

The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law

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Declaration

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G Muller, December 2011, Stellenbosch

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Summary

This dissertation considers the housing rights of unlawful occupiers in the post-1994 constitutional dispensation. Section 26 of the Constitution of the Republic of South Africa, 1996 affords everyone a right of access to adequate housing. This provision is a decisive break with the apartheid past, where forced eviction banished black people to the periphery of society. The central hypothesis of this dissertation is that the Constitution envisages the creation of a society that is committed to large-scale transformation. This dissertation posits that it is impossible to realise the full transformative potential of section 26 of the Constitution in the absence of an independent and substantive understanding of what it means to have access to adequate housing.

This dissertation traverses legal theory as well as the common law of evictions, constitutional law and international law. A consciously interdisciplinary approach is adopted in seeking to develop the content of section 26 of the Constitution, drawing on literature from social and political science. This dissertation develops an organising framework for giving substantive content to section 26(1) of the Constitution with reference to the International Covenant on Economic, Social and Cultural Rights; the Convention for the Protection of Human Rights and Fundamental Freedoms; the Revised European Social Charter, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

This dissertation shows that the adjudication of eviction disputes has moved away from a position under the common law where Courts had no discretion to refuse eviction orders based on the personal circumstances of the squatters. The adjudication of the eviction of unlawful occupiers now requires a context-sensitive analysis that seeks to find concrete and case-specific solutions. These solutions are achieved by considering what would be just and equitable for both the land owner and the unlawful occupiers. This dissertation also shows that the government has a markedly different role to fulfil in post-apartheid evictions through the necessary joinder of local authorities to eviction proceedings, meaningful engagement with unlawful occupiers and the provision of alternative accommodation in terms of its constitutional and statutory obligations.

Opsomming

Hierdie proefskrif ondersoek die behuisingsregte van onregmatige okkupeerders in die post-1994 grondwetlike bedeling. Artikel 26 van die Grondwet van die Republiek van Suid-Afrika, 1996 gee elke persoon die reg op toegang tot geskikte behuising. Hierdie bepaling is 'n duidelike breuk met die apartheid-verlede waar gedwonge uitsettings swart mense na die periferie van die samelewing verban het. Die sentrale hipotese van hierdie proefskrif is dat die Grondwet beoog om 'n samelewing te skep wat verbind is tot grootskaalse transformasie. Hierdie proefskrif voer aan dat dit onmoontlik is om die volle transformerende potensiaal van artikel 26 van die Grondwet te verwesenlik in die afwesigheid van 'n onafhanklike en substantiewe begrip van wat dit beteken om toegang tot geskikte behuising te hê.

Hierdie proefskrif deurkruis regsteorie sowel as die gemenerereg ten aansien van uitsettings, staatsreg and internasionale reg. 'n Doelbewuste interdisiplinêre benadering word gevolg in die soeke na die ontwikkeling van die inhoud van artikel 26 van die Grondwet met verwysing na literatuur uit die sosiale- en politieke wetenskappe. Die proefskrif ontwikkel 'n organiserende raamwerk waarmee substantiewe inhoud aan artikel 26(1) van die Grondwet verleen kan word met verwysing na die Internasionale Verdrag op Ekonomiese, Sosiale en Kulturele Regte; die Konvensie vir die Beskerming van Menseregte en Fundamentele Vryhede; die Hersiene Europese Sosiale Handves; die Amerikaanse Konvensie op Menseregte en die Afrika Handves op Mense en Persoonsregte.

Hierdie proefskrif wys dat die beregting van uitsettingsdispute wegbeweeg het van 'n posisie onder die gemenerereg waar howe geen diskresie gehad het om uitsettingsbevele te weier op grond van die persoonlike omstandighede van die plakkers nie. Die beregting van uitsettingsdispute vereis nou 'n konteks-sensitiewe analise wat strewe daarna om konkrete oplossings te vind. Hierdie oplossings word bereik deur in ag te neem wat reg en billik sal wees vir beide die eienaar en die onregmatige okkupeerders. Die proefskrif wys ook dat die regering 'n merkbaar nuwe rol vervul in post-apartheid uitsettings deur die noodsaaklike voeging van munisipaliteite tot uitsettings, sinvolle interaksie met onregmatige okkupeerders en die voorsiening van alternatiewe akkommodasie in terme van grondwetlike and statutêre pligte.

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In reflecting on who to thank here I inadvertently remembered that my brief stay in Stellenbosch has not always been moonlight and roses. I can recall distinct periods during both my undergraduate and postgraduate studies when I felt dispirited and lonely. I was fortunate to have a support structure that enabled me to keep my shoulder to the grindstone when life shook the foundations upon which my hopes and dreams were built. For this - and much more - I'm indebted to the following people to whom I would like to express my sincere gratitude and love.

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During the past nine years I have lost many friends - some because of choices that steered our lives into different directions and unfortunately deprived us of spending more time together - and others because the choices I made didn't accord with their value system. Wian Erlank, Erin Nel, Petrus Maree, Hanri Ehlers and Hugo Murray listened to my arguments and made me think about things that I had not considered. Mario Penwarden, Monique Cilliers and Liezl van Rensburg helped me to fulfil a life-long dream by going to see Roxette perform live this year. Tiana Brand, my friend and partner, has been supportive and extremely patient the past few months when the dissertation took over my life and while I was in Finland.

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in Property Law and Overarching Strategic Research and Outreach Project on *Combating Poverty, Homelessness and Socio-Economic Vulnerability under the Constitution*. The scholars in both these groups listened to my arguments, embraced my ideas and showed me the error of my ways when my understanding of the law was lacking.

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The EP Bradlow Foundation, Overarching Strategic Research and Outreach Project on *Combating Poverty, Homelessness and Socio-Economic Vulnerability under the Constitution* and the Finnish Ministry of Foreign Affairs awarded me bursaries that allowed me the luxury of doing the reading for, thinking about and writing of this dissertation.

As this chapter in my life is ending with an optimistic outlook for my future and a keen sense of belonging I hope that this dissertation will have contributed a small part to the development of the law of evictions. I therefore want to dedicate this prayer to those people that find themselves feeling dispirited and lonely because they are living in abject poverty and intolerable conditions.

“Oh that you would bless me and enlarge my border, and that your hand might be with me, and that you would keep me from harm so that it might not bring me pain!”

~ 1 Chronicles 4:10 ~

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Introduction

1 1 Introduction

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*¹ ('Blue Moonlight Properties SCA') the first respondent instituted eviction proceedings against the occupiers in terms of section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'). Kernel Carpets, the previous owner and former employer of the majority of the occupiers, erected a double storey office building, two large garages and a small factory on the property. When Kernel Carpets stopped trading, it allowed the occupiers to stay on the property against payment of rent to the caretaker. The occupiers continued paying rent to various individuals until the end of 2005, at which time the buildings had deteriorated to the point of being uninhabitable and without any water supply. Many of the occupiers relied on the meagre income that they generated from informal trading, which made it impossible to find other lawful and affordable accommodation within the inner city of Johannesburg. The applicant alleged that it had no knowledge of the events prior to 2004, when it purchased the property for development purposes, and that it did not receive any rent from any of the occupiers. The applicant also alleged that it would not be economically viable to restore the commercial property so that it complied with the provisions for residential use.

Initially, the matter came before Masipa J in the South Gauteng High Court, Johannesburg, who instructed the City of Johannesburg to investigate the circumstances of the case and to consult the interested parties to provide the court with a full and meaningful report. She postponed the proceedings *sine die* and ordered the City to report to the court on the steps that it had taken and what it could do in future to

¹ 2011 (4) SA 337 (SCA).

provide the respondents with emergency shelter.² The City filed this report five months later under the threat of contempt proceedings.

In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another*³ ('*Blue Moonlight Properties II*'), Spilg J considered the content of the City's report against the background of the obligations placed on local authorities to assist unlawful occupiers in securing access to adequate housing,⁴ while simultaneously protecting private landowners from unlawful occupation of their land.⁵ He proceeded to weigh the rights of Blue Moonlight Properties to evict unlawful occupiers from its property⁶ in terms of section 25 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') against the unlawful occupiers' right to have access to adequate housing⁷ in terms of section 26 of the Constitution. The cumulative effect of these rights and obligations steered him to the conclusion that it was just and equitable⁸ in the circumstances to evict the unlawful occupiers from the property⁹ and he ordered them to vacate the property on or before 31 March 2010.¹⁰ He also ordered the municipality to pay constitutional damages to the applicant for the occupation of the property by the unlawful occupiers in the form of a monthly rental for the period between 1 July 2009 and 31 March 2010.¹¹ He further declared the municipality's housing policy unconstitutional to the extent that it excluded all persons within its jurisdiction who faced the threat of eviction from privately owned land.¹²

The Supreme Court of Appeal agreed with Spilg J that the eviction would be just and equitable in the circumstances but held that he erred in granting Blue Moonlight Properties constitutional damages, because the unique circumstances that gave rise to the granting of that order in *Modderfontein Squatters, Greater Benoni City Council v*

² *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Others* 2009 (1) SA 470 (W) paras 75 and 78 ('*Blue Moonlight Properties*'). See section 2 1 2 6 in chapter 5 for a discussion of Masipa J's reasoning on the joinder of the City of Johannesburg Metropolitan Municipality.

³ [2010] JOL 25031 (GSJ).

⁴ *Blue Moonlight Properties II* paras 128-130.

⁵ *Blue Moonlight Properties II* paras 131-135.

⁶ *Blue Moonlight Properties II* paras 93-113.

⁷ *Blue Moonlight Properties II* paras 114-127.

⁸ *Blue Moonlight Properties II* paras 172-195.

⁹ *Blue Moonlight Properties II* par 196, Order 1.

¹⁰ *Blue Moonlight Properties II* par 196, Order 2.

¹¹ *Blue Moonlight Properties II* par 196, Order 3.

¹² *Blue Moonlight Properties II* par 196, Order 4.

*Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the RSA and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*¹³ were absent in this case.¹⁴ Navsa JA and Plasket AJA further found that Spilg J categorised the differentiation in treatment incorrectly and therefore held that the housing policy of the City is discriminatory on the incorrect basis. However, they concluded that the City's housing policy is discriminatory and therefore unconstitutional to the extent that it excludes the occupiers of privately owned buildings that are not fit for human habitation. Currently the City's housing policy only provides temporary emergency accommodation to those evicted from publicly owned unsafe buildings by the City itself or at its instance in terms of the National Building Regulations and Building Standards Act 103 of 1977.¹⁵

While the brief discussion of the *Blue Moonlight Properties* case focuses on evictions that can be instituted at the behest of private landowners to the exclusion of evictions that can be instituted by the government, the case remains important because the particular set of facts provides a useful insight into the dynamics at play in housing development and evictions in South Africa. Furthermore, the appeal to the Constitutional Court against parts of the order of the Supreme Court of Appeal in this case will ensure that *Blue Moonlight Properties* adds to the burgeoning jurisprudence of the Constitutional Court on the right of access to adequate housing.¹⁶ I will engage with the impact of section 26 of the Constitution on the eviction of a specific type of unlawful occupier by both private and public landowners throughout this dissertation.

The circumstances leading up to the hearing on the substantive issues in the *Blue Moonlight Properties* case provide a perfect example of the housing problems in South Africa. Hundreds of thousands of poor people live in abandoned buildings or informal

¹³ 2004 (6) SA 40 (SCA) par 43. The appropriateness of constitutional damages in that case was subsequently confirmed by the Constitutional Court in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) par 65 ('*Modderklip CC*').

¹⁴ *Blue Moonlight Properties* SCA par 70.

¹⁵ *Blue Moonlight Properties* SCA par 77, Order 3.

¹⁶ The Constitutional Court granted the City of Johannesburg leave to appeal against parts of the Supreme Court of Appeal's judgment and set *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* CCT 37/11 down for oral hearing in the Constitutional Court on 11 August 2011.

settlements in urban areas¹⁷ because their meagre income, derived from informal street trading and insecure seasonal or domestic work, is insufficient to obtain better accommodation. Inner city accommodation is often not fit for human habitation because it is harmful for their health and dangerous. Their occupation is a double-edged sword to the extent that they have to live in the city to conduct their informal trading and to take any other available employment, but while doing so, they expose themselves to dangerous, unhealthy living conditions and the occasional police raid, aimed at identifying illegal immigrants. This is exacerbated by the fact that an increasing number of local authorities in the big urban centres of South Africa – Johannesburg, Cape Town and Durban – prefer to distance themselves from the housing crises that prevails in their areas of jurisdiction by consistently disputing the fact and the extent of their constitutional and statutory obligations to provide access to adequate housing for people living in abject poverty.

The case law on joinder in eviction cases shows that in the majority of cases local authorities get involved in the case either when the respondents apply for a postponement *sine die* of the proceedings so that the local authority can be joined or when a court orders *ex mero motu* a local authority to be joined to the proceedings. *Blue Moonlight Properties II* illustrates that local authorities often submit that they have no function to fulfil in eviction disputes where a private land owner seeks to evict unlawful occupiers from her property and therefore request a further stay of eviction proceedings in order for them to obtain a declaratory order that sets out their constitutional and statutory obligations.

Once such an order is obtained, a local authority usually submits a further application to stay eviction proceedings in order to join the MEC for Housing and Local

¹⁷ A recent study by Statistics South Africa revealed that 1 082 207 households or 11.14% of the 9 708 854 households in nine major municipal areas lived in informal dwellings. Individually, the results are: 220 830 households or 26% of the 849 349 households in Ekurhuleni, 214 362 households or 18.4% of the 1 165 014 households in Johannesburg, 184 019 households or 26.8% of the 686 640 households in Tshwane, 142 589 households or 17.1% of the 833 859 households in eThekweni, 139 853 households or 15.5% of the 902 278 households in Cape Town, 54 660 households or 37.3% of the 146 542 households in Rustenburg, 51 055 households or 24.5% of the 208 389 households in Buffalo City, 37 937 or 13.7% of the 276 881 households in Nelson Mandela Metro, and 36 902 households or 18.2% of the 202 762 households in Mangaung. See Statistics South Africa *Community Survey 2007: Key Municipal Data* (2008) ('Stats SA *Community Survey 2007*') available online at <http://www.statssa.gov.za/communitynew/content.asp> (accessed on 28 February 2011).

Government and the National Department of Human Settlements. Local authorities argue that this joinder is necessary because they have no role to play in complex eviction cases since they merely execute national and provincial housing policy. As such, so the argument continues, they cannot be held to account for the housing crisis that prevails in their jurisdictions, because they are dependent on the higher echelons of government to provide the requisite funding for expensive housing development and urban regeneration projects. Some local authorities even contend, so the argument concludes, that they should be applauded for what they have accomplished for occupiers living on privately owned land “without being obliged to do so”,¹⁸ given their passive role in housing development and their limited financial resources.

The intransigent attitude of local governments impacts negatively on the housing rights of unlawful occupiers and the property rights of private owners. The constant delay in eviction proceedings requires the owner to tolerate the unlawful occupiers on her property throughout the protracted legal process without any guarantee that an eviction order will be granted. However, once an eviction order is granted the owner could be required to tolerate the occupation even further if the court finds that it would be just and equitable to afford the local authority some time to identify alternative land or alternative accommodation and ensure its adequacy. In the event that this additional waiting period does not come into play, the owner runs the further risk that the sheriff of the court could be unable to execute the eviction because it would be too costly or too dangerous to attempt the execution of the eviction order.¹⁹ This stands in stark contrast to the “simple and drastic”²⁰ eviction process that was available to owners in terms of the *rei vindicatio* and the government’s exercise of its police powers to evict people for health and safety reasons during apartheid.

¹⁸ *Blue Moonlight Properties II* par 32.5.

¹⁹ *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) par 13.

²⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 8 (‘*PE Municipality*’).

1 2 Research problem

1 2 1 The common law of eviction

In the South African common law, ownership has been described as the real right that confers the most complete control over a thing.²¹ According to this perception, it is argued that ownership has an individualistic nature and that it is an absolute right that can be enforced against anyone.²² The owner can achieve this, *inter alia*, through the entitlement to recover (*ius vindicandi*) her property from any person who retains possession of it, using the *rei vindicatio*.

The *rei vindicatio* is regarded as the most important real action available to the owner and in the case of immovable property it adopts the form of an eviction application. To succeed with this real action the owner merely had to allege and prove that she is the owner of the property and that the property is in possession of the defendant.²³ The owner would satisfy these requirements by proving that the property is

²¹ This definition can be traced back to Hugo Grotius and the distinction he drew between complete and incomplete ownership, by defining complete ownership as “[v]olle is den eigendom waer door iemand met de zake alles mag doen nae sijn geliefde en t’sijnen bate dat by de wetten onverboden is”. This definition was partly influenced by Bartolus de Saxoferrato who defined dominium as “*ius de re corporali perfecte disponendi, nisi lege prohibeatur*”. See De Groot H *Inleidinge tot de Hollandsche Rechts-Geleerdheid* edited by F Dovring, HFWD Fischer and EM Meijers (eds) 2nd edition (1965) 2.3.9–2.3.11 and Bartolus *ad D* 41.2.17.1.

²² The abovementioned definitions of ownership by Bartolus de Saxoferrato (“*nisi lege prohibeatur*”) and Hugo Grotius (“*by de wetten onverboden*”) make it clear that the Roman-based concept of ownership was restricted by the objective law and thus by no means absolute. During the French Revolution, the population campaigned for the abolition of the feudal system, because the increased political freedom that followed was inextricably linked to possession of land. This gave rise to the reinstatement of private ownership and the establishment of separate public- and private law measures with regard to land. The concept of absolute, inviolable and individualist private ownership was emphasised, because government interference was regarded as a violation of personal liberty. This understanding of ownership was characterised as a return to the Roman law concept of ownership in an effort to afford greater authority to this idea. It is easy to see how the entitlement of full disposal in the definitions of Bartolus de Saxoferrato (“*perfecte disponendi*”) and Hugo Grotius (“*met de zake alles mag doen nae sijn geliefde en t’sijnen bate*”), together with the industrial revolution in Great Britain and the revaluation of capitalism in the western world, lead the nineteenth century Pandectists to accentuate the absoluteness of ownership. The notion of absoluteness of ownership was thus erroneously attributed to Roman- and Roman-Dutch law. See Birks P “The roman law concept of dominium and the idea of absolute ownership” 1985 *Acta Juridica* 1-37; Visser DP “The ‘absoluteness’ of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39-52; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *TSAR* 295-308 and Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasie daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 305-321.

