,¹³¹ legal culture informs the courts' understanding and attitude towards the application of eviction remedies. As a result, legal culture has an impact on how courts ultimately approach and apply the constitutional eviction remedy, PIE. Therefore, the pivotal point of consideration is whether the application of PIE by the courts is contrary to the approach prescribed by *PE Municipality* and whether this can be associated with the existing legal culture of the courts that might still contain the pre-constitutional theoretical underpinnings and background assumptions of formalism, conservatism and set hierarchies.

In chapter three a number of cases were discussed, all of which pointed out that some courts are resisting the proper application of PIE. These cases highlight the apparent disconnect between the courts' approach to the substantive requirements of PIE and how courts are supposed to approach the provisions of PIE. *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another*¹³² ("*Modderklip HC*") shows that courts adopt a conservative and hierarchical approach to the application of PIE by way of ascribing far more weight to the interest of owners than to the interest of unlawful occupiers.¹³³ *Voster v Van Niekerk*,¹³⁴ *Daisy Dear Investments (Pty) Ltd and Others*¹³⁵ and *Shibambo and Others v Pitje*¹³⁶ ("*Pitje HC*") were instrumental in showing that some courts still fail to ensure that they are in a position to have regard to all relevant rights, interests and circumstances of the parties involved in order to properly exercise their just and equitable discretion.¹³⁷ Finally, *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*¹³⁸ indicates that courts are very uncomfortable with applying PIE and that they would much rather

¹³¹ See chapter 3, section 3.1 above. See D Bhana "The role of judicial method in contract law revisited" (2015) 132 *SALJ* 122 124.

¹³² 2001 (4) SA 385 (W).

¹³³ See chapter 2, section 2.2.3.3; chapter 3, section 3.2.3.2.2 above.

¹³⁴ (6723/2008) [2009] ZAFSHC 9 (5 February 2009).

¹³⁵ 2009 (4) All SA 410 (SCA).

¹³⁶ (77700/2010) [2015] ZAGPPHC 89 (17 February 2015).

¹³⁷ See chapter 3, section 3.2.3.2.2 above.

¹³⁸ 2013 (1) SA 583 (GSJ).

prefer to apply rules in a mechanical fashion. In that instance the approach exhibited by the court arguably reflected pre-constitutional conservatism and formalism to the adjudication of eviction cases.

What is apparent from chapter three is that some lower courts seem to struggle to abandon the hierarchical, formalistic and conservative manner with which they applied eviction remedies in the pre-constitutional era. Furthermore, the case law illustrates that some lower courts do not always understand and comprehend what is expected of them in eviction cases, although *PE Municipality* has expressly and boldly highlighted the new role of courts in PIE eviction cases.¹³⁹ Based on the above, I submit that some courts, especially the lower courts, still identify with the pre-constitutional concept of, and approach to, ownership, which automatically invokes the hierarchical approach to the protection thereof. Furthermore, courts cling to that which is familiar, namely a mechanical and hierarchical manner of adjudicating property disputes. This phenomenon may be ascribed to the presence of very rich formalism and conservatism that forms part of courts' pre-constitutional legal culture. This contributes to some courts struggling with the application of the requirement in PIE that an eviction order must be just and equitable and, correspondingly, with the application of a context-sensitive approach within the requisite human rights paradigm. The implication of this pre-constitutional tendency in the constitutional context of evictions is that the constitutional purposes for eviction are not achieved because the vehicles which were set in place to ensure that the goals of the Constitution are reached, are disregarded. Justice and equity are accordingly not always attained in the context of eviction.

The fact that the above-mentioned failures of courts have direct implications for the protection of the constitutional rights of unlawful occupiers cannot be disputed. Where courts fail in the ways described above the orders made by the court would invariably fall short of the requirements of section 26(3) of the Constitution.¹⁴⁰ In this respect, the

¹³⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 13.

¹⁴⁰ See S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 27 where Liebenberg observes that "[j]ustice and equity are the pre-requisite for granting an eviction order in terms of PIE. The Act gives effect to the requirement in s 26(3) of the Constitution that a court must consider 'all the relevant circumstances' before granting an order evicting people from their homes". Accordingly, where a court fail to take into consideration all the relevant factors due to pre-constitutional

rights of the unlawful occupiers would not adequately be given effect to. In contrast, the impact that these above-mentioned failures may have on an owner's section 25 constitutional property rights might not be so obvious. Accordingly, the section below explores whether the courts' failure to approach and apply PIE as mandated by the Constitution due to pre-constitutional legal culture is problematic for landowners. While this is not the primary aim of the study undertaken here, this brief exploration follows logically subsequent to the findings of the approach analysis.

4 3 4 The implications of the courts' failures on landowners' right to evict

This section briefly determines what the impact of the above failures of courts are on landowners' eviction rights in light of section 25(1) of the Constitution. A particular focus is placed on the impact of the courts' approach on the position of landowners due to their relatively strong position in the pre-constitutional era.¹⁴¹ In this regard, the section below sets out: (a) the general test for section 25 infringements and (b) an exploration of the implications for landowners where courts fail to apply PIE as mandated by way of an section 25 analysis.¹⁴² This will allow for broad conclusions to be drawn about whether the courts' failure to apply PIE as mandated is problematic for landowners.

4 3 4 1 *The section 25 test: FNB methodology*

Section 25 of the Constitution expressly regulates deprivations and expropriations of property.¹⁴³ Its purpose is to find a proportionate balance between the protection of

legal culture and thereafter grant an eviction order the failure of the court in this regard will lead to unlawful occupiers' section 26(3) rights being infringed upon.

¹⁴¹ See chapter 2, section 2.2 above.

¹⁴² This section is not focussed on establishing the constitutionality of PIE per se, or the constitutionality of the courts' conduct. Rather these issues are explored here as a consequence of the primary findings. Here, the focus falls on the landowner's position because of the landowner's strong position in the pre-constitutional era.

¹⁴³ Section 25 of the Constitution reads as follows:

“(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application -

existing property rights and the promotion and protection of the public interest.¹⁴⁴ Consequently, where an infringement of property is alleged, such infringement can be tested against the requirements contained in section 25 in order to determine the constitutional validity of the infringement. The requirements for a valid deprivation of property are set out in section 25(1) of the Constitution, while the requirements for expropriation are set out in section 25(2).

*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*¹⁴⁵ developed a methodology for the adjudication of constitutional property law disputes.¹⁴⁶ According to *FNB* the point of departure for a section 25 analysis is whether an arbitrary deprivation of property occurred in terms of section 25(1).¹⁴⁷

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

¹⁴⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 48; T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-3.

¹⁴⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

¹⁴⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 58; P Dhliwayo *A constitutional analysis of access rights that limit landowners’ right to exclude* LLD dissertation Stellenbosch University (2015) 206.

¹⁴⁷ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 60. See further *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 28; AJ van der Walt *Constitutional Property law* 3 ed (2011) 75; T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-9. However, case law has indicated that courts are willing to skip the deprivation question by starting with the expropriation question in situations where it is clear from the outset that the case does not involve a deprivation, but rather an expropriation. In this regard see *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Haffejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC); *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC); AJ van der Walt *Constitutional property law* 3 ed (2011) 225; E Marais “When does state interference with property (now) amount to expropriation? An analysis of the Agri SA court’s state acquisition requirement (Part I)” (2015) 18 *PELJ* 2983 2985.