²³ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A (“*Chetty*”). Confirmed in *Akbar v Patel* 1974 (4) SA 104 (T) at 109F-H; *Vogel NO v Volkersz* 1977 (1) SA 537 (T) at 552E-H; *Worcester Court (Pty) Ltd v Benatar* 1982 (4) SA 714 (C) at 721G-722D; *Shimuadi v Shirungu* 1990 (3) SA 344 (SWA) at 347B-G; *Port Nolloth Municipality v Xhalisa and Others*; *Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 110B-D; *Warrenton Munisipaliteit v Coetzee* 1998 (3) SA 1103 (NC) at 1109I; *Unimark Distributors (Pty)*

registered in her name²⁴ and that the defendant occupies it. The onus then shifts onto the defendant to establish a valid and enforceable right of occupation, which may take the form of a real or personal right, acquired in terms of legislation or a right, permission or licence granted by the owner. However, if the owner acknowledges that the occupier has or had a right of occupation, without there being any obligation to admit this fact, the owner had to prove that the right no longer exists or is no longer enforceable. The owner would satisfy this additional requirement by proving that the right of occupation has expired or has been terminated.²⁵ The owner would only bear this additional onus in cases where she acknowledged the existence of or relied on the termination of the right of occupation from the outset and the defendant relies on the right as a defence.²⁶ Once the owner satisfied these requirements, the court will have no discretion to refuse the eviction order based on the social and economic circumstances of the unlawful occupiers or any other general policy considerations.²⁷

This entitlement to evict was based on the assumption that it is normal for a landowner to be allowed exclusive and undisturbed possession of her property.²⁸ It follows that once ownership has been proved it will be regarded as superior to all other conflicting interests.²⁹ In the case of evictions the ability to exclude unlawful occupiers

Ltd v Erf 94 Silvertondale (Pty) Ltd 1999 (2) SA 986 (T) at 996A-C; *Pareto Ltd and Others v Mythos Leather Manufacturing (Pty) Ltd* 2000 (3) SA 999 (W) at 1001I-1002B; *Khuzwayo v Dlodla* 2001 (1) SA 714 (LCC) par 11; *Ellis v Viljoen* 2001 (4) SA 795 (C) at 803A-D; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) par 4; *De Villiers v Potgieter and Others NNO* 2007 (2) SA 311 (SCA) par 12; *Van der Merwe v Taylor NO* 2008 (1) SA 1 (CC) paras 131-132 and *Jackpersad NO and Others v Mitha and Others* 2008 (4) SA 522 (D) at 528H-529A. See Keightley R “The impact of the Extension of Security of Tenure Act on an owner’s right to vindicate immovable property” (1999) 15 SAJHR 277-307 283 (“Keightley “The impact of ESTA”).

²⁴ She can prove this *inter alia* by producing the title deeds in court. See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82A and *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C) at 804F.

²⁵ See Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s The Law of Property* (2006) 244; Van der Walt AJ *Constitutional Property Law* (2005) 410-411 and Keightley R “The impact of ESTA” 284.

²⁶ *Chetty* at 21.

²⁷ Van der Walt AJ *Property in the Margins* (2009) 54 (“Van der Walt *Property in the Margins*”).

²⁸ See *Chetty* at 20A where Jansen JA stated that

“[i]t may be difficult to define *dominium* comprehensively ... but there can be little doubt ... 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 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”

²⁹ Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 64-71 describes this as the “presumptive power” of property rights in terms of the common perception of property. She argues further

was protected because this ability leads to greater security and autonomy for the owner. In the final analysis the most persuasive rationale for the “presumptive power” of rights is that the interests that underlie those rights are *prima facie* more important than conflicting public interests.³⁰ In this sense “presumptive power” is an authoritative affirmation of individual autonomy that affords strong protection to the owner of land.

With the owner presumed to be entitled to exclusive possession of her property the onus is on the unlawful occupier to show a legal basis for her continued occupation of the land. According to Singer, the occupier bears the “burden of persuasion” to show why the owner’s rights must be limited in terms of a right or, failing that, an overriding public interest.³¹ According to US doctrine this “burden of persuasion” is assigned according to the core stick in the owner’s bundle of rights. In the case of evictions the core stick is the right to exclude others from your property. This right to exclude others provides the owner with the certainty that her vested rights and interests as owner will be protected through the stability that an established regime of property rights maintains.³² The owner’s need for stability and certainty is satisfied with reliance on the tradition or convention that she will be able to evict any unlawful occupier based on her stronger right to possession. Coombe describes this reliance on convention for firm background or “normality conditions” as the “politics of interpretation”.³³ Coombe argues

that this position, where individual rights are considered dominant and normatively more compelling than conflicting non-right interests, must prevail if individual rights are to be taken seriously. Individual rights are important because they protect a certain state of affairs and do so for a particular reason. The common perception of property recognises the individual interests of owners as strong “property rights” which have been fixed in time and are protected against the threat that public interests pose. Underkuffler refers to Alon Harel who argues that legal rights are both content-specific, because there is a certain content that is associated with every legal right, and reason-dependent, in the sense that aforementioned states of affairs are only protected for a particular reason. See further Harel A “Revisionist theories of rights: An unwelcome defense” (1998) 11 *Canadian Journal of Law and Jurisprudence* 227-244 and Harel A “What demands are rights? An investigation into the relation between rights and reasons” (1997) 17 *Oxford Journal of Legal Studies* 101-114.

³⁰ Underkuffler *The Idea of Property* 74.

³¹ Singer JW *Entitlement - The Paradoxes of Property* (2000) 62.

³² Van der Walt *Property in the Margins* 59.

³³ Coombe RJ “‘Same as it ever was’: Rethinking the politics of legal interpretation” (1989) 34 *McGill Law Journal* 603-652 637-639 (‘Coombe “Same as it ever was”’) analyses the “politics of interpretation” against the backdrop of the concern with “contextual” interpretation and theoretical developments regarding the “interpretive turn” in the social sciences. The “interpretive turn” signals a turn away from conventional understandings of language that underlie traditional legal scholarship and adjudication towards the recognition that there is no inherent or stable meaning in words. It is argued that convention is unstable and socially contingent because it always privileges one set of meaning to the violent exclusion of all others and thus it cannot provide a ready-made, neutral and objective source of stable

that the “politics of interpretation” adopts the guise of an adjudicative strategy that attempts to limit the apparent indeterminacy of interpretation by seeking stable legal meaning in convention as found in a doctrinal tradition or a core text like a constitution.³⁴

During apartheid courts found stable legal meaning in the South African doctrinal tradition that entitle a private owner to exclude others from her property and to enforce this right against others with the *rei vindicatio*. The result was that evictions from land occurred without any regard for the personal circumstances of the unlawful occupiers because these considerations were simply not relevant in terms of the *rei vindicatio* in the absence of a constitutional provision that guaranteed people access to adequate housing and forced courts to consider all relevant circumstances before issuing an eviction order. This position was exacerbated during apartheid when the powerful *rei vindicatio* was legislatively enhanced to establish and maintain a land use system that was segregated along racial lines.

1 2 2 Apartheid land law

During apartheid the Union government of South Africa developed the institution of segregation with the enactment of a plethora of racist laws. These pieces of legislation established a special relationship between power, land and labour. In rural areas black farmers lost their land and were forced into some form of oppressive labour relationship with white farmers in terms of three principal pieces of legislation. The purpose of the Black Land Act 27 of 1913³⁵ was to identify “traditional” black land and to reserve this land for the exclusive use and occupation by black people. The only way that black

meaning. P Schlag “Rights in the postmodern condition” in Sarat A and Kearns TR (eds) *Legal Rights - Historical and Philosophical Perspectives* (1996) 263-304 takes this argument further in his “politics of form” where he draws a distinction between the analytic aesthetic and instrumental aesthetic. The former reflects the pre-modern legal world and is described as static, based on order, stability and status. It operates with static, territorial terminology and metaphors that are strongly based on property notions which bear a striking resemblance to the common law (at 270-284). The instrumental aesthetic, on the other hand, reflects the modern legal world and is described as dynamic, based on progress, change and contract. The instrumental aesthetic operates with dynamic, purposive terminology and metaphors that refer to progress and the developmental characteristic of the change and reform that international human rights law represents (at 284-300). I rely on Van der Walt’s description of the analytic and instrumental aesthetic. See Van der Walt AJ “Modernity, normality, and meaning: The struggle between progress and stability and the politics of interpretation” (2000) 11 *Stell LR* 26-49, 226-243 235 (“Van der Walt “Modernity, normality, and meaning”).

³⁴ Van der Walt AJ “Modernity, normality, and meaning” 231.

³⁵ See section 2 2 1 in chapter 2 for a discussion of this Act.

people could remain on land outside “traditional” areas without the fear of criminal prosecution was to enter into a labour tenant contract with a white farmer. The Black Service Contract Act 24 of 1932³⁶ was the first comprehensive attempt to regulate labour tenancy in the Union. Many white farmers entered into labour tenancy relationships with black people and allowed their families to stay on the farms with them until the government stepped in to limit the number of black people that were congregating on farms. Chapter 4 of the Development Trust and Land Act 18 of 1936³⁷ placed extensive limitations on the tenure of black people who resided on land other than the “traditional” areas. Chapter 4 of the Act also placed onerous obligations on farmers to register all labour tenants with the native commissioner of the district and to appear before a labour tenant control board to explain why the number of labour tenants on his farm should not be reduced. While some farmers subjected themselves to this bureaucracy, others simply found this too onerous and allowed labour tenant contracts to lapse. This forced many black people to return to overcrowded “homelands” while others chose to travel to the big urban centres of South Africa in search of minimum wage-paying unskilled employment opportunities.

The process of urbanisation that ensued created a severe shortage in the availability of formal housing in urban areas, which led to the creation of informal settlements and urban squatting. In urban areas the policy of separate development was enforced through the Group Areas Act 36 of 1966.³⁸ The purpose of the Act was to establish separate areas for the different race groups defined in the Act³⁹ and to control the use, occupation and acquisition of ownership of land in those areas. The Act accordingly prohibited persons of other race groups from using, occupying or acquiring ownership of land in areas designated to a particular group. The Black (Urban Areas) Act 21 of 1923,⁴⁰ the Black (Urban Areas) Consolidation Act 25 of 1945⁴¹ and the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and

³⁶ See section 2 2 1 in chapter 2 for a discussion of this Act.

³⁷ See section 2 2 in chapter 2 for a discussion of this Act.

³⁸ See section 2 3 in chapter 2 for a discussion of this Act.

³⁹ Section 12(1) of the Act distinguished between white, black (originally termed “native”) and coloured (with subdivisions for Indian, Chinese, Malay and a “residual” class) groups.

⁴⁰ See section 2 2 in chapter 2 for a discussion of this Act.

⁴¹ See section 2 2 in chapter 2 for a discussion of this Act.

Relevant Matters⁴² placed further limitations on the nature and duration of black tenure in urban areas to the point where the presence of black people in urban areas was considered to be of a temporary nature only.

The operation of the *rei vindicatio*, in conjunction with rural and urban land tenure measures during apartheid, ensured that black people only settled in group areas or official townships as they were driven from rural areas to the cities in search of employment. The steady influx into urban areas quickly wiped out the supply of residential space for black people and forced them to occupy land close to employment opportunities in contravention of the Group Areas Act 36 of 1966.

In turn the government acted decisively by using its police powers to evict people for health, safety and public interest reasons in terms of the Prevention of Illegal Squatting Act 51 of 1952 alone, or in conjunction with the Group Areas Act 36 of 1966, the Slums Act 53 of 1934,⁴³ the Trespass Act 6 of 1959,⁴⁴ the Physical Planning Act 88 of 1967⁴⁵ or the Health Act 63 of 1977.⁴⁶ These pieces of legislation were used to remove the squatters with force and to relocate them to densely populated areas on the fringes of society without any regard for the personal hardship inflicted on the people that were evicted or their housing need. It was possible to evict and relocate people in this way during apartheid because there was no constitutional right to housing that could act as a counterweight to the owner's proprietary rights or the police powers of the state.

The rural and urban legislation that regulated the land tenure of black people ensured that they were systematically moved out of city centres and relocated to pieces of vacant land that were located on the periphery of urban areas. These areas were serviced with very little infrastructure or municipal services. Over time these areas deteriorated and people were forced to live in intolerable conditions that posed serious risks to their health and safety. The result of these land tenure measures was the

⁴² Proclamation R1036 of 1968 in *GG Extraordinary* 2096 of 14 June 1968. See section 2.2 in chapter 2 for a discussion of this Act.

⁴³ See section 1 in chapter 2 for a brief discussion of this Act.

⁴⁴ See section 1 in chapter 2 for a brief discussion of this Act.

⁴⁵ See section 1 in chapter 2 for a brief discussion of this Act.

⁴⁶ See section 1 in chapter 2 for a brief discussion of this Act.

establishment of large, impoverished black settlements that existed alongside small, prosperous white neighbourhoods.⁴⁷

1 2 3 Housing need and service delivery

In 1994 the Department of Housing (as it was then known) published a *White Paper on Housing*⁴⁸ ('*White Paper*') to mark the beginning of its process to house the nation in terms of an inclusive and comprehensive housing policy framework. The *White Paper* estimated⁴⁹ that there were 8.3 million households in South Africa in 1994 and that the projected annual population growth would result in the formation of an additional 200 000 households per year, on average, until 2000.⁵⁰ The *White Paper* envisaged that the population growth coupled with "[a] relatively small formal housing stock, low and progressively decreasing rates of formal and informal housing delivery"⁵¹ would result in a surge of households seeking alternative accommodation in informal settlements,⁵² "squatter housing"⁵³ and already overcrowded formal housing.⁵⁴ The *White Paper* further noted that overcrowding in informal settlements and an increasing number of land invasions in urban areas not only threatened to rapidly increase the estimated housing backlog of 1.5 million housing units, but it also aggravated the insecurity and frustration that individuals and communities as a whole felt on a daily basis, which would only contribute to the rising levels of criminal activity and instability already prevalent in many communities.⁵⁵

⁴⁷ *PE Municipality* par 10.

⁴⁸ GG 354 GN 1376 of 23 December 1994.

⁴⁹ *White Paper* at 7 the Department of Housing stated that "there is no comprehensive source of information on housing" and therefore added the disclaimer that "the statistical information in this section must be seen as indicative only."

⁵⁰ *White Paper* par 3.1.1(b).

⁵¹ *White Paper* par 3.1.3.

⁵² *White Paper* par 3.1.3(b) estimated that approximately 1.5 million urban informal housing units existed in South Africa.

⁵³ *White Paper* par 3.1.3(d) estimated that approximately 1.06 million households or 13.5% of the total population lived in free standing "squatter housing" on the periphery of cities and towns. The *White Paper* defined "squatter housing" as "any housing unit over which no formal tenure is held" and noted that such housing would generally be "of a poor standard, with minimal or no access to basic services."

⁵⁴ *White Paper* par 3.1.3(a) estimated that the formal housing stock (houses, flats, townhouses and retirement homes) at 3.4 million units.

⁵⁵ *White Paper* par 3.21.

Since 1994 the housing backlog increased to 2 470 000 units during the 2001/02 financial year,⁵⁶ to 2 475 200 units during the 2005/06 financial year⁵⁷ and showed a slight decrease to 2 154 000 units during the 2008/09 financial year.⁵⁸ The government completed 2 604 763 units at the end of the 2007/08 financial year⁵⁹ and estimates that it will deliver a further 1 134 899 houses by the end of the 2013/14 financial year.⁶⁰ Despite these ambitious expectations, the Department of Human Settlements (as it is currently known) is unlikely to deliver on its promises, because it is plagued by *inter alia*

⁵⁶ Department of Human Settlements *Need for Adequate Shelter Estimates (Housing Backlog) since 1994* (2010) ('Department of Human Settlements *Need for Adequate Shelter Estimates*') available online at www.pmg.org.za/questions/table1866.pdf (accessed on 28 February 2011). The Department provided this information in reply to a parliamentary question. During this period the housing backlog per province was as follows: 330 000 in the Eastern Cape, 220 000 in the Free State, 750 000 in Gauteng, 400 000 in KwaZulu-Natal, 120 000 in Limpopo, 145 000 in Mpumalanga, 35 000 in the Northern Cape, 240 000 in the North West and 230 000 in the Western Cape. This information is significant, because it shows the housing backlog in the financial year following the judgment of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) ('*Grootboom*'). Statistics South Africa does not have information available on the housing backlog for the 2000/01 financial year.

⁵⁷ Department of Human Settlements *Need for Adequate Shelter Estimates*. During this period the housing backlog per province was as follows: 352 600 in the Eastern Cape, 169 000 in the Free State, 697 950 in Gauteng, 533 200 in KwaZulu-Natal, 112 800 in Limpopo, 132 500 in Mpumalanga, 32 200 in the Northern Cape, 222 100 in the North West and 222 850 in the Western Cape. This information is significant, because it shows the housing backlog in the financial year following the judgments of *PE Municipality and Modderklip CC*.

⁵⁸ Department of Human Settlements *Need for Adequate Shelter Estimates*. During this period the housing backlog per province was as follows: 235 000 in the Eastern Cape, 160 000 in the Free State, 615 000 in Gauteng, 365 000 in KwaZulu-Natal, 110 000 in Limpopo, 128 000 in Mpumalanga, 34 000 in the Northern Cape, 202 000 in the North West and 305 000 in the Western Cape. This information is significant, because it shows the housing backlog in the financial year following *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) ('*Occupiers of 51 Olivia Road*') and preceding *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) ('*Residents of Joe Slovo*'), *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) ('*Joseph*'), *Abahlali baseMjondolo Movement of South Africa and Another v Premier of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) ('*Abahlali baseMjondolo*'), *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) ('*Nokotyana*') and *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) ('*Betlane*').

⁵⁹ National Treasury *Provincial Budgets and Expenditure Review 2005/06 – 2011/12* (2009) 102 available online at <http://www.treasury.gov.za/publications/igfr/2009/prov/00.%20Title%20page,%20Foreword,%20Technical%20notes%20and%20Contents.pdf> (accessed on 11 July 2011). During the period of the 1994/95 and 2002/03 financial years the government completed 1 420 897 houses. This was followed by 193 615 houses in the 2003/04 financial year, 217 348 houses in the 2004/05 financial year, 252 834 houses in the 2005/06 financial year, 271 219 houses in the 2006/07 financial year and 248 850 houses in the 2007/08 financial year.

⁶⁰ Department of Human Settlements *Presentation to the Portfolio Committee on Human Settlements, 5 March 2010* (2010) available online at www.pmg.org.za/files/docs/100305dhs.ppt (accessed on 11 July 2011). Preliminary results show that the government delivered 219 899 houses in the 2009/10 financial year and expects to deliver an average of 230 000 houses until the end of the 2013/14 financial year.

underspending at provincial level, as a result of poor programme management;⁶¹ a lack of coordination between the different arms and other spheres of government that are involved in the housing delivery process; severe delays in the initiation, approval, implementation and completion of housing projects; and the ultimate derailment of housing projects as a result of fraud, corruption and escalations in construction costs.⁶² Tissington therefore observes that the “housing need”⁶³ is set to increase, even if the Department succeeds in delivering an average of 230 000 houses per year until the end of the 2013/14 financial year, because by then the “housing need” will still amount to 1 million houses on the information available at present.⁶⁴ The “housing need” in South Africa is exacerbated by the fact that it is closely linked to a lack of access to basic services including water,⁶⁵ sanitation⁶⁶ and electricity for lighting.⁶⁷

⁶¹ National Treasury *Press Release, Provincial Budgets: 2010/11 Financial Year, Mid-Term Provincial Budgets and Expenditure Report, 18 November 2010* (2010) 5 shows that provincial housing and local government departments spent R 8 billion or 38.6% of the R 20.8 billion budget appropriated to them collectively. This represents a 14.9% year-on-year decrease in spending. The spending per province was: R 1.129 million or 44.6% of the R 2.533 million budget in the Eastern Cape, R 0.449 million or 26.7% of the R 1.684 million in the Free State, R 1.738 million or 38.5% of the R 4.511 million budget in Gauteng, R 1.459 million or 35% of the R4.173 million budget in KwaZulu-Natal, R 0.882 million or 46.8% of the R 1.885 million budget in Limpopo, R 0.650 or 40.6% of the R 1.601 million budget in Mpumalanga, R 0.267 million or 54.2% of the R 0.493 million budget in the Northern Cape, and R 0.652 million or 38.3% of the R 1.704 million budget in the Western Cape. The press release is available online at www.treasury.gov.za/comm_media/press/2010/2010111801.pdf (accessed on 11 July 2011).

⁶² National Treasury *Provincial Budgets and Expenditure Review 2005/06 – 2011/12* (2009) 103-104 available online at <http://www.treasury.gov.za/publications/igfr/2009/prov/00.%20Title%20page,%20Foreword,%20Technical%20notes%20and%20Contents.pdf> (accessed on 11 July 2011).

⁶³ Tissington K A *Resource Guide on Housing Policy and Implementation in South Africa 1994-2010* (2011) 34 (*‘Tissington Resource Guide on Housing’*) observes that the Department recently abandoned the term “housing backlog”, because the time-specific nature of the term and rapid urbanisation made it very difficult to quantify housing backlogs accurately. Instead, the Department adopted the term “housing need” to refer to the investment required to provide housing for those in need of housing.

⁶⁴ Tissington *Housing Resource Guide* 30.

⁶⁵ *White Paper* par 3.1.4(a) estimated that 25% of all functionally urban households did not have access to piped potable water supply in 1994. Stats SA *Community Survey 2007* shows that 11.4% or 5.529 million people did not have access to water in 2007 compared to the 15.5% or 6.947 million people in 2001.

⁶⁶ *White Paper* par 3.1.4(b) estimated that 48% of all households did not have access to flush toilets or ventilated improved pit latrines (‘VIP toilets’) whilst 16% of all households did not have access to any type of sanitation system in 1994. Stats SA *Community Survey 2007* 5 shows that 60.4% or 29.295 million people, 6.8% or 3.298 million people, and 8.6% or 4.171 million people had access to flush toilets, VIP toilets and no toilets respectively in 2007. This shows an increase in access since 2001, when 51.9% or 23.261 million people, 5.7% or 2.554 million people, and 13.6% or 6.095 million people had access to flush toilets, VIP toilets and no toilets respectively.

⁶⁷ *White Paper* par 3.1.4(c) estimated that 46.5% of all households did not have a link to the electricity supply grid in 1994. Stats SA *Community Survey 2007* 4 shows that 20% or 9.7 million people did not have access to electricity for lighting in 2007, compared to the 30.3% or 13.580 million people in 2001.

A recent study conducted under the auspices of the Community Law Centre⁶⁸ shows that both the frequency⁶⁹ and violent nature⁷⁰ of community protests⁷¹ have increased significantly since 2007. The study further shows that 36.33% or 190 of the 523 instances of community protest concerned the lack of access to affordable or adequate housing.⁷² This is followed by 96 instances (18.36% of the community protests) of complaints about the lack of access to clean drinking water,⁷³ 95 instances (18.16% of the community protests) of complaints about the lack of access to electricity or the exorbitant rates charged,⁷⁴ and 75 instances (15.43% of the community protests) of complaints about the lack of access to adequate refuse removal services and unsanitary toilet facilities.⁷⁵ This has resulted in the Department recently conceding that its housing provision will “remain inadequate because of the lack of access to basic services.”⁷⁶

Since the advent of democracy in 1994 the Constitution has come into force. Amongst other things it sets out to “[i]mprove the quality of life for all citizens”.⁷⁷ Significantly, in the housing and eviction context, the Constitution includes a right that

⁶⁸ Jain H *Community Protests in South Africa: Trends, Analysis and Explanations* (2010) ('Jain *Community Protests*') available online at <http://ldphs.org.za/publications/publications-by-theme/local-government-in-south-africa/communityprotests/Final%20Report%20%20Community%20Protests%20in%20South%20Africa.pdf> (accessed on 28 February 2011).

⁶⁹ During 2007, there was an average of 8.73 community protests per month. During 2008, this number increased modestly to 9.83 protests per month, while in 2009 the number nearly doubled to 19.18 protests per month. In the period of January to June 2010, the number of community protests decreased slightly to 16.33 per month. See Jain *Community Protests* 4-5.

⁷⁰ During 2007, 41.66% of the community protests were violent. This percentage decreased slightly in 2009 when 38.13% of the community protests were violent, but increased again in 2009 when 43.60% of the community protests were violent. In the period of January to June 2010, the percentage of violent community protests increased even further to 54.08%. Jain defines “violent community protests” as “protests in which some participants engaged in physical acts that either caused immediate physical harm to a person or were substantially likely to result in such harm.” See Jain *Community Protests* 9-12.

⁷¹ Jain defines “community protest” as including “instances of unrest where protestors did not explicitly cite the inadequacy of municipal service delivery, but referred to ‘corruption’ on the part of municipal officials or to inadequate housing (for which local government is not legally responsible) as grievances.” See Jain *Community Protests* 2.

⁷² Jain *Community Protests* 30.

⁷³ Jain *Community Protests* 30.

⁷⁴ Jain *Community Protests* 30.

⁷⁵ Jain *Community Protests* 30.

⁷⁶ Department of Human Settlements *Presentation to the Portfolio Committee on Human Settlements, 5 March 2010* (2010) available online at www.pmg.org.za/files/docs/100305dhs.ppt (accessed on 11 July 2011).

⁷⁷ Preamble of the Constitution.

guarantees everyone the right of access to adequate housing.⁷⁸ The Constitution requires that government adopt legislative and other measures that will enable the progressive realisation of this right within its available resources.⁷⁹ Parliament has sought to adhere to this provision with the enactment of the Housing Act 107 of 1997. The Act provides for the facilitation of a sustainable housing development process and lays down general principles that apply to all housing developments in all spheres of government. Sections 3, 7 and 9 of the Act clearly enumerate the functions of national, provincial and local government in the housing development process.⁸⁰

Following the *Grootboom* judgment the Department of Housing (as it was then known) adopted a programme to provide Housing Assistance in Emergency Housing Situations as chapter 12 of the National Housing Code. The aim of this programme is to provide assistance to people who, for reasons beyond their control face disasters, evictions or threatened evictions, demolitions or imminent displacement, or immediate threats to life, health and safety and therefore find themselves in an emergency situation. The Department of Housing adopted a further programme to provide for Upgrading of Informal Settlements as chapter 13 of the National Housing Code. The aim of this programme is to provide grants to local authorities so that they can upgrade informal settlements in their jurisdiction in a structured way according to a phased development approach. This programme enables local authorities to fulfil their constitutional obligations of providing services to communities in a sustainable manner⁸¹ and promoting a safe and healthy environment for the inhabitants of its jurisdiction.⁸²

Recently Parliament also enacted the Social Housing Act 16 of 2008. According to its long title the aim of this Act is to establish a sustainable social housing environment and to define the functions of national, provincial and local government in this regard.

Finally, the Constitution states that a court may only grant an order for the eviction from or demolition of a home after it has considered all the relevant circumstances and that no legislation may permit arbitrary evictions.⁸³ The Prevention of Illegal Eviction

⁷⁸ Section 26(1) of the Constitution.

⁷⁹ Section 26(2) of the Constitution.

⁸⁰ See section 1 of chapter 5 for a discussion of the Act.

⁸¹ Section 152(1)(b) of the Constitution.

⁸² Section 152(1)(d) of the Constitution.

⁸³ Section 26(3) of the Constitution.

from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') was enacted to ensure that: firstly, evictions were decriminalised; secondly, adequate procedural protections were put in place to prevent arbitrary evictions; and thirdly, substantive rights were included for courts to have regard to in considering whether it would be "just and equitable" in the circumstances to issue an eviction order. This coincided with a major shift in the focus of eviction legislation, from the prevention of illegal squatting during apartheid to the prevention of illegal eviction during democracy. With this shift the term "squatter" became obsolete because it was incompatible with the foundational values of the Constitution, the right to equality and the right to human dignity.

South Africa has come a long way in addressing the problem of housing need and service delivery since the beginning of democracy. Parliament has enacted legislation and the Department of Human Settlements has adopted policies to give effect to section 26(2) of the Constitution. The constitutional, policy and legislative framework to address housing need and service delivery has been created. The challenge remains to find a way of interpreting these provisions in a structured manner so that it gives substantive content to the right of access to adequate housing in section 26(1) of the Constitution.

1 2 4 Interpretation of the right of access to adequate housing

In *Grootboom* the Constitutional Court stated that the right of access to adequate housing amounted to "more than bricks and mortar."⁸⁴ However, in the ten years since this judgment the Constitutional Court has failed to elaborate on the normative purposes and substantive content of this right.⁸⁵ In *Grootboom* the Constitutional Court also rejected the submission that the right of access of adequate housing contained a "minimum core obligation" that government had to comply with, in order for it to "respect, protect, promote and fulfil"⁸⁶ the right. While it can be argued that the Constitutional Court was correct in refusing to adopt a "minimum core obligation" in the South African context, it must also be noted that the court has not developed its own

⁸⁴ *Grootboom* par 35.

⁸⁵ See section 2 1 2 in chapter 3 for a discussion of the home interests of unlawful occupiers.

⁸⁶ Section 7(2) of the Constitution. See section 2 in chapter 4 for the development of an organising framework for giving substantive content to the right of access to adequate housing. See also section 3 in chapter 4 for interpretive guidance from the European, Inter-American and African human rights systems on the substantive content of the right to housing.

approach to give substantive content to the right of access to adequate housing since *Grootboom*. In this regard the Constitutional Court could have adopted the characteristics that the Committee on Economic, Social and Cultural Rights identified in *General Comment 4: The Right to Adequate Housing (Art. 11(1))*⁸⁷ as being indicative of having access to adequate housing. These characteristics include legal security of tenure;⁸⁸ availability of services, materials, facilities and infrastructure;⁸⁹ affordability;⁹⁰ habitability;⁹¹ accessibility;⁹² location;⁹³ and cultural adequacy.⁹⁴

In the absence of a developed normative purpose and substantive content of the right of access to adequate housing, applicants have found it difficult to express their housing related and service delivery concerns as a violation of section 26(1) of the Constitution. The Constitutional Court judgments of *Joseph* and *Nokotyana* serve as recent examples of this problem. In *Joseph* and *Nokotyana* the Constitutional Court opted to decide the cases in terms of administrative law considerations despite the fact that the applicants couched their constitutional challenge in terms of section 26(1) of the Constitution. The failure of the Constitutional Court to engage with arguments about the content of the right of access to adequate housing is limiting the development of a substantive understanding of this right that would include the need for electricity, water, sanitation, refuse removal and other municipal services.

Instead the Constitutional Court chose to read sections 26(1) and (2) of the Constitution together and developed under it the model of “reasonableness review”.⁹⁵

⁸⁷ UN Doc E/C 1992/23.

⁸⁸ Par 8(a).

⁸⁹ Par 8(b).

⁹⁰ Par 8(c).

⁹¹ Par 8(d).

⁹² Par 8(e).

⁹³ Par 8(f).

⁹⁴ Par 8(g).

⁹⁵ *Grootboom* paras 39-44. The authors that have engaged critically with this model of reasonableness review are: Liebenberg S *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 132-186; Liebenberg S “Socio-economic rights: Revisiting the reasonableness review/minimum core debate” in Woolman S and Bishop M (eds) *Constitutional Conversations* (2008) 303-330; Pieterse M “On ‘dialogue’, ‘translation’ and ‘voice’: A reply to Sandra Liebenberg” in Woolman S and Bishop M (eds) *Constitutional Conversations* (2008) 331-347; Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007); McLean K “Housing” in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original Service, July 2006) 55-14 - 55-26; Steinberg C “Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence” (2006) 123 *SALJ* 264-284; Brand D “The proceduralisation of South African socio-economic rights jurisprudence or ‘What are socio-economic rights for?’” in Botha H, Van der

This model has dominated the jurisprudence of the courts under section 26 (and section 27) of the Constitution and has precluded them from giving independent and substantive content to the right of access to adequate housing. As a result, there is no normative foundation or clearly identified set of characteristics that constitute what adequate housing means and against which the obligation to “progressively” realise can be measured.

The dominance of the inquiry into the reasonableness of the government’s actions has also forced counsel in constitutional litigation to cast their heads of argument into a form that only evaluates the (un)reasonableness of the governments’ actions, where in some cases it might have been easier to launch a constitutional attack in terms of sections 26(1) or (3) of the Constitution. The Constitutional Court judgment of *Abahlali baseMjondolo* serves as a recent example of this problem. In *Abahlali baseMjondolo* the applicants couched their constitutional challenge to various provisions of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 in terms of section 26(2) of the Constitution. The purpose of this Act is to prevent the re-emergence of slums and is not to provide access to adequate housing on a progressive basis. It would therefore have been better to conceptualise a constitutional challenge in terms of section 26(3) of the Constitution because this would have forced the court to scrutinise the Act from a different perspective and could have prompted added nuance to the jurisprudence on the right of access to adequate housing.

As a result, the courts, and especially the Constitutional Court, has allowed the government to hide behind institutional, financial and capacity concerns to excuse its poor performance in terms of housing delivery, despite otherwise clear policy and legislative obligations in the Housing Act 107 of 1997, the National Housing Code (2000, revised in 2009)⁹⁶ and the *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004)⁹⁷ policy.

Walt AJ and Van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33-56; Van der Walt AJ “A South African reading of Frank Michelman’s theory of justice” in Botha H, Van der Walt AJ and Van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (2003) 163-211 and Liebenberg S “The interpretation of socio-economic rights” in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original Service, December 2003) 33-32 - 33-41.

⁹⁶ Available online at <http://www.dhs.gov.za> (accessed on 28 February 2011).

⁹⁷ Available online at <http://www.capegateway.gov.za/Text/2007/10/bng.pdf> (accessed on 28 February 2011).

1 2 5 Obligations of the State

Over the past seven years, the High Courts developed the law of evictions and the common law rules of joinder in a series of cases where local authorities contested the applicants' application to have it joined to the eviction proceedings, on the basis that it has no role to play in those proceedings.⁹⁸ However, these cases show that the courts have not adopted a uniform approach in their reasoning for the joinder of local authorities to eviction proceedings. The courts have consistently relied on a combination of arguments founded on the interconnected nature of the notice requirement in section 4(2) of PIE; the requirement to attempt mediation in section 7(1) of PIE; and finally, the constitutional and statutory obligations of local authorities. In *Occupiers of Erf 101, 102, 104 and 112 Short Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*⁹⁹ and *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*¹⁰⁰ the Supreme Court of Appeal recently held that the primary reason for joining local authorities to eviction proceedings flows from their constitutional and statutory obligations. One further positive development that flowed from the series of cases before the High Courts is the requirement that local authorities have to compile and submit reports that provide relevant and up to date information on the housing conditions in the area of the jurisdiction of the specific local authority¹⁰¹ to the courts in eviction cases.

This obligation to submit a report to a court on the housing conditions that prevail in a specific local authority coincides with the obligation of “meaningful engagement” that the Constitutional Court recently created in *Occupiers of 51 Olivia Road*.¹⁰² After hearing oral argument, the Constitutional Court issued an interim order¹⁰³ that directed

⁹⁸ *ABSA Bank Ltd v Murray and Another* 2004 (2) SA 15 (C) ('Murray'); *Cashbuild (South Africa) (Pty) Ltd v Scott and Others* 2007 (1) SA 332 (T); *Lingwood and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W) ('Lingwood'); *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W) ('Sailing Queen Investments'); *Blue Moonlight Properties; Blue Moonlight Properties II and Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 (5) SA 387 (T). These cases are discussed in section 2 1 2 in chapter 5.

⁹⁹ 2010 (4) BCLR 354 (SCA) par 14.

¹⁰⁰ 2010 (9) BCLR 911 (SCA) par 14.

¹⁰¹ *Blue Moonlight Properties* par 75.

¹⁰² The Constitutional Court subsequently applied and developed this obligation further in *Residents of Joe Slovo and Abahlali baseMjondolo*. This obligation is discussed in section 2 2 in chapter 5.

¹⁰³ The interim order was issued on 30 August 2007 (Interim order *Occupiers of 51 Olivia Road*). Available online at www.constitutionalcourt.org.za/Archimages/10731.PDF (Accessed on 7 March 2010).

the parties “to engage with each other meaningfully”.¹⁰⁴ The Court found that a local authority would be acting in a manner that was generally in conflict with the spirit and purpose of its obligations to, on the one hand, provide access to adequate housing¹⁰⁵ read with the right to human dignity¹⁰⁶ and the right to life,¹⁰⁷ and on the other hand, to fulfil the constitutional functions of local government in section 152 of the Constitution, when it evicted people from their homes without first engaging with them.¹⁰⁸

In *Residents of Joe Slovo* the Constitutional Court made it clear that meaningful engagement could even have a significant role to play after litigation came to a close. While engagement, at this stage, should by no means be viewed as a substitute for the engagement that precedes litigation, it could concern the upgrading of the properties where the unlawful occupiers currently reside in order to make it safer or more suitable for human habitation.¹⁰⁹ However, engagement at this stage will invariably pertain to the details of the eviction,¹¹⁰ possible relocation to temporary accommodation,¹¹¹ and ultimately the provision of permanent alternative accommodation.¹¹² The subsequent decision of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another as Amici Curiae)*¹¹³ shows that meaningful engagement after litigation has come to a close has the potential to be highly unproductive because the parties failed to reach agreement on a proposed time table for the relocation of the unlawful occupiers from the Joe Slovo informal settlement to Delft. The MEC for Human Settlements in the Western Cape requested that the execution of the original order be postponed because there were grave concerns about the social, financial and legal costs of relocating the unlawful occupiers to Delft and the timing of the construction of the temporary residential units.