Section 25(1) gives rise to a number of subsidiary questions. Firstly, it should be determined whether the alleged infringed interest constitutes “property” for purposes of section 25(1) of the Constitution.¹⁴⁸ In *FNB* the court established that the property concept has to be interpreted generously,¹⁴⁹ when it decided that it would not be wise to ascribe a fixed meaning to constitutional property.¹⁵⁰ It held that ownership of land is central to the constitutional concept of property although property is not limited to land.¹⁵¹ If a court finds that the interest qualifies as property for purposes of section 25, the threshold requirement for a section 25 analysis has been met and the court can proceed to the second question.¹⁵²

¹⁴⁸ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 46(a), 51.

¹⁴⁹ Subsequent case law followed this generous approach to the interpretation of constitutional property. See *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 32; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 104.

¹⁵⁰ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51; AJ van der Walt *Constitutional property law* 3 ed (2011) 84.

¹⁵¹ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. See also AJ van der Walt *Constitutional property law* 3 ed (2011) 93. Subsequent cases and academic literature have held that certain property interests amount to constitutional property for purposes of section 25(1). In this regard, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51 has held that ownership of land constitutes constitutional property. In *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) paras 1-40; *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2007 (6) SA 350 (CC) the Constitutional Court accepted that intellectual property was property for purposes of section 25(1); in *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 63 the Constitutional Court held that personal rights such as the right to restitution of money paid was constitutional property.

¹⁵² AJ van der Walt *Constitutional property law* 3 ed (2011) 85; T Roux “Property” in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-12.

The second question that arises is whether a deprivation of the identified property interest has taken place.¹⁵³ In *FNB* the court explained that a deprivation refers to any interference with the use, enjoyment or exploitation of private property belonging to a right or title holder of the concerned property.¹⁵⁴ However, it is important to understand that deprivations are part of the normal regulation of property interests and will only be invalid if they are arbitrary or not authorized by law of general application, as required by section 25(1).¹⁵⁵ Section 25 therefore ensures that regulatory measures imposed on property rights are not arbitrary.¹⁵⁶ Accordingly, where a deprivation is present and it proves to comply with section 25(1), the deprivation constitutes a legitimate regulatory measure.¹⁵⁷ If a court finds that on the facts of a particular case a deprivation of property has not taken place the inquiry will come to an end based on the fact that where there is no deprivation, there will be no infringement in terms of section 25. However, in the event that the deprivation question is answered in the

¹⁵³ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 46,57.

¹⁵⁴ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 35; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 73. However, the court has been inconsistent with its description or explanation of what a deprivation is. In both *Mkontwane v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 32 and *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 66 the Constitutional Court held that “[w]hether there has been a *deprivation* depends on the extent of interference with the use, enjoyment or exploitation of the constitutionally protected property”. This inconsistency has been described as a development of the concept of deprivation by the Constitutional Court. In this regard see *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 35.

¹⁵⁵ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

¹⁵⁶ AJ van der Walt *Constitutional property law* 3 ed (2011) 17.

¹⁵⁷ AJ van der Walt *Constitutional property law* 3 ed (2011) 17.

affirmative, the court will move on to establish whether such deprivation is consistent with the requirements as set out in section 25(1) of the Constitution.¹⁵⁸

As explained above, the test for a valid deprivation is found explicitly in section 25(1) of the Constitution. Section 25(1) requires that a deprivation should firstly, be authorized by law of general application and secondly, that it should not be arbitrary.¹⁵⁹ A law of general application refers to a law or a rule that is authorised by valid and properly promulgated legislation, regulation, subordinate legislation other than regulations, municipal by-laws, rules and principles of common law and customary law, rules of court and international conventions that apply to the citizenry.¹⁶⁰ In other words, the rule or law should be a valid rule and should not apply selectively to only specific individuals or members of groups.¹⁶¹

Secondly, section 25(1) requires that the law of general application may not permit arbitrary deprivation of property.¹⁶² According to *FNB*, the arbitrariness question has two legs, namely the substantive arbitrariness leg and the procedural arbitrariness

¹⁵⁸ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

¹⁵⁹ Section 25(1) of the Constitution. See also AJ van der Walt *Constitutional property law* 3 ed (2011) 218.

¹⁶⁰ S Woolman & H Botha "Limitations" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 34-1 34-53. See also AJ van der Walt *Constitutional property law* 3 ed (2011) 232-237 for an explanation of the requirements any law or rule must comply with in order to constitute law of general application.

¹⁶¹ S Woolman & H Botha "Limitations" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 34-1 34-50; T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-21.

¹⁶² See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61. The *FNB* methodology regarding the arbitrariness question was followed in subsequent case law, namely: *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 65; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 48; *Haffejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC) para 27; *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 49; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 77.

leg.¹⁶³ The court explained that substantive arbitrariness concerns establishing sufficient reason for the deprivation. In this regard, whether or not sufficient reason for the deprivation is established is determined by investigating a complexity of relationships depending on the facts of each particular case.¹⁶⁴ These are; the relationship between the means employed and ends sought to be achieved; the relationship between the purpose of the deprivation and the person whose property rights are affected; the purpose of the deprivation and the nature of the property, having regard to the extent of the deprivation on the particular property. More specifically, in the context of the last consideration it needs to be determined whether all the incidents of ownership are affected, or whether only some incidents are entirely or partially affected. The reason advanced for the deprivation is required to be more compelling in cases where the deprivation affects all the incidents of ownership, completely.¹⁶⁵ The nature and extent of the deprivation will indicate whether, based on the facts of the case, a mere rationality inquiry will be enough to establish sufficient reason for a deprivation, or whether something closer to a proportionality inquiry is more appropriate to determine the validity of the deprivation.¹⁶⁶ Therefore, a court is enjoined to decide which test for establishing sufficient reason should be employed with regard to the extent of the deprivation in the particular case, in order to ultimately determine whether a deprivation is arbitrary.¹⁶⁷

¹⁶³ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁶⁴ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 99.

¹⁶⁵ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁶⁶ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁶⁷ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

Where the deprivation is arbitrary and therefore does not comply with the section 25(1) requirements, *FNB* mandates that the section 36 limitation test be applied to determine if such a limitation of the property right is nonetheless justifiable in an open and democratic society based on equality, human dignity and freedom.¹⁶⁸ However, there is support in academic literature that section 36 falls into redundancy where the section 25 test is applied.¹⁶⁹ Roux¹⁷⁰ and Currie and De Waal¹⁷¹ argue that the section 36 limitation test is only available theoretically. These scholars explain that (a) where there is no law of general application, section 36 cannot be applied; and (b) that deprivation of property that is arbitrary is not likely to meet the reasonableness and justifiable standard of section 36(1).¹⁷² Case law supports these arguments by showing that where a deprivation is found to be arbitrary, it is unlikely that a section 36 analysis would save it from unconstitutionality.¹⁷³ Interestingly, Van der Walt agrees that the relationship between section 25 and section 36 of the Constitution is not perfect, but he argues that this imperfection does not mean that the section 25 test is

¹⁶⁸ See also *See First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 110.

¹⁶⁹ See T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-26; I Currie & J De Waal J *The Bill of Rights handbook* 6 ed (2013) 557-559.

¹⁷⁰ T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-26.

¹⁷¹ I Currie & J De Waal J *The Bill of Rights handbook* 6 ed (2013) 557-559.

¹⁷² See T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-26; I Currie & J De Waal *The Bill of Rights handbook* 6 ed (2013) 557. However, Roux concedes that where the standard of the arbitrariness test is lower, in other words, the sufficient reason measure is applied instead of a full proportionality review, the section 36 limitation test may have some significance. See T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 46-27.

¹⁷³ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) paras 73-76; *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 49 and *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 87. See also AJ van der Walt *Constitutional property law* 3 ed (2011) 74.

not adequate.¹⁷⁴ In contrast, Van der Walt applauds the robust and substantive approach that the court applied to the deprivation issue in the *FNB*-judgment.¹⁷⁵

What remains curious for purposes of this study is whether situations where courts fail to apply PIE as mandated, by not having regard to all relevant rights, interests and circumstances, would infringe on a landowner's section 25 rights. The section below explores whether failure by courts to approach and apply PIE with the necessary context-sensitive approach may result in landowners being arbitrarily deprived of their property rights.

4 3 4 2 Possible consequence for landowners when courts disregard their mandate in terms of PIE

It has been established that the outcome of eviction cases, pertaining to unlawful occupation in terms of PIE, really depends on the circumstances of each individual case.¹⁷⁶ However, on the basis of cases decided since the promulgation of PIE, one can make a deduction that a court having to decide on whether to grant an eviction order, essentially has three different possible orders it can make.¹⁷⁷ These are: (a) to grant an eviction order with no reservations; (b) to grant an eviction order but suspend its enforcement; and finally (c) to refuse to grant an eviction order. Where the courts

¹⁷⁴ AJ van der Walt "Striving for a better interpretation - A critical reflection on the Constitutional Court's Harksen and FNB decisions on the property clause" (2004) 121 *SALJ* 854 873.

¹⁷⁵ AJ van der Walt "Striving for a better interpretation - A critical reflection on the Constitutional Court's Harksen and FNB decisions on the property clause" (2004) 121 *SALJ* 854 873.

¹⁷⁶ See chapter 3, section 3.4 above. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 36.

¹⁷⁷ See the following PIE eviction cases that have led to this preposition: *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE); *FHP Management (Pty) Ltd v Theron and Another* 2004 (3) SA 392 (C); *Davids and Others v Van Straaten and Others* 2005 (4) SA 468 (C); *Kanescho v Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D); *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D) 113; *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06 [2006] ZAGPHC 39 (28 April 2006)); *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC (5 February 2009); *Wine v Zondani* (2044/08) [2009] ZAECHC 19 (26 February 2009); *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown and Others* 2013 (2) All SA 236 (KZD).

fail to embrace their new role in eviction cases in the constitutional era it is expected that the rights and interests of unlawful occupiers will not find adequate protection *via* the provisions of PIE. However, the impact of such failure on the owners' rights has not been reiterated and explained with regard to section 25 of the Constitution. Such an exploration might be interesting in light of the strong positions landowners enjoined in the pre-constitutional era.¹⁷⁸ Accordingly, the exercise of the courts' discretion that results in (a) eviction orders; (b) suspensive eviction orders; and (c) no eviction orders is scrutinized in light of section 25 of the Constitution in order to determine the way in which failure on the courts' part to adequately approach and apply PIE impacts on landowners' rights to evict.

(a) The first possible order: The granting of an eviction order

The court may order the eviction of the unlawful occupiers in favour of the landowner.¹⁷⁹ The implication of this outcome is that the court order will confirm that the landowner is entitled to an eviction order in the particular circumstances. However, the decision to grant the eviction order will not exclusively rest on the ownership of the landowner.¹⁸⁰ The strength of the owner's entitlement to exclude in the constitutional era is founded on what is just and equitable in the circumstances. Such strength should no longer be founded solely on an owner's right to evict as depicted by the characteristics of ownership, set out in chapter two above. Normatively, this means that the context in which the landowner would be entitled to an eviction order is not based on the meaning of ownership as individualistic, abstract or complete. Rather, it concerns whether in the particular circumstances the granting of an eviction order would be just and equitable. In this instance, the landowner's right to evict will find complete operation as there are no circumstances that necessitate limiting or weakening the landowner's right to evict.¹⁸¹

¹⁷⁸ See chapter 2, section 2.2.3 above.

¹⁷⁹ See *FHP Management (Pty) Ltd v Theron and Another* 2004 (3) SA 392 (C); *Dauids and Others v Van Straaten and Others* 2005 (4) SA 468 (C); *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D) 113.

¹⁸⁰ See *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D) 106.

¹⁸¹ *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D) 113.

In the event where a court fails to have regard to all rights, interests and circumstances of the parties involved and subsequently grant an eviction order the affected landowner will not be prejudiced, even though the court failed to follow the approach as mandated by PIE and the Constitution. *FNB* explains that for an infringement of section 25 to take place a constitutionally recognised property right should be limited by law of general application.¹⁸² In this scenario, an owner's right to evict would qualify as constitutional property.¹⁸³ However, no deprivation of such right occurs due to the fact that the eviction order does not amount to any interference with the owner's rights; but rather gives effect to the owner's rights. Accordingly, where courts grant an eviction order in favour of the landowner, without adequately exercising its discretion, such failure could not possibly amount to a deprivation of landowners' rights. Section 25(1) would accordingly not be affected negatively by the courts' failure to exercise its discretion as mandated.

(b) The second possible order: The suspended eviction order

The court may in terms of its discretion make an eviction order in the landowner's favour, subject to conditions which might result in the delay of the enforcement of the eviction order.¹⁸⁴ This means that the execution of the eviction order is postponed until certain events take place, based on the circumstances of the case as stipulated in the court order. As explained in chapter three, these stipulations could arise due to a

¹⁸² See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 60. See further *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 28; AJ van der Walt *Constitutional Property law* 3 ed (2011) 75; T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* volume 3 2 ed (RS: 6 2014) 46-1 46-9.

¹⁸³ See *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) 69; *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 390; *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and* 2004 (3) All SA 169 (SCA) para 21.

¹⁸⁴ See *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1087; *Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown and Others* 2013 (2) All SA 236 (KZD).

number of factors that crystallise from the application of a context-sensitive approach by the courts.¹⁸⁵ In these instances, the landowner's right to evict is confirmed, but the execution of the eviction order is made subject to certain conditions. The *Modderklip HC* and *Daisy Dear Investment* cases are examples of where the court decided to grant eviction orders subject to suspensive conditions requiring that set periods of time lapse to allow the occupiers to move from the land before eviction may take place.