¹⁰⁴ Interim order *Occupiers of 51 Olivia Road*, Order 1.

¹⁰⁵ Section 26 of the Constitution and section 9(1)(a)(i) of the Housing Act 107 of 1997.

¹⁰⁶ Section 10 of the Constitution.

¹⁰⁷ Section 11 of the Constitution.

¹⁰⁸ *Occupiers of 51 Olivia Road* par 16.

¹⁰⁹ See Interim order *Occupiers of 51 Olivia Road*, Orders 1 and 2.

¹¹⁰ See *Residents of Joe Slovo* par 7, Orders 4-7 and 11-15.

¹¹¹ See *Residents of Joe Slovo* par 7, Orders 8-10.

¹¹² See *Residents of Joe Slovo* par 7, Orders 17-20.

¹¹³ 2011 (7) BCLR 723 (CC).

The availability of alternative accommodation has not been considered in any principled manner, despite it being widely regarded as “the most important factor for a court to have regard to in determining whether it is just and equitable to issue an eviction order.”¹¹⁴ Courts have correctly been at pains to incorporate detailed descriptions of the squalid conditions¹¹⁵ that prevail in informal settlements and inner city buildings that have been abandoned by their owners. It has also become customary to include a detailed overview of the history of the occupation¹¹⁶ to highlight the daily struggles of these unlawful occupiers.¹¹⁷

Sadly, the acknowledgment of the realities of the accommodation of impoverished groups has not translated into a substantive contextual analysis of their right of access to adequate housing and how such an analysis could add nuance to the housing development obligations of government,¹¹⁸ because the courts have continued to issue eviction orders that are sought in the name of health and safety considerations¹¹⁹ or development¹²⁰ without any serious regard to the disastrous impact that the evictions and subsequent relocations will have on the livelihoods of these unlawful occupiers.¹²¹

1 2 6 Summary

Currently evictions still occur, on the one hand, at the behest of private land owners who seek to obtain vacant possession of their land for private use or development, and on the other hand, upon application from local authorities that seek to keep people off land and out of buildings in the name of health, safety and public interest considerations. These evictions from private and public land have social and legal consequences to the

¹¹⁴ *Lingwood* par 18.

¹¹⁵ See *Grootboom* par 7 and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 404 (SCA) par 10.

¹¹⁶ See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) par 3; *Pedro and Others v Greater George Transitional Council* 2001 (2) SA 131 (C) paras 5-6; *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C) at 1239D-F; *Baartman and Others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) paras 2-3 and *Murray* par 6.

¹¹⁷ See *Sailing Queen Investments* par 4 and *Lingwood* par 5.

¹¹⁸ See section 3 in chapter 5 for a discussion of the development of an alternative approach to the consideration of alternative accommodation.

¹¹⁹ See *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T) and *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA).

¹²⁰ See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 404 (SCA); *Occupiers of 51 Olivia Road and Residents of Joe Slovo*.

¹²¹ See *Residents of Joe Slovo* par 321.

extent that they contribute to the growing need for housing and service delivery in urban areas throughout South Africa. The courts has taken into account that severe hardship flows from most evictions and have therefore ordered the government to ameliorate these hardships through various housing programmes in those instances where it was deemed “just and equitable” to evict the unlawful occupiers. These same courts, especially the Constitutional Court, have in the process placed too much emphasis on section 26(2) of the Constitution and failed to give substantive content to section 26(1) of the Constitution. The result is that courts have been able to accept that an eviction will be “just and equitable” for purposes of section 26(3) of the Constitution and PIE with greater ease than it would have been able to do had the courts developed an independent and substantive content for section 26(1) of the Constitution.

The South African courts have been reluctant to engage with international law on housing and evictions in terms of section 39(1)(b) of the Constitution. In the process the courts have deprived themselves from participating in and learning from the international human rights debate about housing and evictions. The result is that the courts have not identified or developed characteristics that would be indicative of having access to adequate housing in the South African context like the Committee on Economic, Social and Cultural Rights have done at the United Nations level. The Courts have similarly failed to develop an understanding of having access to adequate housing as being “more than bricks and mortar”. This can be ascribed to the lack of engagement with literature from the social sciences about the meaning and affective value of a home. The result is that evictions are considered to be “just and equitable” with greater ease because the courts have firstly, failed to engage with the human cost and hardship that coincides with evictions in a principled manner; secondly, failed to place the rights and interests of those that stand to be evicted in an international legal context; and finally, been unable to read existing constitutional and statutory obligations of government in light of such developments.

1 3 Research question, hypothesis and methodology

In *Grootboom*, the Constitutional Court laid down its approach to the interpretation of section 26 of the Constitution, by stating that it “must be construed in its context.”¹²²

Yacoob J explained that this required

“the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chap[ter] 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.”¹²³

With regard to the textual context of the right of access to adequate housing, Yacoob J noted that all the rights in the Bill of Rights are interrelated and mutually supportive of each other.¹²⁴ The right of access to adequate housing can therefore not be viewed in isolation, because it has a close relationship with all the other rights in the Constitution.¹²⁵

Chaskalson P (as he then was) summarised the social and historical context within which socio-economic rights - including the right of access to adequate housing - must be interpreted in *Soobramoney v Minister of Health, KwaZulu-Natal*¹²⁶ as follows:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”¹²⁷

The Constitutional Court has engaged with the textual context of section 26 of the Constitution by emphasising the interrelationship between the right of access to adequate housing and equality;¹²⁸ human dignity;¹²⁹ life;¹³⁰ citizenship;¹³¹ access to

¹²² *Grootboom* par 21.

¹²³ *Grootboom* par 22.

¹²⁴ *Grootboom* par 23.

¹²⁵ *Grootboom* par 24.

¹²⁶ 1998 (1) SA 765 (CC).

¹²⁷ Par 8.

¹²⁸ See *Grootboom* paras 23 and 83; *PE Municipality* par 15; *Residents of Joe Slovo* paras 142, 191 and 231. See also Liebenberg S and Goldblatt B “The interrelationship between equality and socio-economic rights under South Africa’s transformative constitution” (2007) 23 *SAJHR* 335-361.

courts;¹³² and administrative justice.¹³³ However, the Constitutional Court has only engaged with the social and historical context of section 26 to a limited extent in cases where it focussed on the history and duration of the occupation.¹³⁴

I pose the research question of this dissertation against the background of this interpretative approach and the problems experienced in housing delivery. The central research question of this dissertation is whether squatters will be afforded greater protection through a substantive interpretation of section 26 of the Constitution that is influenced by a contextual understanding of evictions and international law.

The central hypothesis of this dissertation is that the Constitution envisages the creation of a society that is committed to large-scale political, social and economic transformation based on human dignity, equality and justice. In the housing and eviction context this requires among other things the development of an independent and substantive understanding of what it means to have access to adequate housing for purposes of section 26(1) of the Constitution. Developing an independent and substantive content for the right of access to adequate housing must be understood against the background of the evictions that occurred during apartheid without any regard for the personal circumstances or subsequent hardship that flowed from these evictions. During apartheid evictions occurred without any concern for the interests that unlawful occupiers had in their homes. I contend that it is impossible to realise the full transformative potential of section 26 of the Constitution in the absence of such an independent and substantive understanding of what it means to have access to adequate housing.

¹²⁹ See *Grootboom* paras 23 and 83; *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) par 29; *PE Municipality* paras 12, 15, 18 and 41-42; *Occupiers of 51 Olivia Road* par 16; *Residents of Joe Slovo* paras 75, 119, 173, 218, 231, 329 and 406 and *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) par 29. See also Chaskalson A “Human dignity as a foundational value of our constitutional order” (2000) 16 *SAJHR* 193-205; Sachs A “The judicial enforcement of socio-economic rights” (2003) 56 *Current Legal Problems* 579-601 and Liebenberg S “The value of human dignity in interpreting socio-economic rights” (2005) 21 *SAJHR* 1-31.

¹³⁰ *PE Municipality* par 10; *Occupiers of 51 Olivia Road* par 16 and *Residents of Joe Slovo* paras 18, 24, 265 and 387.

¹³¹ *PE Municipality* par 19; *Residents of Joe Slovo* paras 147, 199, 265, 387 and 408 and *Joseph* paras 46 and 52.

¹³² *Modderklip CC* paras 39-51.

¹³³ *Residents of Joe Slovo* par 296 and *Joseph* par 43.

¹³⁴ *PE Municipality* paras 8-10 and *Residents of Joe Slovo* paras 20-35.

The aim of chapter 2 is to place forced evictions in their legal-historical context by analysing the rural and urban land tenure measures that were used during apartheid to limit the nature and duration of the tenure of black people. The hypothesis of this chapter is that the prevalence of homelessness and the scope of the housing crisis in present day South Africa originated with the rural and urban land tenure measures that the government used in conjunction with the common law remedies of private owners to conduct large-scale forced evictions during apartheid. This chapter will show that a renewed appreciation of the legal-historical context of forced evictions will form the background against which the exploration of the process to “transform our society into one in which there will be human dignity, freedom and equality”¹³⁵ must begin. This renewed appreciation of the legal-historical context of forced evictions will enable courts to understand the social and historical context of section 26 of the Constitution and to develop a substantive meaning for the right of access to adequate housing. I have adopted adopt the methodology of a limited historical study to place forced removals and the demolition of homes in the context of apartheid land law for purposes of investigating the hypothesis of this chapter. I have limited my description and analysis of legislation and case law to the period between 1913 and 1994. The former date is when the Black Land Act 27 of 1913 was enacted while the latter date marked the official end of apartheid.

The first aim of chapter 3 is to provide an analysis of the impact of section 26 of the Constitution and PIE in an attempt show how the law of evictions has changed since the advent of democracy. The second aim of chapter 3 is to develop the normative content of section 26(1) of the Constitution by drawing on literature about the affective value of the “home” and its relevance in the law. The first hypothesis of this chapter is that the coming into force of the right of access to adequate housing and the enactment of PIE marked a decisive shift from the apartheid past where evictions occurred without any regard for the personal circumstances of unlawful occupiers to the current position under the democratic dispensation where each eviction application requires a careful appreciation of all the relevant circumstances surrounding the eviction. The second hypothesis is that the literature about the affective value of the “home” will enable courts

¹³⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) par 8.

to develop the current understanding of the right of access to adequate housing as simply amounting to “more than bricks and mortar”. The analysis of the constitutional and statutory context of evictions in post-apartheid South Africa will enable courts to understand the textual context of section 26 of the Constitution and PIE. This will enable courts to immerse themselves in the intricacies of each eviction within the textual bounds of the Constitution and PIE by way of creative reasoning and crafting of responsive remedies. A developed understanding of the normative content of the right of access to adequate housing with reference to the affective value of the “home” will increase the likelihood of finding violations of section 26(1) of the Constitution and developing remedies that are responsive to those infringements. I will adopt the methodology of a descriptive and analytical overview of the provisions and case law flowing from section 26 of the Constitution and PIE. This methodology will reveal the manner in which the courts have grappled with the right of access to adequate housing and the provisions of PIE. I will conduct a literature review of the sources on the affective value of the “home” in the law. This methodology will show that the value of a “home” is gaining strength outside the fields of sociology and anthropology.

The aim of chapter 4 is to identify international instruments that can be considered by South African courts in their effort to develop a substantive understanding of the scope and content of the concept of “adequacy”. The hypothesis of this chapter is that there are treaties and regional human rights instruments that can be used by South African courts to interpret the scope and content of adequacy. An overview of the jurisprudence that have been generated at the United Nations and regional human rights level in terms of the housing provisions in these international law sources will assist South African courts in developing a substantive content of section 26(1) of the Constitution. I will adopt a methodology of a descriptive and analytical overview of the respective provisions and case law. This methodology will show how treaty monitoring bodies at the United Nations and regional human rights level have interpreted the right to housing to give substantive content to the provisions in a specific context.

The aim of chapter 5 is to trace the recent jurisprudential developments in the law of evictions that have provided clarity on the obligations of the state for purposes of section 26 of the Constitution. The hypothesis of this chapter is that these developments

have the potential of ushering in a new phase in the adjudication of the right to housing. This chapter will show that the necessary joinder of a local authority to eviction proceedings within its jurisdiction, the development of meaningful engagement and the consideration of alternative accommodation flows from a proper understanding of the normative purpose and substantive content of the right of access to adequate housing. I will adopt the methodology of a descriptive and analytical overview of the case law on joinder, meaningful engagement and alternative accommodation. This will be supplemented with a limited literature review of the common law on joinder, the scope and content of procedural fairness in terms of section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), and the rights and needs of the elderly, children, people with disabilities and female-headed households in considering the availability of alternative accommodation. The descriptive and analytical overview will reveal the development of the respective concepts while the literature review will illuminate the importance of the development for purposes of the interpretation of section 26 of the Constitution and the procedural protections and substantive safeguards contained in PIE.

1 4 Chapter overview

Chapter 2 provides the social and historical context of evictions in South Africa. The chapter begins with a general discussion of how legislative measures were used for political purposes. This is followed by a detailed discussion of the development of rural land tenure measures with specific reference to the Black Land Act 27 of 1913, the Black Service Contract Act 24 of 1932 and the Development Trust and Land Act 18 of 1936. These pieces of legislation, in combination with the uncertainty of obtaining further employment as a labour tenant on farms and the prospect of having to return to overcrowded "traditional" or "released" areas, caused black people to seek employment in urban areas. The following section traces the development of the urban land tenure measures that sought to keep black people spatially separated from white people with specific reference to the Black (Urban Areas) Act 21 of 1923, the Black (Urban Areas) Consolidation Act 25 of 1945, the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters, and the Black Communities

Development Act 4 of 1984. The chapter concludes with a detailed overview of the history and powers to remove, demolish and approve informal settlement areas that the Prevention of Illegal Squatting Act 52 of 1951 afforded individual owners and local authorities and how that relates to the creation and scope of homelessness.

Chapter 3 is the first of three chapters that provide the textual context of evictions in South Africa. The first part of the chapter is divided into sections for each of the three subsections of section 26 of the Constitution. In the first of these sections a theoretical concept of “home” is developed in an effort to build on the normative foundation created for the right of access to adequate housing in *Grootboom* when the Constitutional Court stated that the right amounts to “more than bricks and mortar”. The second section provides a brief overview of the positive obligations incumbent on government to ensure the realisation of the right of access to adequate housing. The third section is devoted to a discussion of the negative obligation in section 26(3) of the Constitution and the prohibition against arbitrary evictions. The second part of the chapter provides a detailed analysis of the PIE with reference to its drafting history, the concept of unlawful occupation, the notice requirement for imminent eviction proceedings; the requirement that courts must be satisfied that evictions from private land, urgent evictions and evictions from public land must be just and equitable, and the form of the eviction order and ancillary matters thereto.

Chapter 4 places evictions in its international context through the interpretation clause of the Constitution which requires that courts must consider international law when interpreting the rights in the Bill of Rights. The aim of this chapter is to identify international instruments that can be considered by the South African courts in their effort to develop a more substantive understanding of the scope and content of the concepts of “home” and “adequacy” in section 26 of the Constitution. The chapter begins with a discussion of the development of the concept of “adequacy” by the Committee on Economic, Social and Cultural Rights for purposes of article 11 of the International Covenant on Economic, Social and Cultural Rights.¹³⁶ This section builds on the section in chapter 3 that developed the normative foundation of the right of access to adequate housing, by showing that it is possible to use the characteristics

¹³⁶ 993 UNTS 3.

identified by the Committee on Economic, Social and Cultural Rights in General Comment 4 to give substantive content to section 26(1) of the Constitution, without defining a minimum core obligation for the right. The section concludes with the development of an organising framework for giving substantive content to the right of access to adequate housing. This is followed by sections that discuss the development of the concept of adequacy with reference to the case law generated in terms of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms,¹³⁷ articles 16, 31 and E of the Revised European Social Charter,¹³⁸ sections 5 and 6 of the American Convention on Human Rights¹³⁹ and the African Charter on Human and Peoples' Rights¹⁴⁰ respectively.

Chapter 5 places evictions in the context of the obligations that the state has to provide housing with reference to three recent developments. The chapter is introduced with a brief overview of the statutory obligations that are imposed on the state in terms of the Housing Act 107 of 1997. The remainder of the chapter is divided into two sections on current developments and pending developments. The section on current developments analyses the case law on the necessary joinder of local authorities to eviction proceedings and the development of the concept of meaningful engagement. The case law on joinder provides a detailed overview of the reasoning adopted in the High Courts for postponing eviction proceedings instituted in terms of PIE and ordering the necessary joinder of organs of state to those proceedings. It is therefore argued that a more nuanced approach for the joinder of local authorities would focus singularly on the obligations of local authorities that flow from section 26(3), read with sections 26(1) and (2), of the Constitution and section 9 of the Housing Act. This approach acknowledges that local authorities have a direct and substantial interest in eviction proceedings, because a range of their constitutional and statutory obligations are triggered when a court finds that it is just and equitable to evict unlawful occupiers. This is followed by an analysis of the development of meaningful engagement with a specific focus on the reasons advanced for this development and the description of this

¹³⁷ 213 UNTS 221.

¹³⁸ CETS No 35.

¹³⁹ OASTS No 36.

¹⁴⁰ 1520 UNTS 217.

obligation. It will be argued that meaningful engagement creates a space for public participation that transcends procedural fairness in terms of PAJA. This space requires unlawful occupiers to appreciate the budgetary and policy challenges of providing for a range of interests, while the government is similarly required to respond in a manner that is consistent with the normative purposes and objectives of section 26(1) of the Constitution. The section on pending developments proposes an organising framework for the consideration of the rights and needs of vulnerable people in determining whether there is alternative land or accommodation available for the unlawful occupiers.