Accordingly, the landowner has a right to evict, but she also has a duty to be patient and empathetic until the conditions for the execution of the eviction order are fulfilled;¹⁸⁶ only then the landowner's right to evict can be enforced. Importantly, the normative basis for a court finding that the owner is entitled to an eviction order in the above context is again not the meaning of ownership as individualistic, abstract and complete. Instead, the basis for giving effect to the owner's right to evict is found in the fact that the court is satisfied that the granting of an eviction order in the particular circumstances is just and equitable. This outcome emphasises that the strength of the owner's entitlement to exclude in the constitutional era relates to justice and equity and no longer to the idea that ownership is absolute.¹⁸⁷

In the event where courts fail to have regard to all rights, interests and circumstances of the parties involved and subsequently grant suspended eviction orders the landowners' rights to evict may be adversely affected. This is illustrated in the *Modderklip HC* and *Daisy Dear Investment* cases. The courts failed to have regard to all rights, interests and circumstances of the parties before granting such orders.¹⁸⁸ The failure of the court leads to prolonged legal proceedings that resulted in continued

¹⁸⁵ See chapter 3, section 3.2.3.2 above. Section 4(8)(a) and (b) of PIE.

¹⁸⁶ See *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 10874; *Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA); *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown and Others* 2013 (2) All SA 236 (KZD). See also AJ van der Walt "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144 159.

¹⁸⁷ P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 188-189.

¹⁸⁸ See chapter 3, section 3.2.3.2.2 above; *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 396; *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2009 (4) All SA 410 (SCA) para 2.

unlawful occupation and in the *Modderklip HC* case impossibility to evict the unlawful occupiers.¹⁸⁹

In light of the above, a section 25 analysis of the scenario follows where a court fails to exercise its discretion adequately and thereafter grants an eviction order but subjects such order to suspensive conditions. The first question in terms of *FNB* is whether the concerned interest amounts to property for purposes of section 25 of the Constitution.¹⁹⁰ The Cape High Court decision of *City of Cape Town v Rudolph and Others*¹⁹¹ ("*Rudolph*") has effectively indicated that the substantive provisions in PIE (a) do affect property interest for purposes of section 25;¹⁹² and (b) do constitute deprivation.¹⁹³ Accordingly, the question that is left to be decided is the arbitrariness question.¹⁹⁴ In this regard, *Rudolph* has explained that the substantive provisions of PIE do not constitute an arbitrary deprivation of property when a court exercises its discretion in terms of the empowering provisions of PIE after having regard to all rights, interests and circumstances involved.¹⁹⁵ However, the scenario currently under

¹⁸⁹ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 48.

¹⁹⁰ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

¹⁹¹ 2004 (5) SA 39 (C).

¹⁹² See chapter 4, section 4.3.3.2 above; *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) 69; *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 390; *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others* 2004 (3) All SA 169 (SCA) para 21.

¹⁹³ See chapter 4, section 4.3.3.2 above; *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) 69; *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) 390-391.

¹⁹⁴ See chapter 4, section 4.3.3.1 above; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

¹⁹⁵ *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) 69. The constitutionality of the substantive provisions of PIE that provide courts with a discretion to decide eviction cases based on what would be "just and equitable" were for the first time considered in *Rudolph*. *Rudolph* concerned a case where the local authority, the City of Cape Town, submitted in an application for the eviction of unlawful occupiers that PIE is unconstitutional in so far as it allows for land grabbing. As point of departure, to test the constitutional validity of the substantive provisions of PIE, the court considered the structure of section 25 of the Constitution, specifically with regard to the *FNB* methodology, in order

scrutiny is where courts fail to apply PIE as mandated. The question is whether courts' unfettered approach to the application of PIE that results in suspended eviction orders could infringe upon landowners' property interests.

FNB has shown that a deprivation would only be arbitrarily if it is lacking sufficient reason or can be said to be procedurally unfair.¹⁹⁶ Furthermore, *FNB* has indicated that the question of whether there is sufficient reason for a deprivation will depend on the circumstances of each case and it will be decided by the court by way of a strict proportionality test or a less strict rationality test.¹⁹⁷ When deciding between applying a rationality test or a strict proportionality test the court has to exercise its own discretion based on the factors advanced by the *FNB* case.¹⁹⁸ A mere rationality test would involve identifying whether there is a rational relationship between the means and the ends employed.¹⁹⁹ If the rationality test is applied the *Rudolph*-judgment must

to analyse whether the "just and equitable" requirement provisions in PIE contravenes section 25 of the Constitution. In this regard, the court started its analysis with the deprivation question because it is assumed, without deciding the point, that the interest sought to be protected was property for purposes of section 25. It held that the protection afforded by PIE permits deprivation of certain property rights, namely an owner's right to exclusive use and enjoyment of her property to the extent the court determines in its order by way of the inclusion of just and equitable conditions for the execution of the eviction order. It then established that PIE qualifies as law of general application. As a result, the section 25(1) requirement that a deprivation may only take place in terms of law of general application was met.

¹⁹⁶ See chapter 4, section 4.3.3.1 above; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁹⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁹⁸ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 for the factors a court would consider when exercising its discretion. The court applied the strict proportionality test, however in *Mkontwane v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) the court applied the less strict rational test. Interestingly, the court in *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 68 followed a hybrid approach by applying both the rational relationship test and the strict proportionality test.

¹⁹⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para

be considered where the court held that PIE's roots are found in section 26(3) of the Constitution and that PIE aims to balance two opposing rights, namely those endorsed in section 26(3) and section 25 of the Constitution by requiring that all relevant circumstances be considered.²⁰⁰ In light of the above, if the courts' *ratio* in *Rudolph* is followed it can be argued that it would make no sense that a landowner's right to use and enjoyment of his property may be limited where a court empowered by PIE to exercise a just and equitable discretion fails to do a proper assessment of the relevant factors applicable when exercising such discretion. The Constitution expressly requires that all relevant circumstances should be considered and balanced when courts exercise their discretion to order or refuse to order eviction.²⁰¹ It will not be necessary to engage in a strict proportionality test as the lower standard rationality test has not been satisfied. Thus, even though the order is granted the suspension which results in deprivation may be unjustifiable if all circumstances are not taken into account. Accordingly, where the court suspends an eviction order after failing to approach the provisions of PIE pertaining to its role and its discretion as mandated, the continued occupation of a landowner's property may potentially amount to an arbitrary deprivation.

(c) The third possible order: The refusal to grant an eviction order

A landowner wanting to evict in terms of PIE might not succeed with an eviction application.²⁰² In this instance, the landowner's right to evict is left bare due to the circumstances and facts of the case. Factors that could give rise to such an outcome could be, for example, facts and circumstances that trump the landowner's right to

100. The less strict rational relationship test was applied by the Constitutional Court in *Mkontwane v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 35.

²⁰⁰ *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) 68; *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) para 20; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-23.

²⁰¹ Section 26(3) of the Constitution.

²⁰² *Kanescho v Realtors (Pty) Ltd v Maphumulo and three similar cases* 2006 (5) SA 92 (D); *Red Stripe Trading 68 CC v Mahlomola & Another* (2011/06) [2006] ZAGPHC 39 (28 April 2006); *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC (5 February 2009); *Wine v Zondani* (2044/08) [2009] ZAECHC 19 (26 February 2009).

evict because the eviction is not capable of having a just and equitable outcome.²⁰³ A court's refusal to grant an eviction order in the owner's favour would leave the owner powerless and her right to evict useless because of the circumstances of the case. However, the landowner would be able to approach a court again at a later stage for an eviction order in the event that the unlawful occupier's circumstances changed. Furthermore, in some instances compensation could be awarded to the landowner.²⁰⁴

In the event where the court refuses to grant an eviction order after failing to have regard to all the rights, interests and circumstances of the parties involved the deprivation may constitute an arbitrary deprivation. The *Voster* case is an example of where the granting of the eviction order, after the court failed to probe for further particulars and accordingly failed to consider all relevant circumstances, could amount to an arbitrary deprivation of the landowner's property.²⁰⁵ If a section 25 analysis of the above scenario is done, the result will be the same as the section 25 analysis above in relation to the second scenario. The deprivation caused by the court order would amount to an arbitrary deprivation on the basis of a mere rationality test. Again, the question would be whether there is a rational relationship between the means and the ends employed.²⁰⁶ Accordingly, an arbitrary deprivation would arguably ensue where a denial of the eviction order lacks a proper assessment of the relevant factors

²⁰³ *Voster v Van Niekerk and Others* (6723/2008) [2009] ZAFSHC (5 February 2009); *Wine v Zondani* (2044/08) [2009] ZAECHC 19 (26 February 2009); P Dhliwayo & AJ van der Walt "The notion of absolute and exclusive ownership" 2017 (forthcoming) 19. Dhliwayo and Van der Walt argue that ownership is inherently limited. It is restricted by the restrictions the law place on it.

²⁰⁴ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC). There is support in academic literature that the award of constitutional damages in the Modderklip scenario compensates for the disproportionate effect that PIE had on Modderklip. This might mean that where the execution of the eviction order becomes impossible and where the landowner proved to be vigilant in her search for relief it would be unlikely that the deprivation would be reasonable and justifiable without compensation. In this regard, see AJ van der Walt *Constitutional property law* 3 ed (2011) 278; JM Pienaar *Land reform* (2014) 773; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 223.

²⁰⁵ See chapter 3, section 3.2.3.2 above.

²⁰⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. The rationality test was applied by the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 35.

applicable when the court exercises its PIE discretion. The Constitution expressly requires that all relevant circumstances should be considered and balanced. Therefore, such denial would in the absence of a proper balancing exercise amount to arbitrary deprivation of a landowner's right to evict.

In view of the above comments about the possible effects of the three potential forms of eviction orders on the property rights of the affected landowner, it is evident that failure of courts to apply and approach PIE in the requisite manner may amount to arbitrary deprivation of landowners' constitutional property rights at least in some of these cases. In the past our courts resisted the application scope of PIE due to fear that it may destabilise the economy by compromising certainty in the property market and by eroding the institution of ownership.²⁰⁷ It is therefore ironic that the same courts that once believed that the above must be avoided at all costs are now responsible for doing just that.²⁰⁸ This finding calls for courts to align their approach to evictions with the pro-active and managerial and context-sensitive approach as mandated by the Constitution so that they are positioned to have regard to all rights, interests and circumstances of all parties involved. Only then can courts ensure that not only the unlawful occupiers' constitutional rights are protected, but also the constitutional property rights of landowners.

4 4 Concluding remarks

It is clear from this chapter that the constitutional dawn, which brought section 26(3) and PIE into operation, has transformed the regulation of the eviction of unlawful occupiers. The first part's analysis of the comparison between the courts' approach in the pre-constitutional era and the courts' approach in the constitutional era showed that section 26(3) and PIE brought about a number of changes. These are firstly, a shift in the conceptual understanding of ownership from the pre-constitutional thinking that ownership and the right to evict are absolutely exclusive to the understanding that

²⁰⁷ See chapter 2, section 2.3.2 above. See further AJ van der Walt "Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law" (2002) 18 *SAJHR* 372 400.

²⁰⁸ See chapter 2, section 2.2.3.3 above.

ownership is limited by nature.²⁰⁹ Secondly, the remedy available to owners for the eviction of unlawful occupiers has changed from the pre-constitutional *rei vindicatio* and PISA to the legislative measure, PIE, in the constitutional era.²¹⁰ Thirdly, the function of eviction remedies for purposes of unlawful occupation has changed. The eviction remedy in the constitutional era not only protects an owner's exclusive right to use and enjoy her property, it also aims to protect unlawful occupiers from arbitrary evictions.²¹¹ Lastly, the way in which courts apply eviction remedies requires a shift on a theoretical level from a formalistic and accordingly mechanical, conservative and uninvolved approach towards a more context-sensitive, transformative, pro-active and involved approach.²¹²

The critical analysis of the second part of this chapter brought some interesting findings to light. The analysis of courts' common law equitable powers has showed that the court is familiar with exercising a context-sensitive discretion.²¹³ However, the differences between the courts' discretion in terms of PIE and common law discretions are vast and fundamental. PIE simply requires more, by virtue of PIE being a constitutionally ordained statute.²¹⁴ This characteristic of PIE forces the process of the eviction of unlawful occupiers to operate within a human rights context that provides for broader societal considerations to be taken into account; rather than just property rights and economic considerations. It further provides for a revised role of courts that are necessarily involved and pro-active instead of uninvolved and passive. Accordingly, this section showed that the transformation of the eviction landscape, brought about by section 26(3) of the Constitution and PIE, extends beyond the move from the formalistic application of private law rules to a private law discretionary remedy. Instead, it requires that courts move beyond the private law adjudication style into a human rights-paradigm when courts exercise their discretion in terms of PIE.²¹⁵

²⁰⁹ See chapter 4, section 4.2.1.3 above.

²¹⁰ See chapter 4, section 4.2.1.3 above.

²¹¹ See chapter 4, section 4.2.1.3 above.

²¹² See chapter 4, section 4.2.1.3 above.

²¹³ See chapter 4, section 4.3.1.3 above.

²¹⁴ See chapter 4, section 4.2.1.3 above.

²¹⁵ See chapter 4, section 4.3.2 above.

Interestingly, a critical analysis of chapter three's findings revealed that some courts are still failing to adjudicate eviction cases within this prescribed human rights paradigm. This section showed that courts are failing in this regard due to traces of pre-constitutional legal culture in the way in which they approach and apply PIE in the constitutional era. The *Modderklip HC*, *Newtown*, *Voster*, *Daisy Dear* and *Pitje HC* cases showed that courts are applying the transformative eviction measure PIE with an approach that resembles traces of pre-constitutional conservatism, formalism and hierarchical thinking.²¹⁶

Finally, one of the implications of this approach identified in the chapter was the impact of the approach on landowners wishing to evict. The focus fell on landowners specifically because the negative implications for landowners might not be as obvious as the negative implications a flawed approach on the part of courts has on unlawful occupiers under section 26(3) of the Constitution. Interestingly, where courts fail to apply PIE as mandated and subsequently (a) grant an eviction order with suspensive conditions or (b) refuse to grant an eviction order, landowners may suffer arbitrary deprivation of their property rights.²¹⁷

²¹⁶ See chapter 4, section 4.3.3 above.