1 5 Scope and terminology

Evictions occur in the following areas of South African law: firstly, civil procedure - following sale in execution proceedings;¹⁴¹ secondly, landlord and tenant law - where former tenants hold over;¹⁴² and thirdly, property law - where people settle on property without any right, permission or licence to do so. This dissertation focuses exclusively on the latter form of evictions and the rights of the people that occupy those properties.

The use of the term “squatter” in the title of this dissertation and in the main hypothesis may appear inappropriate and counterintuitive to a human rights analysis,

¹⁴¹ In the magistrates court this process was regulated by section 66(1)(a) of the Magistrates' Court Act 32 of 1944 until the Constitutional Court declared the former provision unconstitutional and invalid in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC). See also *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 (5) SA 610 (C) and *Mkize v Umvoti Municipality and Others* 2010 (4) SA 509 (KZP). In the High Courts this process is regulated by section 27A, read with section 36, of the Supreme Court Act 59 of 1959. See *De Wet v Le Riche* 2000 (3) SA 1118 (T), *Nedbank v Mortinson* 2005 (6) SA 462 (W); *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) and *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC).

¹⁴² See *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W); *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C); *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W); *Ellis v Viljoen* 2001 (4) SA 795 (C); *Brisley v Drotzky* 2002 (4) SA 1 (SCA) and *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA). Van der Walt AJ “Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law” (2002) 18 *SAJHR* 372-420 provides a detailed analysis of these cases. Following the *Ndlovu* judgment the Department of Housing published the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill B8-2008 to amend section 2 of PIE so that PIE did not apply to tenants or persons who initially occupied the property with the consent of the owner or person in charge of the property. In August 2008 the Parliamentary Portfolio Committee on Housing recommended that the amendment Bill be rejected and sent back to the Department of Human Settlements and the Department of Land Affairs for further review. Subsequently the courts instructed the parties in *Kendall Property Investments v Rutgers* [2005] 4 All SA 61 (C); *Jackpersad NO and Others v Mitha and Others* 2008 (4) SA 522 (D) and *Shulana Court* that the eviction proceedings provided for under PIE should be followed even though the application for eviction was brought under the common law.

but it serves to place the law of evictions relating to this particular category of unlawful occupiers in its proper historical context and to proceed from that context to consider the impact of section 26 of the Constitution on this area of South African law through a constitutional and international law lens. This approach to the human rights analysis of the law of evictions is in accordance with the interpretive approach to the right of access to adequate housing laid down by the Constitutional Court in *Grootboom*.

The Legal and Historical Context of Forced Evictions

2 1 Introduction

During apartheid an owner had a qualified right to exclude all lawful occupiers from her land if she could prove that any right, permission or licence that she granted previously had been revoked or if she could prove that any real or personal right that entitled the occupiers to occupy the property lawfully had been terminated. In the case of unlawful occupiers - who never had any right, permission or licence to occupy the property - the enquiry into their eviction would end once the owner satisfied the requirements of the *rei vindicatio*. During apartheid the *rei vindicatio* was interpreted as if it provided an owner an absolute right to evict all occupiers of her property without any regard for their personal circumstances or housing need. This was possible because there was no constitutional right to housing that could act as a counterweight for the owner's proprietary rights.

The powerful *rei vindicatio* was enhanced by the police powers of the government to evict people for purposes of health, safety and public interest reasons¹ in terms of the Slums Act 53 of 1934,² the Trespass Act 6 of 1959,³ the Physical Planning Act 88 of

¹ Van der Walt AJ "Towards the development of post-apartheid land law: an exploratory survey" (1990) 23 *De Jure* 1-45 32 ("Van der Walt "An exploratory survey") and Van der Walt AJ "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land-reform legislation" 2002 *TSAR* 254-289 259-263.

² A medical officer of health could file a report with a local authority in terms of section 1(2) of the Act if she was of the opinion that a nuisance existed in or on a premises or piece of land because (a) there was inadequate space, inadequate separation of the sexes over 12 years of age, insufficient number of toilets or insufficient cooking facilities; (b) its condition favoured "the spread of infectious disease"; (c) it was "situated, used or kept as to be unsafe or injurious or dangerous to health"; (d) it was so congested that it could be "injurious or dangerous to health" or (e) it did not have "proper, sufficient and wholesome water supply" available within reasonable distance. The local authority could then declare the premises or piece of land to be a slum in terms of section 4(7)(a) or 4(8) of the Act. The local authority would then cause a notice to be served on the owner in terms of section 5 of the Act that (a) directed her to remove the nuisance by taking "such steps for the reduction of the number of occupiers of the slum"; (b) directed her to demolish the slum; or (c) notified her that "it intends to acquire such property by expropriation" in terms of chapter 3 of the Act. Where the owner failed to prevent, in terms of section 12 of the Act, further occupation of the slum, in contravention of sections 10 and 11 of the Act, a court could order the eviction of such occupiers in terms of section 28 of the Act in addition to the 25 pound fine for such unlawful occupation in terms of section 33(1), read with sections 10(5) and 11(4), of the Act. See *De Jager and Others v Farah and Nestadt* 1947 (4) SA 28 (W).

1967, and the Health Act 63 of 1977.⁴ Van der Walt observes that there is nothing extraordinary about the state powers to evict people for these purposes.⁵ However, he adds that during apartheid these powers were used to advance the political purpose of establishing and maintaining an unequal and unjust land-use system that was segregated along racial lines.⁶ Various pieces of apartheid legislation⁷ were then

³ Section 1 of the Act made it an offence to enter or be on land or in a building without the permission of the lawful occupier (section 1(1)(a)), or owner or person in charge of the land (section 1(1)(b)). Any person found to be in contravention of section 1 would be punishable with a maximum fine of 25 pounds or to imprisonment for a maximum period of 3 months in terms of section 2 of the Act. See *R v Maduma* 1959 (4) SA 204 (N); *R v Ramakakau* 1959 (4) SA 642 (O); *R v Badenhorst* 1960 (3) SA 563 (A); *R v Mcunu* 1960 (4) SA 544 (N); *R v Mgwali* 1961 (1) SA 51 (E); *R v Venter* 1961 (1) SA 363 (T); *The State v Mdunge* 1962 (2) SA 500 (N); *Die Staat v Nkopane* 1962 (4) SA 279 (O); *S v Lekwena and Others* 1965 (1) SA 527 (C); *S v Ziki* 1965 (4) SA 14 (E) and *S v Brown* 1978 (1) SA 305 (NC). Keightley R “The Trespass Act” in Murray C and O’Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 180-193 192 argued that it was possible to achieve “important moral and political” victories if the people accused in terms of this Act could present defences based on tactical, legal and absence of *mens rea* considerations. Keightley notes further that “[a]lthough the (...) Act lacks many of the alarming features of other statutes concerned with control over access to land, its role within the context of land disputes should not be underestimated.”

⁴ Section 20(1) of the Act authorises a local authority to “take all lawful, necessary and reasonably practicable measures” to (a) maintain hygienic and clean conditions in its district; (b) prevent the occurrence of any nuisance, unhygienic condition, offensive condition or “other condition which will or could be harmful or dangerous to the health of any person within its district”; (c) prevent the pollution of water; and (d) render services for *inter alia* the promotion of the health of persons in its district. See *Eskom v Rini Town Council* 1992 (4) SA 96 (E) and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W). The Minister of Health is empowered make regulations relating to nuisance, as defined in section 1(xxvii) of the Act, in terms of section 39 of the Act. The Minister can also make regulations on conditions dangerous to health with specific reference to “the prevention and remedying of over-crowded, dirty, insanitary or verminous conditions in any dwelling or other building” (section 34(d)); “the control, restriction or prohibition of the erection of new buildings, and to the provision of sewerage and drainage systems for buildings, the siting, construction and repair of buildings and the provision of water, washing and sanitary conveniences, lighting and ventilation in buildings” (section 34(h)); and “the periodical cleansing of premises, the removal from premises of rubbish, waste or spillage, the evacuation of any premises on which a condition exists which constitutes a danger to health, the prohibition of entrance upon such premises and the remedying of such condition” (section 34(l)).

⁵ Van der Walt AJ *Constitutional Property Law* (2005) 413 (‘Van der Walt *Constitutional Property Law*’).

⁶ Van der Walt *Constitutional Property Law* 414.

⁷ This included, in addition to the pieces of legislation discussed in this chapter, *inter alia* the Asiatic Land Tenure Amendment Act 15 of 1950, the Black Authorities Act 68 of 1951, the Land Settlement Amendment Act 22 of 1952, the Reservation of Separate Amenities Act 49 of 1953, the Blacks (Abolition of Passes and Coordination of Documents) Act 67 of 1952, the Public Safety Act 3 of 1953, the Blacks Resettlement Act 19 of 1954, the Black Administration Amendment Act 13 of 1955, the Land Settlement Amendment Act 31 of 1955, the Group Areas Development Act 69 of 1955, the Coloured People in Towns and Villages Amendment Act 6 of 1956, the Land Settlement Act 21 of 1956, the Blacks (Prohibition of Interdicts) Act 64 of 1956, the Housing Act 10 of 1957, the Black Taxation and Development Amendment Act 38 of 1958, the Black Affairs Act 55 of 1959, the Coloured Persons Communal Reserves Act 3 of 1961, the Preservation of Coloured Areas Act 31 of 1961, the Urban Black Councils Act 79 of 1961, the Rural Coloured Areas Act 24 of 1963, the Removal of Restrictions in Townships Amendment Act 32 of 1963, the Better Administration of Designated Areas Act 51 of 1963, the Residence in the Republic Regulation Act 23 of 1964, the Black States Development Corporations Act 86 of 1965, the Community Development Act 3 of 1966, the Housing Act 4 of 1966, the Land Tenure Act 32

enacted to further bolster this absolute right of the government to evict and displace people irrespective of their personal circumstances or housing need.

The aim of this chapter is to place forced evictions in its proper legal-historical context by showing how the common law right to evict was legislatively enhanced to ensure stability and security for individual owners through the exercise of arbitrary and discriminatory state power. Part two of this chapter traces the development of black land tenure in rural and urban areas through an overview of the most important pieces of legislation. Part three of this chapter provides an overview of the powers that the Prevention of Illegal Squatting Act 52 of 1951 afforded individual owners and local authorities.

2 2 Black land tenure and urbanisation

2 2 1 Introduction

The modern history of South Africa is characterised by the special relationship that existed between power, land and labour.⁸ Terreblanche notes that the colonial powers and the white farmers enriched themselves at the cost of the indigenous people from the mid-17th century until the late 20th century by creating political and economic “power structures” that entrenched their privileged position *vis-à-vis* the indigenous people. Indigenous people were reduced to “different forms of unfree and exploitable labour” by depriving them of the opportunity to cultivate land, draw surface water and herd cattle.⁹

The Union government of South Africa further developed the British institution of segregation with the enactment of a plethora of racist laws that suppressed and exploited black people with greater vigour than any other government that preceded it.¹⁰ Black farmers lost their land and were forced into some form of oppressive labour relationship with white farmers. Some of these white farmers entered into labour tenancy relationships with black people and allowed their families to stay on the farms

of 1966, the Black Affairs Administration Act 45 of 1971, the Promotion of the Economic Development of National States Amendment Act 80 of 1977, the Designated Areas Development Act 87 of 1979, the Black Local Authorities Act 102 of 1982 and the National Policy for General Housing Matters Act 102 of 1984.

⁸ Terreblanche S *A History of Inequality in South Africa 1652-2002* (2002) 6 (‘Terreblanche *History of Inequality*’).

⁹ Terreblanche *History of Inequality* 6.

¹⁰ Terreblanche *History of Inequality* 299.

with them until the government stepped in to limit the number of black people that were congregating on farms. This forced many black people to return to overcrowded “homelands” while others chose to travel to the big urban centres of South Africa in search of minimum wage-paying unskilled employment opportunities. This had substantial implications for land tenure of black people in both rural and urban areas.

2 2 2 Rural land tenure

This process of instituting and maintaining racial segregation in rural areas was streamlined with the enactment of the Black Land Act 27 of 1913¹¹ (‘BLA’). The purpose of the BLA was to identify “traditional” black land and to reserve this land for the exclusive use and occupation by black people. Section 1(1)(a) of the BLA therefore prohibited black people from acquiring a right to, interest in or servitude over land that was not “traditional” land in terms of a sale, lease or other agreement. Section (1)(1)(b) of the BLA provided that only black people could obtain a right to, interest in or servitude over land that was located outside these “traditional” areas if it was owned by another black person. These provisions ensured that the movement of black people was limited to these traditional areas and that their ownership of land could not increase in those rare instances where they owned land outside the traditional areas.¹² Section 1(2) of the BLA furthermore provided that only black people could acquire a right to or interest in land located in the traditional areas. Any person found to be occupying land in

¹¹ When South Africa became a Union in 1910 all the colonies had legislation in place that dealt with racial segregation. The Natal Ordinance 2 of 1865, the Orange Free State Ordinance 4 of 1895 and the Transvaal Ordinance 21 of 1895 all sought to limit the number of squatting families per farm. The Vagrancy Act 23 of 1879, the Vagrancy Amendment Act 27 of 1889, the Native Locations Amendment Act 33 of 1892, the Native Locations Amendment Act 30 of 1899 and the Private Locations Act 32 of 1909 imposed prejudicial taxes upon landowners and squatters in the Cape Colony who were not in a direct employment relationship.

¹² Claassens A “Rural land struggles in the Transvaal in the 1980s” in Murray C and O’Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 27-65 30-43 (‘Claassens “Rural land struggles”’) provides a detailed anecdotal account of the strategies that the landowning communities of Driefontein and kwaNgema adopted during the 1980s to resist their forced removal “by exploiting the excesses of the racial platteland, to turn the contradictions in the dominant ideology to their advantage” (at 31). Claassens notes that this forced government to adopt a policy of voluntary removals which, according to her, “amounted to ‘persuading’ people to move by means that progressed rapidly from discussion, to withdrawal of health services, to demolition of schools, to withholding pensions and finally ... to surrounding the village with armed police in the dead of night” (at 31).

contravention of section 1 would be guilty of an offence.¹³ However, black people could avoid these fines and possible imprisonment if they worked as labour tenants on white farms.¹⁴

The Black Service Contract Act 24 of 1932 ('BSCA') was the first comprehensive attempt to regulate labour tenancy in the Union.¹⁵ The BSCA defined a labour tenant as any black person who was bound to render a service or had permission to occupy and use land in terms of a labour tenant contract.¹⁶ The BSCA required no formalities for the formation of the labour tenant contract,¹⁷ but created reciprocal obligations for the

¹³ Section 5 of the BLA. This offence was punishable with a fine of 100 pounds, incarceration for six months (with or without hard labour) upon non-payment of the fine or a further fine of five pounds per day for a continuation of the offence after release from prison.

¹⁴ C Bundy "Land, law and power" in Murray C and O'Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 3-12 6 ("Bundy "Land, law and power") notes that

"[w]hat the 1913 Act attempted was to legislate out of existence the more independent forms of tenure and to perpetuate instead the most dependent. Its intention was to outlaw cash-paying tenants, and in the Orange Free-State to forbid all sharecropping agreements. The Act was intended to reduce cash tenants and sharecroppers to the status of labour tenants or wage labourers."

See further Plaatjie ST *Native Life in South Africa* (2009) and Van Onselen C *The Seed is Mine - The Life of Kas Maine, A South African Sharecropper 1894-1985* (1996).

¹⁵ Earlier attempts to exercise control over the occupation of white owned farms by black people and the regulation of the relationship between farmer and labour tenant included Natal Ordinance 2 of 1855 and Transvaal Ordinance 21 of 1895. See Haythorn M and Hutchison D "Labour tenants and the law" in Murray C and O'Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 194-213 195 ("Haythorn and Hutchison "Labour tenants").

¹⁶ Section 1 of the BSCA. Section 1 further defined a "labour tenant contract" as

"a contract whereby a native binds himself or binds his ward ... to render any services of whatever nature as a consideration for permission granted to such native or any member of his family or of the kraal or household to which he belongs to occupy or use any land, by any person who has the right to grant such permission."

Section 2 of the BSCA required black people to furnish a farmer with certain documentary proof of age, domicile in South Africa and, if under the age of 18 years, permission to be employed as a labour tenant. In *R v Ndoweni and Others* 1949 (2) SA 86 (N), De Wet J found that the appellants were not labour tenants for purposes of the BSCA because they did not enter into an agreement out of free will to become labour tenants for Mr Miller on his farm Grassfields when they accompanied him from East Griqualand to Natal during July 1947. De Wet J found that section 49 of the Development Trust and Land Act 18 of 1936 made a distinction between labour tenants and servants who were "*bona fide* and continuously employed by the owner under a contract in domestic service or in or about farming operations." De Wet J further found that a servant naturally has to occupy land on the farm and that it would therefore not be irregular for the servants to receive "cash wages, rations, quarters and some fields to plough for their own use." De Wet J therefore found that the court *a quo* erred when it found that appellants were in contravention of section 28(5) of the Natal Master and Servant Act 40 of 1894 read with sections 5(3) and (4) of the BSCA when they left the employ of Mr Miller on 1 October 1948. See also *Malemone v Dreyer and Another* 1949 (2) SA 824 (T) and Haythorn and Hutchison "Labour tenants" 198-200.

¹⁷ Section 5(2) of the BSCA.

parties.¹⁸ The duration of the labour tenant contract was limited to a maximum of three years.¹⁹ The labour tenant contract came to an end through effluxion²⁰ and would be presumed to have been terminated if the farmer was unable to call upon the services of the labour tenant for a period exceeding three months due to his or her absence from the farm without the permission of the farmer.²¹ Upon termination of the labour tenancy contract a labour tenant would be entitled to tend to any crop that was standing on the land “till it matures and thereafter to reap and remove it”.²² The labour tenant would also be entitled to demolish and remove or destroy any building or structure erected on the land that he or she was entitled to occupy and use in terms of the labour tenant contract if that building or structure was not erected with building materials that the farmer provided free of charge.²³ Failure to vacate the farm within one month after termination of the labour tenant contract would render the former labour tenant guilty of an offence.²⁴

¹⁸ The labour tenant had to (a) provide personal services or those of an able-bodied family member to the farmer for the specified period of each year and (b) use the land allocated to them only for their own private purposes as agreed upon in the labour tenant contract. The farmer had to (a) make the land agreed upon in terms of the labour tenant contract available to the labour tenants; (b) allow the labour tenants to reside on that land with their families and dependants; (c) allow the labour tenants to erect buildings and structures on that land; (d) allow the cattle or other stock of the labour tenants to graze on the land allocated to them; and (e) allow the labour tenants to plough the land, sow seed and to reap the crops. See Haythorn and Hutchison “Labour tenants” 200-201.

¹⁹ Section 5(1) of the BSCA. Section 5(2) created a presumption that the labour tenant contract was entered into for one year unless the parties specifically agreed otherwise. See Haythorn and Hutchison “Labour tenants” 201-202.

²⁰ Section 5(4) of the BSCA provided that a labour tenant contract would be renewed for one year if either party to the labour tenant contract did not give the other notice of its intention to terminate the contract three months before the date of its termination. According to section 5(6) any successors in title to the farmer “shall assume all rights and liabilities as employer” in terms of the labour tenant contract provided that both the new owner and the labour tenant could terminate the labour tenant contract thereafter on three months’ notice to that effect. See Haythorn and Hutchison “Labour tenants” 208-210.

²¹ Section 5(5) of the BSCA. Section 5(11) further provided that where two or more labour tenants from the same kraal or household were bound to render services in terms of labour tenant contracts to one or more farmers (individually or jointly), these contracts could be terminated if any one of the labour tenants failed to render such services. See *R v Shapiro* 1949 (3) SA 581 (T), *R v Ndiyase* 1959 (3) SA 818 (N) and Haythorn and Hutchison “Labour tenants” 202-206.

²² Section 5(7) of the BSCA. See *Matjila v Moore* 1948 (3) SA 1001 (T).

²³ Section 5(8) of the BSCA. See Haythorn and Hutchison “Labour tenants” 206-208.

²⁴ Section 5(12) of the BSCA. Section 10 of the BSCA held any offenders liable for a maximum fine of ten pounds or incarceration for a maximum period of two months (with or without hard labour) upon non-payment of the fine. In *R v Mokwena* 1947 (2) SA 686 (T), Ramsbottom J found that the accused was wrongfully convicted for allegedly contravening section 5(12) because a period of four months (comprising the three months’ notice of termination in terms of section 5(4) and the one month period to vacate the farm) had not passed when the case was heard on 24 October 1946.

The Development Trust and Land Act 18 of 1936 ('DTLA') was the legislative embodiment of the government's growing concern with the large number of black people who were living and working on white farms as labour tenants.²⁵ Chapter 4 of the DTLA contained a number of provisions that sought to regulate the tenure of black people who resided on land other than the traditional and "released" areas.²⁶ Black men²⁷ were prohibited from occupying certain land unless they were either (a) the registered owner of that land; (b) a servant of the owner of that land; (c) a registered labour tenant; (d) a registered squatter; or (e) otherwise exempted from the prohibitions contained in chapter 4 of the DTLA.²⁸ Any black person who occupied land in contravention of these prohibitions would be guilty of an offence.²⁹

Any farmer who required the services of black people on a farm therefore had to ensure that they were registered as labour tenants³⁰ with the native commissioner of

²⁵ Haythorn and Hutchison "Labour tenants" 196.

²⁶ Section 25(1) of the DTLA. Section 25(2) of the DTLA enabled the State President to extend the application of chapter 4 to these areas or to suspend the operation of the chapter as a whole. In *R v Maluma* 1949 (3) SA 856 (T) the court *a quo* found that the appellant lived on the farm Kalkfontein in the district of Lydenburg without a permit and that he was therefore in contravention of section 7 of Transvaal Ordinance 21 of 1895. De Villiers J held that the court *a quo* erroneously found that Proclamation 218 of 1940 revived Transvaal Ordinance 21 of 1895 when it repealed proclamation 264 of 1937 which extended the operation of the DTLA to the district of Lydenburg. De Villiers J held that Transvaal Ordinance 21 of 1895 was repealed in its entirety in terms of section 50(4) read with part 2 of schedule 3 of the DTLA and that the appellant was therefore convicted for an offence in terms of a piece of legislation that had no force and effect in the area.

²⁷ Section 26(2) of the DTLA excluded the wife, children and dependent family members of the category of people subjected to the prohibitions of section 26(1).

²⁸ Section 26(1) of the DTLA. Section 34 of the DTLA provided special permission for (a) a chief or headman; (b) an employee of the government, the South African Native Trust, any council or other body established for the administration of the affairs of black people; (c) a minister, an evangelist and a teacher; or (d) a person that is elderly, chronically ill or destitute to for purposes of section 26(1)(e).

²⁹ Section 26(4) of the DTLA. See *R v Mabindla* 1960 (4) SA 307 (E) and *S v Lawrence* 1962 (2) SA 498 (N). In *Mabaso and Others v Native Commissioner, Ladysmith and Another* 1958 (1) SA 130 (N) the court had to interpret the meaning of "reside" for purposes of section 26(1). In this case eighteen black people occupied the farm Wittekleifontein since 1940. The native commissioner found that the applicants occupied the farm unlawfully because they were not registered squatters. Milne J held that the phrase "metterwoon vestig" (Afrikaans for the word "reside") referred to the act of establishing a residence and therefore did not include people who already resided on land. Milne J accordingly held that section 26(1) only prohibited the "taking up of residence" and that this clearly did not apply to the applicants who lawfully resided on the farm since before the operation of chapter 4 of the DTLA was extended to the district of Klip River with proclamation 177 of 1956. This interpretation of "reside" was confirmed by Galgut AJ in *R v Chomo* 1958 (4) SA 241 (T). The legislature accordingly amended the meaning of "reside" with section 4 of the Development Trust and Land Amendment Act 41 of 1958 to bear the meaning of "being resident". See also *R v Nhlanhla* 1960 (3) SA 568 (T).

³⁰ Section 27(2) of the DTLA.

that district.³¹ A farmer could be requested by the native commissioner of the district to appear before a labour tenant control board³² to explain why the number of labour tenants on his farm should not be reduced given the fact that there are more labour tenants registered for his farm than are “actually and *bona fide*” required by him to conduct his domestic services or “in any other industry, trade, business or handicraft” carried on by him on the land where the labour tenants reside.³³

The labour tenant control board had to determine³⁴ what number of labour tenants the farmer “actually and *bona fide*” required for abovementioned operations and could order that the current number of labour tenants be reduced if this number exceeded the number of labour tenants registered with the native commissioner.³⁵ The labour tenant control board could terminate labour tenant contracts to achieve this reduction.³⁶

All farmers were furthermore required to prepare a prescribed form with the details (number, full names and the particulars of the licence, permission or terms and conditions of employment) of all the black people residing on the farm and to submit it periodically to the native commissioner of the district.³⁷ The submission of incorrect and incomplete details or failure to comply with this requirement as such would amount to an offence.³⁸ This ensured that no farmer could go by undetected if he employed and allowed more labour tenants to reside on his land than he paid licence fees for and had registered with the native commissioner.

³¹ Section 27(1) of the DTLA. Section 26(3) provided that no black person “shall be deemed to be a labour tenant under this Chapter unless he has been registered in [the] manner prescribed by regulation in the register of labour tenants kept by the native commissioner of the district ...”

³² Established in terms of section 28(1) of the DTLA.

³³ Section 29(1) of the DTLA.

³⁴ Section 30(1) of the DTLA provided that the labour tenant control board “shall presume unless and until the contrary is proved that five labour tenants are required by any owner in respect of each farm” and “that every labour tenant is engaged to render services for at least six months in every calendar year”.

³⁵ Section 29(3) of the DTLA.

³⁶ Section 29(4) of the DTLA. Section 29(5) empowered the labour tenant control board to “rescind or vary its order for good cause shown”. Any order made by the labour tenant control board had to be communicated to the native commissioner in the district so that it could be recorded on the register.

³⁷ Section 35(1) of the DTLA.

³⁸ Section 35(2) of the DTLA. According to section 47 of the DTLA a farmer could be incarcerated for a maximum of fourteen days with the option of a fine of ten pounds. In the case of a continued offence the farmer would be fined an additional pound per day for the duration of the offence.

All black people who unlawfully³⁹ occupied land outside the traditional and released areas would be served with a written notice that requested them to show cause why they should not be evicted.⁴⁰ In the event that the native commissioner could not be persuaded that a right of occupation existed a warrant would be issued which authorised the police to evict the unlawful occupiers,⁴¹ directing the police to use reasonable force if necessary.⁴² The government and the Department of Native Affairs incurred an obligation to accommodate these black people in a traditional or released area subsequent to the eviction.⁴³

These provisions paved the way for the extensive eviction of labour tenants from farms during the 1960s and 1970s⁴⁴ as part of the eventual plan to abolish labour tenancy in South Africa by replacing labour tenants with full time wage earning farm labourers.⁴⁵ To this end the provisions in chapter 4 of the DTLA were applied strictly and

³⁹ Section 37(5) of the DTLA deemed black people to be in unlawful occupation of the land if they failed to vacate the land after the notice of termination period (one month for a servant and three months for a labour tenant, squatter or any other black person) expired.

⁴⁰ Section 37(1) of the DTLA. In *S v Mafora and Others* 1970 (3) SA 190 (T) the court *a quo* found that the appellant and nineteen others lived on the farms Braklaagte and Leeufontein without the permission of the Secretary for Bantu Administration and Development in contravention of section 26(1)(b) of the DTLA. These farms were owned by the government and controlled by the South African Native Trust in terms of chapter 4 of the DTLA. Hiemstra J held that the government erroneously instituted criminal proceedings against the appellants in terms of section 26(4) of the DTLA because it would have to institute criminal proceedings against itself for permitting the unlawful occupation. Hiemstra J stated that “the Government in any event has powers to remove them and it is obvious that all those concerned should co-operate in speeding up this removal which can in any event be achieved if the correct procedure is followed” (at 192B). Hiemstra J upheld the appeal and set aside the convictions and sentences.

⁴¹ Section 37(3) of the DTLA.

⁴² Section 37(4) of the DTLA.

⁴³ Section 38 of the DTLA.

⁴⁴ Platzky L and Walker C *The Surplus People: Forced Removals in South Africa* (1985) 138 calculated that between 1960 and 1983 1.13 million people were evicted from farms and a further 614 000 people were evicted from black spots and consolidation areas. Morris M “State intervention and the agricultural labour supply post-1948” in Wilson F, Kooy A and Hendrie D (eds) *Farm Labour in South Africa* (1977) 62-71 71 (“Morris “State intervention”) analysed these numbers further and found that

“[b]etween 1960 and 1970, 340 000 labour tenants plus 656 000 squatters and 97 000 squatters in ‘Black Spots’ were estimated to have been removed. In addition, an estimated 400 000 labour tenants were removed between 1971 and 1974. By 1976 labour tenancy in South African agriculture has to all intents and purposes been abolished and farm labour was stabilised.”

⁴⁵ The *Report of the Inter-Departmental Committee of Enquiry in Connection with the Labour Tenant System and Matters Related Thereto* (1961) recommended the enactment of legislation that abolished the labour tenant system by 1968. However, the Report (at 5) recognised that the abolition of the labour tenant system in one step would cause problems and therefore recommended that the system be phased out “by means of proclamation to a particular farm, area, district or province according to circumstance.” These recommendations were given effect to in the Bantu Laws Amendment Act 42 of 1964, which

executed with extreme efficiency to ensure that the land purchased to create the released areas could “accommodate the displaced squatters resulting from the application of chapter IV” of the DTLA.⁴⁶ The DTLA has therefore been described as “perhaps the most concerted legislative attack on peasant squatters and labour tenants”.⁴⁷

The strengthened measures for regulating rural land tenure of black people intensified the need for land in the traditional and released areas⁴⁸ as the employment conditions worsened on white farms.⁴⁹ Industrial growth and the promise of employment opportunities in urban areas created a way for black people to avoid the nearly impossible task of acquiring suitable accommodation in the traditional or released areas and to escape the prospect of criminal prosecution for not being a registered labour tenant or squatter. Bundy notes that

“[i]f the reserves were the sources of migrant labour, the mining compounds and the squalid urban townships were its destination: the system as a whole was propped up on the [Black] Land Act, the pass laws, influx control, and political exclusion. Denied access to land elsewhere, the inhabitants of the increasingly crowded reserves were condemned to a sphere of existence simultaneously distant, debilitating and deteriorating.”⁵⁰

repealed the BSCA and substantially amended chapter 4 of the DTLA. Chapter 4 of the DTLA was repealed by the Abolition of Influx Control Act 68 of 1986.

⁴⁶ Morris “State intervention” 68.

⁴⁷ O’Regan C “No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act” (1989) 5 *SAJHR* 361-394 364 (‘O’Regan “No more forced removals”) and Van der Walt “An exploratory survey” 5.

⁴⁸ As a result the “traditional” land was extended to thirteen per cent of the land in the Union with the addition of certain “reserved” land in terms of the DTLA. Section 10(1) of the DTLA limited the total area of land for exclusive use and occupation by black people to 7.25 million morgen in the whole Union, while the Transvaal, Natal, Orange-Free State and Cape colonies were limited to 5.028 million morgen (section 1(1)(a)), 526 000 morgen (section 1(1)(b)), 109 000 morgen (section 1(1)(c)) and 1.587 million morgen (section 1(1)(d)) respectively.

⁴⁹ O’Regan “No more forced removals” 365. Claassens “Rural land struggles” 48 notes that white farmers often abused the political power and access to land that their skin colour provided them to assert their so-called superior position over black people by assaulting and often murdering disobedient labourers. Claassens found that there were very few instances where white farmers were prosecuted because the black labourers did not lay charges. In those rare instances that charges were laid, the “half-hearted” prosecution process resulted in white farmers seldom serving prison sentences in the unlikely event that they were convicted.

⁵⁰ Bundy “Land, law and power” 8-9.

The process of urbanisation that ensued created a severe shortage in the availability of formal housing⁵¹ in urban areas, which led to the creation of informal settlements and urban squatting.

2 2 3 Urban land tenure

In urban areas the policy of separate development⁵² was enforced through the Group Areas Act 36 of 1966.⁵³ The purpose of the Act was to establish separate areas for the different race groups defined in the Act⁵⁴ and to control the use, occupation and acquisition of ownership of land in those areas.⁵⁵ The Act accordingly prohibited persons from other race groups to use, occupy or acquire ownership of land in areas designated to a particular group.⁵⁶ The Act therefore provided various types of areas that differed with regard to the kind and/or extent of control exercised over use, occupation and ownership. If these areas were represented by points on a continuum the “controlled areas”⁵⁷ would be on the left and the “group areas”⁵⁸ on the right. The progression from left to right on the continuum not only signalled an increase in the type and/or extent of control but also the time when the area was created.⁵⁹ In principle the Act applied to the whole of South Africa with the exception of certain areas that were excluded from its operation.⁶⁰

⁵¹ See section 2 3 in chapter 1 for statistics on the backlog in formal housing, informal housing, hostels and “squatter housing” in 1994.

⁵² Schoombee JT “Group areas legislation - The political control of ownership and occupation of land” 1985 *Acta Juridica* 77-118 77 (‘Schoombee “Group areas legislation”’) argues that group area legislation not only formed the cornerstone of racial segregation but also of the all-encompassing government policy of separate development.

⁵³ Section 49 of this Act repealed the Group Areas Act 77 of 1957, which in turn repealed the Group Areas Act 41 of 1950.

⁵⁴ Section 12(1) of the Act distinguished between white, black (originally termed “native”) and coloured (with subdivisions for Indian, Chinese, Malay and a “residual” class) groups.

⁵⁵ Van der Walt “An exploratory survey” 26.

⁵⁶ Section 23(6)(c)(ii) of the Act and the definition of “black residential area” in section 1 of the Black (Urban Areas) Consolidation Act 25 of 1945 expressly excluded these areas from the ambit of the Group Areas Act 36 of 1966. See Schoombee “Group areas legislation” 78.

⁵⁷ In these areas the race group of a person determined her eligibility for lawful occupation of land; occupation contrary to this constituted a criminal offence in terms of section 46(1) of the Group Areas Act 36 of 1966.

⁵⁸ Areas proclaimed for occupation and ownership by a specific race group in terms of section 23 of the Act.

⁵⁹ Schoombee “Group areas legislation” 79.

⁶⁰ These areas included (a) released areas in terms of the DTLA; (b) black urban townships in terms of the Black (Urban Areas) Consolidation Act 25 of 1945; (c) coloured areas in terms of the Coloured

The purpose of the Black (Urban Areas) Act 21 of 1923 was to ensure that black people had adequate accommodation in or near urban areas.⁶¹ To this end an urban local authority⁶² could, upon approval of the Minister of Native Affairs,⁶³ “define, set apart and lay out” land for the “occupation, residence and other reasonable requirements” of black people⁶⁴ and “define, set apart and lay out” any portion of a location or any other land within its jurisdiction where black people could lease a lot for the erection of “houses and huts for their own occupation.”⁶⁵ An urban local authority could provide buildings or huts to black people “on such terms and conditions as, with the approval of the administrator and the Minister,” it could prescribe through regulation to black individuals⁶⁶ and families⁶⁷ within locations or native villages.

An urban local authority was furthermore empowered to acquire any land or interest in land within or outside its jurisdiction,⁶⁸ to borrow money against the provision of security,⁶⁹ and to advance moneys or supply material to black people on credit⁷⁰ “for the purpose of providing, setting apart, establishing, equipping and maintaining” any location, native village and native hostel.

Persons Settlement Act 7 of 1946, the Preservation of Coloured Areas Act 31 of 1961 and the Rural Coloured Areas Act 24 of 1963; (d) missionaries and reserves in terms of the Coloured Missions and Reserves Act 12 of 1949; (e) national parks in terms of the National Parks Act 57 of 1976; and (f) land under the control of the South African Development Trust.

⁶¹ Long title of the Act.

⁶² Section 29 of the Act defined an “urban local authority” as “any municipal council, borough council, town council or village council, or any town board, village management board, local board, health board or health committee.”

⁶³ According to section 1(2) of the Act, the Minister of Native Affairs could withhold this permission until he was satisfied with

“the suitability of [the] area and situation of the land set apart and the title thereto, the general plan and lay-out of the location or native village, the situation, nature and dimensions of any building and the provision made for water, lighting, sanitary and other necessary services for the location, native village or hostel, as the case may be.”

Section 2(1) of the Act empowered the Minister to require an urban local authority to take all reasonable measures to comply with section 1(1)(a)-(d) where “the provision made in the area of [its] authority for the needs of natives ordinarily employed within that area for normal requirements is inadequate or unsuitable.” Where the urban local authority failed to adhere to this request section 3(1) of the Act authorised the Minister “to exercise all such rights, powers and authorities as might have been exercised by the urban local authority” to “carry out such works and do all such things as may be necessary to give effect to” section 1(1)(a)-(d) of the Act.