²¹⁷ See chapter 4, section 4.3.4.3 above.

Chapter 5: Conclusion

5 1 Introduction

The approach of courts to eviction remedies has been the combined result of the legal doctrine that regulated the concept of ownership, specific eviction remedies, and standard practices of presiding officers as entrenched in interpretation and procedural rules. In the pre-constitutional era these aspects worked together to ensure that the landowner's apex position was protected.

Interestingly, the constitutional dawn transformed the eviction landscape on the basis of section 26(3) of the Constitution of the Republic of South Africa, 1996 (the "Constitution") and the enactment of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). *Port Elizabeth Municipality v Various Occupiers*¹ ("*PE Municipality*") enunciated that the PIE not only replaced the pre-constitutional eviction remedies but in fact also required that the deep-level assumptions of a landowner's right to evict and the standard practices all associated with the courts' role in eviction cases were also turned on its head. The question that this study explores is whether the courts' approach to eviction remedies always reflects the new role of the court as envisioned by the landmark judgment of *PE Municipality*.

The study provides a mirrored description of the courts' approach to eviction remedies in the pre-constitutional era on the one hand, and the constitutional era on the other. This description is utilised to ultimately determine whether the courts' actual approach is on par with the constitutional standard for eviction whereafter the implications of these findings, particularly for the landowner, are explored.

¹ 2005 (1) SA 217 (CC).

5 2 Conclusions

5 2 1 The courts' approach to eviction remedies before the Constitution

Chapter two focusses on two aspects that informed the legal culture of courts pertaining to the application of an owner's vindication remedies in the pre-constitutional era. These are: firstly, the conceptual understanding of an owner's right to vindicate as informed by the rules and principles applicable to the remedy itself; and secondly, the attitude of courts as a product of the standard practices and interpretation rules they follow in their application of vindication remedies.

The chapter shows how the conceptual understanding of an owner's right to vindicate was established in Roman law, developed in Roman-Dutch and German law and received into the South African legal system. Chapter two indicates that the conceptual understanding of vindication in ancient Roman times can be linked to natural and moral legal thinking about the function of the law. The idea that a person could be restored of that which had been taken from her without consent can be ascribed to the pre-classical natural and moral legal philosophical notions that nature is impregnated with a rational order that provides men with a clear idea of that which is right and that which is wrong. An action to restore lost possession was therefore a form of restoring the rational order. Accordingly, the rationale behind the existence of the right to vindicate in ancient Roman times was found in the theory of ancient natural and moral philosophical doctrine. The *vindicatio* action in Roman law was regarded to have a fundamental function in honouring the rational order and was therefore subject to a strict and precise formula.²

In Roman-Dutch law the underlying rationale of vindication, as it was received from Roman law, was further developed in light of the focus on and development of the concept of ownership. The scholar Bartolus de Saxeforato provided the first formal definition of ownership. This was the description of ownership that was received into Roman-Dutch law. The Roman-Dutch scholar Grotius on the basis of Bartolus' definition succeeded in providing a distinction between ownership and other property rights. Grotius distinguished between ownership and other rights in property by

² See chapter 2, section 2.2.2.1 above.

emphasising the completeness of the former and the limited nature of the latter pertaining to entitlements. This focus on the complete and limited nature of the entitlements brought about by Grotius and the pandectists respectively, was influenced by a developed form of natural and moral legal philosophical doctrine due to the fact that Grotius was an avid natural and moral legal theorist. This occurrence marked the start of viewing ownership as the apex right in property. Presumably this meant that the primary remedy available to an owner to vindicate her property had to entrench this apex status of ownership and the hierarchical relationship its status brought about. Furthermore, the German pandectists during the French revolution bolstered this apex status of ownership by ascribing to ownership an individualistic and abstract character. This was aimed at making ownership an absolute and unlimited right in order to secure economic liberty after the French revolution. Accordingly, a lot of emphasis was placed on the owner's strong and absolute entitlements over her property.³

The rhetoric of ownership that signified the most absolute power a person can have with regard to her property inevitably ascribed to its primary remedy the *rei vindicatio* a similar rhetoric. The right to exclude forms the basis of the owner's *rei vindicatio*. The strong nature of the owner's right to exclude was received into South African law and applied accordingly. The decisions of *Chetty*, *Jeena*, and *Webb* are evidence of how South African courts applied a strong version of the *rei vindicatio* by entrenching in each case the individuality, abstract and complete characteristics of ownership. Therefore, the underlying rationale of the *rei vindicatio* remedy relates directly to a strong right to exclude, with the focus being on the owner and the protection of her rights against weaker rights. Accordingly, the understanding that ownership is the apex right, together with the understanding that the *rei vindicatio*'s application must complement this apex right as its primary remedy, constituted the *ratio* of courts when they applied the *rei vindicatio*.⁴

This underlying belief about the status and strength of ownership was regarded as the "normal state of affairs". In line with Van der Walt's normality assumption, one can argue that the acceptance of completeness, individuality and abstractness of

³ See chapter 2, section 2.2.2.2 above.

⁴ See chapter 2, section 2.2.3 above.

ownership, together with the strong version of exclusion through the strict application of the *rei vindicatio* led to the pre-constitutional acceptance by South African courts (and society) of the idea that the normal state of affairs entails the situation where the owner of immovable property will always be in occupation of her property, unless the owner consents to a temporary “abnormal state”.⁵ In other words, the hierarchical relationship between ownership, limited real rights, personal rights and no rights not only informed the rules, requirements and principles of the *rei vindicatio*, but also informed the courts’ rhetorical and logical assumptions and beliefs underlying the application of the remedy. This particular rhetoric, logical assumptions and beliefs of the apex status of ownership and the strong power an owner has to vindicate her property caused the courts to apply the *rei vindicatio* remedy in a conservative manner. Ultimately, this conservative approach meant that courts upheld and entrenched the underlying assumptions of ownership by fiercely defending ownership and its corollary entitlement to exclude when the *rei vindicatio* was applied.⁶

Furthermore, chapter two also shows that statutory eviction remedies in the pre-constitutional era, were applied with the same conceptual understanding as the common law *rei vindicatio*. This conceptual understanding attributed completeness, individuality and abstractness to ownership and created the basis for a strong right to vindicate property from unlawful occupiers. This was the case even though the pre-constitutional statutory eviction remedies were primarily employed to segregate South Africans according to racial classifications.⁷ Also, in this context a conservative attitude was exhibited by courts in their approach to statutory eviction provisions. This was evident in that the courts also applied a hierarchical and mechanical approach to eviction disputes adjudicated in terms of eviction legislation.⁸

The second aspect of legal culture, namely the attitude of courts towards eviction remedies as informed by (a) the interpretive function of courts and (b) the standard practices and rules that applied to their presiding role, is explored and explained in the second part of chapter two. The analysis of the courts’ interpretive function brought to

⁵ See chapter 2, section 2.2.3 above.

⁶ See chapter 2, section 2.2.3 above.

⁷ See chapter 2, section 2.2.2 above.