⁶⁴ Section 1(1)(a) of the Act. These areas would be known as “locations”.

⁶⁵ Section 1(1)(b) of the Act. These areas would be known as “native villages”.

⁶⁶ Section 1(1)(c) of the Act. These areas would be known as “native hostels”.

⁶⁷ Section 1(1)(d) of the Act.

⁶⁸ Section 7(1)(a) of the Act.

⁶⁹ Section 7(1)(b) of the Act.

⁷⁰ Section 7(1)(c) of the Act.

Only black people were allowed to “enter into any agreement or transaction for the acquisition” of a right to, interest in or servitude over a piece of land in a location or native village.⁷¹ Any person who was party to any agreement that attempted to circumvent section 4(1) would be guilty of an offence.⁷² All black people who were employed within the jurisdiction of an urban local authority were further prohibited from obtaining residence anywhere else than in locations, native villages or native hostels.⁷³ Any person who harboured or otherwise provided accommodation to black people in contravention of section 5(1) would be guilty of an offence.⁷⁴ The Act furthermore prohibited owners, lessees and lawful occupiers of land from allowing the congregation of black people on their land if that land was situated within three miles of the urban authorities’ jurisdiction.⁷⁵ Any person who allowed black people to congregate on their land in contravention of section 6(1) would be guilty of an offence.⁷⁶ This ensured that black people congregated in certain defined areas for domestic employment purposes

⁷¹ Section 4(1) of the Act. However, coloured people could stay in locations and native villages if they were and continued to be ordinarily resident in that location or native village at the commencement of the Act (section 4(3)(a)), until the urban local authority could satisfy the Minister that “adequate and suitable accommodation” was available for them somewhere else in its jurisdiction (section 4(3)(b)).

⁷² Section 4(2) of the Act. This offence was punishable with a maximum fine of 100 pounds and a further five pounds per day on which the act or default continued.

⁷³ Section 5(1) of the Act. Section 5(2) of the Act exempted the following black people from this provision: (a) a registered owner of immovable property valued at 75 pounds or more; (b) a successor in title in terms of a valid will or through intestate succession; (c) a registered voter in the Cape Colony; (d) the wife, minor child, unmarried daughter or *bona fide* dependent of abovementioned persons; (e) a *bona fide* domestic servant that receives sleeping and sanitary accommodation from his or her employer; (f) where accommodation is provided by the employer in terms of section (1)(1)(e) of the Act; (g) a resident of a mission house, private hostel or similar institutions; (h) a resident of an area proclaimed as an approved area for black occupation; (i) a resident of a location in the Orange Free State Colony on the date that it was proclaimed as a coloured location in terms of section 27(3) of the Act; and (j) the holder of an exemption otherwise granted permanently or for a specified period.

⁷⁴ Section 5(3) of the Act. This offence was punishable in terms of section 25 of the Act with a maximum fine of ten pounds, or with incarceration (with or without hard labour) for a maximum period of two months upon default of the fine, or with both the fine and imprisonment, or to imprisonment without the option of a fine for a first time conviction. All subsequent convictions were punishable with a maximum fine of 25 pounds, or with incarceration (with or without hard labour) for a maximum period of three months upon default of the fine, or with both the fine and imprisonment, or to imprisonment without the option of a fine.

⁷⁵ Section 6(1) of the Act. The Governor-General could increase this area to a maximum of five miles in terms of section 6(2) of the Act.

⁷⁶ Section 6(3) of the Act. This offence was punishable with a maximum fine of 50 pounds.

where they could be carefully managed⁷⁷ and could have their living conditions inspected on a regular basis.⁷⁸

However, black people were required to live in “proclaimed areas” if they sought employment in the mining and industrial sector.⁷⁹ Black people had to report to an authorised officer upon their arrival in these proclaimed areas.⁸⁰ The authorised officer would, upon payment of a licence fee,⁸¹ issue them with a certificate stating that they duly reported their arrival in the proclaimed area⁸² and provide them with a badge that identified them as eligible people to take up employment by the day.⁸³ Any person who intentionally attempted to deceive another;⁸⁴ or wilfully altered, defaced, destroyed or mutilated a certificate or document issued in terms of section 12 of the Act;⁸⁵ or aided and abetted any person in the commission of abovementioned⁸⁶ would be guilty of an offence.⁸⁷

This enabled the urban local authority to “establish, equip, control and manage” the accommodation required for all the black people who sought employment in the proclaimed areas. All employers were obliged to pay a registration fee for the registration of the service contract entered between them and their black labourers.⁸⁸ All

⁷⁷ According to section 11(1) of the Act every urban local authority had to appoint or assign officers for the management of every location, native village and native hostel within its jurisdiction.

⁷⁸ According to section 11(2) of the Act the Minister could appoint officers who would be responsible for the inspection of every location, native village and native hostel or any other area in the jurisdiction of the urban local authority where black people were accommodated to establish whether there were “any matter affecting the well-being and welfare” of those black people that required attention. Section 11(4) of the Act then required these officers to submit a report to the Minister about the factual living conditions of the black people in those areas.

⁷⁹ Section 12 of the Act.

⁸⁰ Section 29 of the Act defined an “authorised officer” as “a magistrate, justice of the peace, a European member of the police, and such other officers as may be authorised by the Minister to demand the production of documents under this Act or the regulations.”

⁸¹ Section 12(1)(f) of the Act.

⁸² Section 12(1)(b) of the Act. Section 12(1)(d) of the Act empowered an authorised officer to refuse to issue this certificate to any black person who appeared to be under the age of 18 years and who could not provide evidence to the contrary unless they entered the proclaimed area with a parent or guardian.

⁸³ Section 12(1)(f) of the Act.

⁸⁴ Section 14(1)(a) of the Act.

⁸⁵ Section 14(1)(b) of the Act.

⁸⁶ Section 14(1)(c) of the Act.

⁸⁷ Section 14(1) of the Act. This offence was punishable in terms of section 14(2) of the Act with a maximum fine of 50 pounds, or with incarceration (with or without hard labour) for a maximum period of six months upon default of the fine, or with both the fine and imprisonment, or to imprisonment without the option of a fine.

⁸⁸ Section 12(1)(a) of the Act. Section 18(1) of the Act prohibited any employer from employing more than 50 labourers who did not reside in a native hostel within the jurisdiction of the urban local authority.

black labourers who remained in a proclaimed area after the termination of their employment contract, expiration of their licence or release from prison had to report to an authorised officer to receive a certificate of that fact⁸⁹ so that they could reside at a prescribed place until they found employment again.⁹⁰

A black labourer could be brought before a magistrate or native commissioner to “provide good and satisfactory account of himself” where there was reason to believe that he was (a) habitually unemployed; or (b) is “by reason of his own default” not in a position to lead a honest livelihood; or (c) is leading an idle, dissolute or disorderly life; or (d) has been ordered to leave the proclaimed area in terms of section 12(1)(h) of the Act.⁹¹ If the labourer failed to provide a good and satisfactory account of himself a magistrate or native commissioner could order the eviction of that black labourer, order his return to his place of origin and enforce a time limitation on his return to the proclaimed area,⁹² or impose detention for a maximum period of two years “in a farm colony, work colony, refuge, rescue home, or similar institution established or approved in terms of section [50] of the Prisons and Reformatations Act” 13 of 1911.⁹³

These provisions were copied verbatim in the Black (Urban Areas) Consolidation Act 25 of 1945, which in turn led to the proclamation of the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters.⁹⁴ Chapter 2 of these regulations provided for various forms of urban tenure for black people that conformed to the policy whereby the presence of black people in urban areas was considered to be of a temporary nature.

Section 18(3) of the Act made any contravention of this prohibition an offence that was punishable in terms of section 25 of the Act.

⁸⁹ Section 12(1)(c) of the Act.

⁹⁰ Section 12(1)(g) of the Act.

⁹¹ Section 17(1) of the Act.

⁹² Section 17(2)(a) of the Act.

⁹³ Section 17(2)(b) of the Act.

⁹⁴ Proclamation R1036 of 1968 in *GG Extraordinary* 2096 of 14 June 1968. The relevant matters referred to include the administration of and control over trading, business and professional sites (chapter 3); the possession of dangerous weapons (chapter 4); the administration of and control over communal halls and recreational grounds (chapter 5); the keeping of animals (chapter 6); the administration and control over bantu hostels (chapter 7); and the establishment of cemeteries, internment and funerals (chapter 8).

These regulations empowered a superintendent⁹⁵ of a black residential area to issue a site permit⁹⁶ and a building permit⁹⁷ to an emancipated black male who was “desirous of taking up residence in the Bantu residential area with his dependents and of erecting a dwelling”⁹⁸ if his application fulfilled certain requirements.⁹⁹ The site permit afforded the holder the right to the exclusive use and occupation of the site¹⁰⁰ in terms of a lease.¹⁰¹ The holder of the site permit was required to maintain and repair the site¹⁰² and could not transfer the permit;¹⁰³ let, sublet or transfer the dwelling;¹⁰⁴ or sell, cede, assign, make over, alienate, pledge or hypothecate his permit¹⁰⁵ without the written permission of the superintendent.

The superintendent was also empowered to issue a residential permit¹⁰⁶ to an emancipated black male who was “desirous of taking up residence in the Bantu residential area and of occupying together with his dependents a council dwelling”¹⁰⁷ if his application fulfilled certain requirements.¹⁰⁸ The residential permit afforded the holder the right to occupy the council dwelling as a tenant¹⁰⁹ on certain conditions.¹¹⁰

⁹⁵ Regulation 1 of Chapter 1 defined a “superintendent” as “the officer referred to in regulation 1(2) of Chapter 2 of these regulations, being the officer appointed and licensed under the provisions of section 22(1) of the [Black (Urban Areas) Consolidation] Act [25 of 1945] for the management of the Bantu residential area and includes a deputy or assistant to such officer.”

⁹⁶ The site permit had to include the name, date of birth, identity number and ethnic group of the holder (regulation 6(6)(e)) and all other occupiers (regulation 6(6)(f)) of the site. The site permit further had to include a description of the site (regulation 6(6)(b)) and had to “specify which buildings, structures or fences have been or may be erected on the relative site” (regulation 6(6)(c)).

⁹⁷ According to regulation 6(3) the holder of the building permit had to begin with building operations within three months of receipt of the permit if he wished to avoid its cancellation, withdrawal and *ipso facto* lapsing of any rights he acquired in terms of it.

⁹⁸ Regulation 6(1).

⁹⁹ Regulation 6(2).

¹⁰⁰ Regulation 6(6)(a).

¹⁰¹ According to regulation 6(4) the rent and service charges was “payable monthly in advance with effect from the date of beneficial occupation of the site by the holder of the site permit.”

¹⁰² Regulation 12.

¹⁰³ Regulation 9.

¹⁰⁴ Regulation 10.

¹⁰⁵ Regulation 11.

¹⁰⁶ The residential permit had to specify the number of the allotted dwelling (regulation 7(3)(a)); the date on which it was issued (regulation 7(3)(e)); the name, identity number and ethnic group of the holder (regulation 7(3)(c)) and all other occupiers (regulation 7(3)(d)) of the site.

¹⁰⁷ Regulation 7(1).

¹⁰⁸ Regulation 7(2).

¹⁰⁹ Regulation 7(6)(a).

¹¹⁰ Regulation 7(6)(b)-(i).

The holder of a residential permit was under the same obligations as the holder of a site permit, with the exclusion of the prohibition in terms of regulation 9, which did not apply. The superintendent was further empowered to issue a certificate of occupation¹¹¹ to an emancipated black male who was “desirous of acquiring the right of occupation of a dwelling”¹¹² if his application fulfilled certain requirements.¹¹³ The certificate of occupation afforded the holder a protected personal right of occupation to a house that he purchased from the local authority. The holder of a certificate of occupation was prohibited from letting, subletting and transferring his dwelling without the written permission of the superintendent.¹¹⁴ The superintendent was empowered to, in addition to abovementioned forms of tenure, issue entry-,¹¹⁵ accommodation-,¹¹⁶ hostel-¹¹⁷ and lodger’s¹¹⁸ permits¹¹⁹ that granted the holders short periods of entry into a black residential area.

The abovementioned forms of tenure could be cancelled by the superintendent, after a 30 day notice period, if the holder of such permit or certificate was unemployed,¹²⁰ failed to execute certain building works,¹²¹ committed a crime¹²² or if he no longer complied with the conditions of his occupation.¹²³ In the case of a residential permit, the permit could additionally be cancelled if the holder ceased to fall within the sub-economic group defined in terms of section 20(1)*bis* of the Black (Urban Areas)

¹¹¹ The certificate of occupation had to specify the number of the allotted dwelling and include a description of the site (regulation 7(4)(b)); the date on which it was issued (regulation 8(4)(e)); the name, identity number and ethnic group of the holder (regulation 8(4)(c)) and all other occupiers (regulation 8(4)(d)) of the site.

¹¹² Regulation 8(2).

¹¹³ Regulation 8(4)(a).

¹¹⁴ Regulation 10.

¹¹⁵ Regulation 19(1).

¹¹⁶ Regulation 19(2).

¹¹⁷ Regulation 19(3).

¹¹⁸ Regulation 20(1).

¹¹⁹ According to Regulation 19(6) the following people did not require any permit to enter a black residential area: (a) employees of the local authority in the exercise of their duties; (b) members of the South African Police and South African Railways and Harbours Police in the exercise of their duties; (c) ministers of religion, registered medical practitioners, nurses and midwives and missionaries; (d) public servants, sheriffs and messengers of the court in the discharge of their duties; and (e) a person who fell within the purview of regulation 20(12).

¹²⁰ Regulation 15(1)(a) and (b).

¹²¹ Regulation 15(1)(c) and (d).

¹²² Regulation 15(1)(h) and (i).

¹²³ Regulation 15(1)(e)-(g) and (j)-(n).

Consolidation Act 25 of 1945.¹²⁴ Any person who contravened these regulations or the social behaviour regulations¹²⁵ would be guilty of an offence.¹²⁶ Any person who was convicted of an offence in terms of Regulation 47(1)(i), (j), (k) or (l) could also be evicted from the dwelling, site or black residential area.¹²⁷

The South African economy experienced a period of growth at the beginning of the 1980s that forced a shift from capital to labour intensive operations. This shift created a demand for skilled and unskilled workers that the supply of white and coloured workers could not satisfy.¹²⁸ This unsatisfied demand for workers led to the rapid urbanisation of black workers into white urban areas in an effort to stay closer to employment opportunities.¹²⁹ Initially these black workers obtained the requisite permits to stay in the white areas, but over time these permits either expired or were not renewed by a superintendent. This resulted in a flood of arrests for contraventions of the Black (Urban Areas) Consolidation Act 25 of 1945 and the regulations promulgated in terms of that Act. The resulting circle of lawlessness, violence and civil unrest¹³⁰ forced a change in the urbanisation strategy of the government that would allow more black people to reside in urban areas in order to maintain the workforce that the growing economy required.

This change in the national urbanisation strategy led to the enactment of the Black Communities Development Act 4 of 1984 ('BCDA'). The purpose of the BCDA was "to provide for the purposeful development of Black communities outside the national states."¹³¹ To this end the Minister of Co-operation and Development was empowered

¹²⁴ Regulation 15(2)(b).

¹²⁵ These included prohibitions that related to the organisation of public meetings, assemblies and entertainment (Regulation 26); disturbing the public peace (Regulation 27); obstructing the work of officers of the local authority (Regulation 28); obstructing the flow of traffic and pedestrians (Regulation 29); public indecency (Regulation 30); solicitation for the purpose of prostitution or mendicancy (Regulation 31); defecating or urinating in the street (Regulation 32); scaling fences to enter or exit a black residential area (Regulation 33); the slaughtering of stock (Regulation 34); damaging trees and council property (Regulation 35); the control of games and entertainment (Regulation 36); the sinking of wells and excavations (Regulation 37); washing facilities (Regulation 38); the use of refuse receptacles (Regulation 39); the provision of water and health services (Regulation 40) and the reporting of infectious diseases to the superintendent (Regulation 41).

¹²⁶ Regulation 47(1).

¹²⁷ Regulation 47(2).

¹²⁸ Terreblache *History of Inequality* 329-332.

¹²⁹ Terreblache *History of Inequality* 75.

¹³⁰ Terreblache *History of Inequality* 404.

¹³¹ Long title of the BCDA.

to declare certain areas to be development board areas¹³² and to establish a development board for each of those areas.¹³³ The objects of these boards were to (a) promote the viability, development and autonomy of black communities; (b) promote the welfare of those communities and people; (c) take steps to prevent the economic and social decline of those communities and people; and (d) take steps to rehabilitate those communities and people.¹³⁴ Pursuant to these objectives the boards were bestowed with certain local government,¹³⁵ housing and development;¹³⁶ and agency functions.¹³⁷

Significantly, the BCDA empowered the board¹³⁸ and the local authority or the township developer¹³⁹ to grant a competent person¹⁴⁰ a leasehold for a period of 99 years¹⁴¹ on certain conditions¹⁴² and against payment or the furnishing of security for that right.¹⁴³ Upon registration¹⁴⁴ of this leasehold in terms of the Deeds Registries Act 47 of 1937, the holder of this real right would obtain a certificate¹⁴⁵ that served as proof of the registration, her right to occupy the leasehold site and the fact that certain rights have vested¹⁴⁶ in her.

These provisions paved the way for the enactment of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988¹⁴⁷ as part of the range of legislative provisions, enacted during President FW de Klerk's term in office, which started

¹³² Section 3(1)(a) of the BCDA.

¹³³ Section 3(1)(c) of the BCDA.

¹³⁴ Section 16 of the BCDA.

¹³⁵ See chapter 3 of the BCDA.

¹³⁶ See chapter 4 of the BCDA.

¹³⁷ See chapter 5 of the BCDA.

¹³⁸ Section 52(1)(a)(i) of the BCDA.

¹³⁹ Section 52(1)(a)(ii) of the BCDA.

¹⁴⁰ Section 52(2) of the BCDA provides that a leasehold may be acquired by (a) a black male as defined in section 10(1)(a) or (b) of the Black (Urban Areas) Consolidation Act 25 of 1945; (b) the wife or partner in a customary union of the person in (a); (c) a descendant of the person in (a); (d) an approved township developer; (e) an approved association or a person; and (f) an approved category of persons.

¹⁴¹ Section 52(1)(a) of the BCDA.