⁸ See chapter 2, section 2.3.2 above.

light that courts in the pre-constitutional era were guided by positivism in their interpretation of both the common law *rei vindicatio* and statutory eviction remedies. Judicial positivism led to the elevation of one of the canons of interpretation above all the other. This elevated canon of interpretation is the intention of the legislator interpretive rule in statutory interpretation. As a result, the meaning ascribed to the statutory eviction provisions as found in the Prevention of Illegal Squatting Act 52 of 1951 (“PISA”) was primarily a reflection of the legislator’s intention and was accordingly applied mostly in a mechanical manner in order to give effect to such intention. Furthermore, the application of the common law eviction remedy (the *rei vindicatio*) also showed the same preference to finding the original application of the remedy and applying it in the same way as it was applied in terms of South African and Roman-Dutch precedent. Interestingly, common law interpretation rules were less strict than the statutory interpretation rules in that courts were allowed to ascribe interpretations to common law principles that would ensure fair judgments. However, case law in chapter two indicates that even despite the relatively wide judicial discretion in this regard, courts chose not to interpret the requirements of the *rei vindicatio* in a manner that might require consideration of factors other than established rights. Therefore, despite the fact that courts may have had a more creative interpretive function in these instances, they in fact limited the *rei vindicatio* to the requirements of the remedy and took no further considerations into account.⁹ Interestingly, the case law makes it possible to argue that courts might not have found it necessary to invoke their creative interpretive power because they deemed an outcome where the owner’s entitlement to exclude was given effect to as fair and just.¹⁰

The analysis in chapter two of the standard practices and rules that applied to the presiding role of courts showed that the South African courts were subject to the rules of the adversarial court system. Case law indicated that the adversarial court system ensured that the role of courts in eviction cases remained a limited and passive one. This is because the adversarial system expressly required the court not to become involved in the proceedings.¹¹ Accordingly, the institution of ownership, based on the

⁹ See chapter 2, section 2.4.2 above.

¹⁰ See chapter 2, section 2.4.2 above.

¹¹ See chapter 2, section 2.4.3 above.

natural legal and moral philosophical notions of completeness, individuality and abstractness, together with the courts' jurisprudential guide that was informed and directed by positive legal philosophy and the adversarial system, caused the courts to apply eviction remedies in a conservative, formalistic and passive manner in the pre-constitutional era.¹²

5 2 2 The courts' approach to eviction remedies in the constitutional context

Chapter three revealed that the aftermath of apartheid necessitated a new approach to eviction and resettlement. Section 26(3) of the final Constitution established and entrenched a commitment to rectifying the injustices of the past by making evictions subject to constitutional scrutiny. Furthermore, parliament enacted PIE to give effect to section 26(3). PIE was promulgated to change the eviction landscape, and in so doing, it has replaced both the common law *rei vindicatio* and PISA in the context of the regulation of unlawful occupation. PIE forms part of a broader legislative scheme aimed at giving effect to section 26(3) of the Constitution.¹³ As a result, it is confined to the regulation of unlawful occupation from what the unlawful occupier regards as her home. Interestingly, the chapter also revealed that PIE sets out to give effect to section 25(1) of the Constitution which provides that "no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property". Evidently, PIE aims to promote two opposing rights, which in the context of evictions, are also conflicting.¹⁴

It is in light of these developments that the courts' approach to eviction remedies becomes of utmost importance. Chapter three set out to investigate in wide terms the constitutional standard required to inform the approach of the court in PIE eviction cases. It explores: (a) the conceptual understanding of PIE that must underpin the courts' application of PIE; and (b) the attitude with which courts are required to approach eviction remedies in light of the rules pertaining to interpretation and the role of the court in eviction cases in the constitutional era.

¹² See chapter 2, section 2.4.3 above.

¹³ See chapter 3, section 3.2.2 above.

¹⁴ See chapter 3, section 3.2.2 above.

The chapter indicates that *PE Municipality* provided courts with a framework aimed at shaping the courts' understanding of property rights in light of section 26(3) of the Constitution.¹⁵ In this regard, *PE Municipality* showed that courts have to understand eviction disputes within their historical and constitutional context. The chapter showed that *ubuntu* as a philosophical approach has a major role to play in how courts should understand PIE and its aims within this historical and constitutional context. *Ubuntu* should inform the way in which courts mediate the constitutional conflict between section 25(1) and section 26(3) of the Constitution. The discussion of *ubuntu* in the chapter revealed that *ubuntu* is much more than an interpretive aid in the context of PIE. Rather, it should also dictate which values must be considered in the balancing of the opposing interests and inform the particulars of the order made by the court. The chapter further indicated that a context-sensitive approach to the adjudication of eviction cases is a necessary corollary for the values of *ubuntu* to be present in the way courts apply PIE.¹⁶

Furthermore, the procedural and substantive requirements an owner has to satisfy in order to obtain an eviction order have changed dramatically in the context of the eviction of unlawful occupiers. Chapter three investigates the shift from action proceedings to application proceedings. An analysis of case law pertaining to the requirements for *locus standi*, unlawfulness, the service of documents and joinder of interested parties showed that courts are called upon, even when they deal with threshold issues like the service of the notice of motion and joinder questions, to follow a context-sensitive approach to achieve the aims of PIE.¹⁷ The section on the substantive requirements of PIE also indicates that courts have to apply the substantive requirements of PIE with the same context-sensitive approach as inspired by the values of *ubuntu* as illustrated in the landmark decision, *PE Municipality*. This context-sensitive approach is followed by balancing the opposing relevant factors after ascribing to each particular factor its appropriate weight in light of all other relevant factors.¹⁸ Accordingly, PIE is primarily aimed at providing context-sensitive and

¹⁵ See chapter 3, section 3.2.2 above.

¹⁶ See chapter 3, section 3.2.3 above.

¹⁷ See chapter 3, section 3.2.3 above.

¹⁸ See chapter 3, section 3.2.3 above.

balanced outcomes (with regard to procedural and substantive matters) in each individual and unique unlawful occupation eviction case.

Chapter three showed that courts must embrace the new meaning of eviction of unlawful occupiers in light of the new measures set in place to regulate these situations. A new conceptual understanding underpins eviction. This conceptual understanding is led by the philosophy of *ubuntu* in terms of which human dignity and human-interdependence are brought to life when the courts see eviction disputes as completely dependent on the circumstances of the case with justice and equity as end goals for all parties involved. However, an analysis of case law pertaining to the “just and equitable” requirement in PIE showed that especially some lower courts are still failing to approach and apply PIE as mandated in that they fail to sufficiently employ a context-sensitive approach.¹⁹

The second part of chapter three showed that both the interpretive function and the role of courts in eviction cases changed dramatically in the constitutional era. In terms of the interpretive function it became apparent that the dominant traditional cannon of statutory interpretation, namely the literalist-cum-intentionalist approach, is predominantly applied as a starting point for the interpretation of concepts related to PIE. However, interpretation in the constitutional context also requires that constitutional guidelines must be followed, especially when statutes that were promulgated to give effect to constitutional rights are interpreted. In this regard, case law has indicated that the historical context and constitutional context are the primary constitutional guidelines that should inform interpretation. As a result, courts are now mandated to combine the pre-constitutional cannon for statutory interpretation with constitutional guidelines when they seek to ascribe meaning to the provisions of PIE. Accordingly, the interpretive function of courts in the constitutional era is also subject to contextual factors in that the historical and constitutional contexts must guide the interpretation exercise of courts.²⁰

Finally, the chapter highlighted that the constitutional era has also changed the courts’ prescribed role in eviction cases. The court in *PE Municipality* established this new role of courts. From its dictum it becomes evident that two major features of the

¹⁹ See chapter 3, section 3.3.3.2 above.

²⁰ See chapter 3, section 3.3.1 above.

prescribed role of courts in eviction cases have changed. In the first place the function of courts has changed. The function of courts in terms of PIE is to embody a balance between unlawful occupation and unlawful eviction by establishing an appropriate relationship between sections 25(1) and 26(3) of the Constitution. Furthermore, courts are provided with express guidelines in this regard, namely to employ a context-sensitive approach and balance competing interests in light of the aims of PIE. In the second place, the end goal of evictions has changed. Justice and equity are what courts have to work towards in eviction cases. The Constitutional Court in both *PE Municipality* and *Pitje* showed that courts are vested with wide powers to ensure that this end goal is achieved. These wide powers enable courts to go beyond the pleadings of the parties, devise innovative ways to procure all relevant circumstances, require joinder, mediation and postponements *mero moto*.²¹ Accordingly, it seems as though section 26(3) and PIE require that courts deviate from standard procedural practices to take up a more proactive and managerial role in PIE eviction cases.

5 2 3 A critical analysis of the impact of the Constitution on eviction remedies

Chapter four critically analyses the changes brought about by section 26(3) of the Constitution and PIE to the regulation of the eviction of unlawful occupiers. The chapter revealed that the manner in which courts apply eviction remedies on a theoretical level has shifted from formalistic, mechanical, conservative and uninvolved to context-sensitive, transformative, proactive and involved.²² Interestingly, an analysis of the courts' common law equitable powers indicated the true extent of this purported transformation. Not only has the mandate on courts in this context shifted from the mechanical application of rules to the exercise of a just and equitable discretion, this new discretion and the general role of courts in eviction cases are completely different from traditional private law adjudication methods. The just and equitable standard in PIE cannot be compared to the equity principle that informs private law doctrine in those instances where courts are called upon to exercise an equitable discretion.²³ In this regard, chapter four revealed that section 26(3) and PIE

²¹ See chapter 3, section 3.3.2 above.

²² See chapter 4, section 4.3.1.3 above.

²³ See chapter 4 section 4.3.1 above.

require more than what equity in the private law sense has to offer. In this regard, courts are required to approach and apply PIE within a human rights paradigm.²⁴

As expected, an analysis of case law indicated that courts sometimes fail to apply PIE within this human rights paradigm. The cases identified showed that where courts fail to apply PIE with an approach that is sensitive to the context, they also fail to apply PIE within the human rights paradigm. A further analysis of the courts' approach in these identified cases showed that particularly lower courts struggle to apply PIE with the necessary context-sensitivity. These failures on the part of the lower courts showed tendencies towards the pre-constitutional way of thinking and legal culture as identified in chapter two. Accordingly, some courts are still applying the transformative eviction measure PIE outside of the human rights paradigm with continued pre-constitutional deep-level assumptions and practices that result in conservative, formalistic and hierarchical adjudication.²⁵ These pre-constitutional tendencies in the constitutional era in the context of evictions has the effect of frustrating the objectives of the above identified transformation in eviction law. It goes without saying that the unlawful occupiers' constitutional rights as entrenched in section 26(3) are not adequately protected when courts deviate from the mandated way in which they should apply PIE. However, chapter four illustrated that where courts approach and apply PIE with these pre-constitutional tendencies it is not only unlawful occupiers' constitutional rights that might suffer. Interestingly, the analysis in chapter four showed where courts fail to apply PIE within a human rights paradigm and subsequently either make a (a) suspensive eviction order or alternatively (b) refuse to grant an eviction order, a landowner, as a consequence, may suffer an arbitrary deprivation of her right to evict in terms of section 25(1) of the Constitution.²⁶

The critical analysis undertaken in chapter four was useful because it showed that the courts' approach to eviction remedies has perhaps not undergone such a holistic transformation on a practical level. This is due to the presence of very rich pre-constitutional legal culture that still dominates the approach of courts. It has also indicated that where courts adjudicate eviction cases with pre-constitutional legal

²⁴ See chapter 4 section 4.3.2 above.

²⁵ See chapter 4 section 4.3.3 above.

²⁶ See chapter 4 section 4.3.4 above.

culture, their failure in this regard may as a consequence in some instances impact on landowners' constitutional property rights. Although the constitutional property law enquiry was not the primary focus of the study, it was interesting to identify it as a possible consequence of the way courts approach eviction in the new constitutional dispensation. These findings are of utmost importance when considering how such a flawed approach can be remedied.

5 3 Concluding remarks

Overall, the critical analysis of the courts' approach to eviction remedies in the pre-constitutional and constitutional contexts has shown that section 26(3) of the Constitution and PIE have on a theoretical level transformed the eviction landscape. In other words, the broader purposes of PIE have proven to go beyond private law doctrine and thinking. However, some courts, especially the lower courts, are still failing to apply PIE as mandated due to pre-constitutional deep-level assumptions of the strength of the landowner's right to evict, combined with procedural practices that form part of their pre-constitutional legal culture.²⁷

The findings of this thesis show that the eviction remedy in PIE will never achieve its transformative aim of considering both the rights of the owner and the unlawful occupier where the courts are failing to apply the Act as required. The study also indicates that the courts' role is pivotal because when courts' duties and responsibilities are not performed with the necessary due diligence, caution and seriousness this could lead to serious infringements of constitutional rights of not only unlawful occupiers but also landowners. Courts must take their mandate seriously and be aware of the possibility of pre-constitutional legal culture dominating the way evictions are decided in the constitutional era. The danger of such a flawed approach to evictions is clear: the constitutional rights of both landowners and unlawful occupiers may be compromised if decisions in this regard are based on hierarchies and mechanical application of requirements. The awareness of the pre-constitutional tendencies may lead to our current presiding officers making more of an effort to ensure that they apply PIE within the requisite human rights paradigm so as to ensure

²⁷ See chapter 4, section 4.3.4.3 above.

that the institution that is meant to uphold and protect constitutional rights is not the one that is in actual fact infringing those rights.

List of abbreviations

<i>ASSAL</i>	Annual Survey Of South African Law
<i>CILSA</i>	Comparative and International Law Journal of South Africa
<i>ICLQ</i>	International and Comparative Law Quarterly
<i>LAWSA</i>	The Law of South Africa
<i>Nat LF</i>	Natural Law Forum
<i>PELJ</i>	Potchefstroom Electronic Law Journal
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>SAPL</i>	South African Public Law
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
<i>TLR</i>	Tulane Law Review
<i>TSAR</i>	Tydskrif vir die Suid Afrikaanse Reg
<i>Wis L Rev</i>	Wisconsin Law Review
<i>YLJ</i>	Yale Law Journal

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