¹⁴² Section 52(3)(a) of the BCDA provided that the Minister for Co-operation and Development could impose such conditions as he saw fit for purposes of section 52(2)(d)-(f). According to section 52(3)(b) of the BCDA these conditions encompassed the fact that his approval would "be valid only for a particular purpose or for a specified period or until the taking place of a particular event."

¹⁴³ Section 52(4)(a) and (b) of the BCDA.

¹⁴⁴ Section 52(10) of the BCDA.

¹⁴⁵ Section 53(3)(a)-(c) of the BCDA.

¹⁴⁶ Section 53(5) of the BCDA afforded the holder of the leasehold the right to (a) erect and improve buildings or to alter and demolish buildings or structures; (b) occupy the buildings or structures and the site; (c) encumber the leasehold; and (d) dispose of the leasehold to another competent person.

¹⁴⁷ Section 24 of the General Law Second Amendment Act 108 of 1993 amended the short title of this Act which was formerly the Conversion of Certain Rights to Leasehold Act.

dismantling apartheid land law.¹⁴⁸ The purpose of this Act is “to provide for the conversion of certain rights of occupation into leasehold or ownership.”¹⁴⁹

The Act empowers the Director-General¹⁵⁰ to conduct an investigation¹⁵¹ to determine which of the “affected sites”¹⁵² within her province have been granted a right of leasehold or ownership.¹⁵³ At the close of this inquiry the Director-General must publish a notice¹⁵⁴ that states to whom she intends to grant a right of leasehold or ownership.¹⁵⁵ The Director-General must then, upon expiration of the period specified for the lodging of an appeal against this notice or upon “confirmation, variation or substitution” of the determination,¹⁵⁶ lodge the declaration, the title deed and any other documents with the Registrar of Deeds.¹⁵⁷

¹⁴⁸ Other pieces of legislation included the Abolition of Influx Control Act 68 of 1986, the Land Affairs Act 101 of 1987, the Abolition of Development Bodies Amendment Act 81 of 1990, the Abolition of Racially Based Land Measures Act 108 of 1991, the Abolition of Racially Based Land Measures Amendment Act 133 of 1992, the Regional and Land Affairs General Amendment Act 89 of 1993 and the Land Reform: Provision of Land and Assistance Act 126 of 1993.

¹⁴⁹ Long title of the Act. Section 1 of the BCDA defined “right of leasehold” as “a right of leasehold contemplated in section 52, and includes a right in respect of a sectional leasehold unit as contemplated in section 55, and ‘leasehold’ has a corresponding meaning.”

¹⁵⁰ Section 1 of the Act defines “Director-General” as “the director-general of the provincial administration in question.”

¹⁵¹ Section 7(1) of the Act reads:

“For the purposes of the application of this Act a Director-General may, after due notice, at all reasonable times enter such premises where any record, book or document which relates to or is suspected to relate to matters dealt with in this Act by any local authority, is kept, and may examine or make copies of or extracts from any such record, book or document and require from any person who has control over such record, book or document an explanation of any entry in any such record, book or document.”

The Director-General may delegate this power of investigation to another official in terms of section 10 of the Act. Any person who obstructs the Director-General or a delegated official during the investigation envisaged by section 7(1) will be guilty of an offence in terms of section 7(2) and liable to pay a maximum fine of R 500 or incarceration for a maximum period of six months.

¹⁵² Section 1 of the Act defines an “affected site” as

“a site which is or purports to be occupied by virtue of a site permit, a certificate, a trading site permit, or a permit issued by the local authority concerned conferring upon the holder thereof rights which in the opinion of the Director-General concerned are similar to the rights which are held by the holder of a site permit, certificate or trading site permit.”

¹⁵³ Section 2(1), read with section 2(3), of the Act.

¹⁵⁴ Section 2(5) of the Act.

¹⁵⁵ Section 2(4) of the Act.

¹⁵⁶ Section 4(1), read with section 3, of the Act.

¹⁵⁷ Section 5(1), read with section 5(1A), of the Act.

2 2 4 Conclusion

The rural land tenure provisions severely limited the livelihood strategies of black farmers when it dispossessed them of their land and limited their free movement by restricting their occupation to certain restricted areas, where they could occupy land lawfully.¹⁵⁸ National policies exacerbated this situation by ensuring that there was no guarantee that these restricted areas would bear any resemblance to the needs of black farmers.¹⁵⁹ The only way for black farmers to sustain a family in rural areas was to enter into a temporary labour tenant contract with a white farmer because all the other forms of tenure were legislated out of existence. The combination of having to leave white areas upon termination of a labour tenant contract, the uncertainty of obtaining further employment as a labour tenant on another farm and the prospect of having to return to overcrowded traditional or released areas caused black people to seek employment in urban areas.¹⁶⁰ The period of intense urbanisation that followed forced government to enact strict influx control policies to keep black people at the periphery of urban areas.¹⁶¹ These policies prohibited black people from living in any other area than in locations, native villages and native hostels or in certain proclaimed areas if they were employed in the mining and industrial sector. Every aspect of their daily lives was meticulously regulated and recorded so that it could be checked at a moment's notice for compliance. The tenure of black people in these areas was always regarded as temporary, despite the illusion of permanency that was created by inspections to ascertain whether there were any factors that impeded their general well-being and required improvement. However, black people started occupying vacant land and buildings closer to work because they could not afford the daily commute from the periphery, nor could they risk the possibility of losing their jobs on account of being late for work on a regular basis. Government subsequently criminalised the tenure of black

¹⁵⁸ See Robertson MK "Dividing the land: An introduction to apartheid land law" in Murray C and O'Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 122–136 123.

¹⁵⁹ See Sutcliffe M, Todes A and Walker N "Managing the cities: An examination of state urbanization policies since 1986" in Murray C and O'Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 86-106.

¹⁶⁰ See Van der Merwe D "'Not slavery but a gentle stimulus': Labour-inducing legislation in the South African Republic" 1989 *TSAR* 353-369.

¹⁶¹ See Schoombee JT and Davis DM "Abolishing influx control - Fundamental or cosmetic change?" (1986) 2 *SAJHR* 208-219.

people in white areas in terms of the Group Areas Act 36 of 1966¹⁶² and the Prevention of Illegal Squatting Act 52 of 1951.

2 3 The Prevention of Illegal Squatting Act 52 of 1951

2 3 1 Introduction

In 1944, Parliament enacted a War Measure¹⁶³ in terms of the War Measures Act 13 of 1940. The War Measure enabled a magistrate to issue an order first, for the immediate removal of people living on land or in buildings without the permission of the owner/lawful occupier; and second, for the demolition of any buildings/structures that threatened the health and safety of the general public or the maintenance of peace and good order. The War Measure was inadequate because it was premised on the hope that, once evicted, these people “would go back to where they came from”.¹⁶⁴ However, with nowhere else to go the evictees merely moved to another piece of land nearby and waited for the process to start again. The city councils were forced to use a range of measures, mostly unsuccessful, to stem the influx of black people who flocked to the cities in search of employment opportunities. It was soon realised that a single measure would not solve the problem of urban squatting and that a co-ordinated legislative framework was required.¹⁶⁵

Three years after the National Party achieved election victory in 1948, parliament enacted the Prevention of Illegal Squatting Act 52 of 1951 (‘PISA’) with the aim of making good on the Party’s promise to “take vigorous and effective steps to care for the safety of ... as well as property and the peaceful lives” of white people.¹⁶⁶ The purpose of PISA was to prevent and control illegal squatting on public or private land.¹⁶⁷ This was achieved by criminalising the entering and remaining on land or in buildings/structures without any lawful reason.¹⁶⁸ PISA further contained provisions that

¹⁶² See Dodson A “The Group Areas Act: Changing patterns of enforcement” in Murray C and O’Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 137-161.

¹⁶³ Proclamation 76 in *GG Extraordinary* 3325 of 6 April 1944.

¹⁶⁴ Fagan HA *Report of the Commission of Enquiry into the Disturbances at Moroka, Johannesburg, on the 30th August 1947* (1948) 25.

¹⁶⁵ Fagan HA, Smit HP and Welsh AS *Report of the Native Law Commission* (1948).

¹⁶⁶ National Party *Election Manifesto* (1948).

¹⁶⁷ Long title of PISA.

¹⁶⁸ Section 1, read with section 2, of PISA.

firstly, enabled a court to order the eviction of squatters and authorised the demolition of any buildings/structures that were erected on the land without the permission of the owner/lawful occupier;¹⁶⁹ secondly, prohibited the collection of fees or the exercising of authority with regard to the organisation of illegal squatting;¹⁷⁰ thirdly, afforded administrative powers to magistrates and native commissioners to effect the removal of squatters;¹⁷¹ fourthly, afforded local authorities the power to establish emergency camps;¹⁷² and finally, criminalised any obstruction of police and other authorised officials that were “acting under the authority of an instruction or order issued” by a court.¹⁷³ The peremptory nature of these provisions obliged owners to evict unlawful occupiers and therefore significantly extended “the scope of evictions based on the stronger right to possession” under apartheid land law.¹⁷⁴

In 1952 the National Party complemented PISA with a package of laws aimed at implementing its influx control policy. The Black Laws Amendment Act 54 of 1952 amended section 10 of the Black (Urban Areas) Consolidation Act 25 of 1945 so as to provide that black people may only be in urban areas for 72 hours without a permit, except when they were born or had been continuously employed in the area. The Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 consolidated the pass laws and introduced a uniform reference book which all black men had to carry on their person at all times, while the Black Service Levy Act 64 of 1952 introduced a scheme of employer taxation which would finance the provision of housing and services in the townships.¹⁷⁵

The South African government continued to enforce its policy of influx control during the 1960s and 1970s. However, as the economy changed its focus from agriculture to mining, a change of policy was required to stem the tide of people streaming to cities in an effort to satisfy the demand for low-income employment under a capitalist driven economy. This forced a change in government policy, which coincided with various amendments to PISA.

¹⁶⁹ Section 3 of PISA.

¹⁷⁰ Section 4 of PISA.

¹⁷¹ Section 5, read with section 8, of PISA

¹⁷² Section 6 of PISA.

¹⁷³ Section 7 of PISA.

¹⁷⁴ Van der Walt *Constitutional Property Law* 413.

¹⁷⁵ O'Regan “No more forced removals” 369.

The 1976 amendment to PISA¹⁷⁶ followed after the judgment in *S v Peter*.¹⁷⁷ It was argued that the continuous surge of people into urban areas and the epidemic erection of shacks necessitated a departure from normal legal procedures to show that effective action was being taken to address a problem that was assuming serious proportions.¹⁷⁸ The amendment inserted section 3B, which enabled landowners and local authorities to effect summary demolition of squatter shacks after a seven day notice period. The provision further deterred landowners from allowing squatters to live on their land by making it a criminal offence that was punishable with a fine, imprisonment or both.

The judgment in *Fredericks v Stellenbosch Divisional Council*¹⁷⁹ ('*Fredericks*') resulted in the 1977 amendment of PISA.¹⁸⁰ The seven day notice period¹⁸¹ was removed and substituted with an ouster clause. The aim of the ouster clause was to prevent squatters from approaching the court and obtaining an order that would prevent their removal, unless they could show that they had title or a right to the land. O'Regan observed that this amendment reflected the determination of the government to counter the resolve that squatters demonstrated in pursuing legal strategies that enabled them to resist removal.¹⁸²

The government realised that the demand for low-income labour required a change in the strict influx control policy. As a result the Riekert Commission of Inquiry into

¹⁷⁶ Prevention of Illegal Squatting Amendment Act 92 of 1976.

¹⁷⁷ 1976 (2) SA 513 (C). In this case the Bantu Affairs Administration Board, acting in terms of section 12 of the Black Affairs Administration Act 45 of 1971, actively pursued the prosecution of 6000 squatters that moved onto a piece of land known as Cross Roads during April and August of 1975 in contravention of section 1, read with sections 2 and 3, of PISA. Van Winsen AJP found that the Cape Provincial Council owned the property; that section 12 of the Act did not apply because the property was never used for Bantu accommodation; that there was no evidence supporting the alleged contravention of PISA and accordingly held that the magistrate erred in granting the order for eviction from the property and demolition of the shanties.

¹⁷⁸ O'Regan "No more forced removals" 370-371.

¹⁷⁹ 1977 (3) SA 113 (C).

¹⁸⁰ Prevention of Illegal Squatting Amendment Act 72 of 1977.

¹⁸¹ Blecher MD "Spoliation and the demolition of legal rights" (1978) 97 *SALJ* 8-16 refers to the notice period in terms of section 3B(2) as a safety device on a machine. Where the safety device fails to ensure that no one gets hurt, the unwillingness and incompetence of the operators of the machine should warrant their replacement rather than result in the scrapping of the safety device. The author argues that the safety device was scrapped by the rapid and harsh legislative response to this decision which resulted in severe hardship for squatters who were no longer afforded the opportunity to remove their valuables or to find alternative accommodation.

¹⁸² O'Regan "No more forced removals" 372-373.

Manpower Utilization¹⁸³ was established and assigned the duty to investigate and report on the participation of black people in the urban labour market. The Commission recommended that black urban labourers be afforded the freedom to move and work in any urban area, provided that suitable accommodation was available for them.¹⁸⁴ The 1980 amendment of PISA¹⁸⁵ reflected this recommendation with an alteration to the summary demolition powers of local authorities.

Shortly after the South African government conceded that its influx control strategy for urbanisation had failed, the Constitutional Affairs Committee of the President's Council was required to develop a new strategy for urbanisation. The Committee acknowledged that influx resulted in increased urban population, a decrease in available land stock and ultimately urban squatting. The new strategy would thus have to absorb inevitable urbanisation, the resultant overcrowding and the fact that the acquisition of formal housing was unattainable for most black people.

The Committee accordingly created the notion of "orderly urbanisation", which would focus on development and the accommodation of and planning for urban growth. The notion of "orderly urbanisation" was premised on the operation of market forces, while its purpose was to accomplish spatial ordering. This would be achieved through direct measures, such as legislation, ordinances and by-laws, and indirect measures, like incentives and restrictive conditions. These recommendations ultimately paved the way for the enactment of the Abolition of Influx Control Act 68 of 1986.

However, the 1988 amendment of PISA¹⁸⁶ not only amplified its application to include rural areas, but also introduced comprehensive provisions to regulate rural squatting. It extended the powers of local authorities to remove squatters and summarily demolish their homes, and it eroded judicial powers and common law principles pertaining to the rights of accused.¹⁸⁷

¹⁸³ Established in terms of GN 1673 GG 5720 of 26 August 1977.

¹⁸⁴ O'Regan "No more forced removals" 373.

¹⁸⁵ Prevention of Illegal Squatting Amendment Act 33 of 1980.

¹⁸⁶ Prevention of Illegal Squatting Amendment Act 104 of 1988.

¹⁸⁷ O'Regan "No more forced removals" 376.

2 3 2 Powers to remove¹⁸⁸

2 3 2 1 Criminal provision - section 1

Section 1(1)(a) of PISA provided that it would be a criminal offence for any person to enter upon land without lawful reason or to remain on that land without the permission of the owner or lawful occupier, irrespective of whether the land is enclosed or not.¹⁸⁹ This provision remained untouched on the whole, despite criticism for criminalising activities that extend far beyond the implied scope of the long title of PISA.¹⁹⁰

However, until 1988 the comprehensive criminal prosecution of squatters anticipated by this provision had not materialised because it proved to be an ineffective technique for forcibly removing entire communities.¹⁹¹ O'Regan observed that this could be attributed to the reluctance of government to undertake a large scale prosecution programme, fearing that it might result in the criminal justice system being extended beyond its means.¹⁹² This coincided with the inability of government to prove the elements of the crime because it had no means of showing firstly, that the land in question fell within the scope of PISA;¹⁹³ secondly, that the entry upon the land was unlawful;¹⁹⁴ and thirdly, who the owner of the land was; which negated any effort to prove that the occupation was without the consent of the owner.¹⁹⁵ In the unlikely event that government overcame all these obstacles and obtained a conviction, it still had to convince the magistrate to exercise his discretion to order eviction in terms of section 3.

The purpose of the 1988 amendment of PISA¹⁹⁶ was to address the problems that government experienced in successfully prosecuting squatters in terms of this provision. The first step in that direction was taken with the introduction of two rebuttable presumptions that shifted the burden of proof onto the squatters to show that there was

¹⁸⁸ The headings of the following three sections are based on the categorisation that O'Regan used in O'Regan "No more forced removals".

¹⁸⁹ See *R v Zulu* 1959 (1) SA 263 (A) and *R v Malika* 1958 (4) SA 663 (T) for an interpretation where section 1 of PISA is seen as creating two separate offences.

¹⁹⁰ *R v Phiri* 1954 (4) SA 708 (T) at 710A.

¹⁹¹ O'Regan "No more forced removals" 378.

¹⁹² O'Regan "No more forced removals" 378.

¹⁹³ *R v Mailula* 1960 (1) SA 413 (A), *R v Matsabe* 1957 (3) SA 210 (T), *R v Nompanza* 1957 (2) SA 184 (E) and *S v Mchunu* 1976 (1) SA 320 (N).

¹⁹⁴ *S v Mampura* 1964 (3) SA 477 (T).

¹⁹⁵ *S v Peter* 1976 (2) SA 513 (C), *S v Sikwane* 1976 (2) SA 896 (T) and *R v Ndabambi* 1959 (2) SA 454 (A).

¹⁹⁶ Prevention of Illegal Squatting Amendment Act 104 of 1988.

lawful reason and consent for their occupation of the land and/or building.¹⁹⁷ Section 1(2) of PISA consequently provided that, once it had been proved that a person entered land or a building of another and remained on that land or in that building for purposes of section 1(1) of PISA, it would be presumed that this person did so without lawful reason and without the consent of that other person. In addition, section 3(1) of PISA revoked the discretion a magistrate had to grant an eviction order and replaced it with a directive to order eviction upon conviction in terms of section 1 of PISA. The government was further aided by section 11B of PISA that provided for the execution of the eviction despite the launching of appeal proceedings.

Before 1977, when section 3B(4)(a) of PISA ousted the courts' jurisdiction to grant any relief, the problems that government experienced in prosecuting squatters in terms of section 1 of PISA sometimes caused owners, lawful occupiers and local authorities to take the law into their own hands, which enabled squatters to rely on the *mandament van spolie* with some success.¹⁹⁸

The *mandament van spolie*¹⁹⁹ is a possessory remedy that only affords the applicant temporary relief in terms of a possessory suit, whereby possession is temporarily restored until the merits of the case could be considered in a subsequent case. The purpose of the *mandament van spolie* is to protect the public order against breaches of the peace²⁰⁰ by restoring possession *ante omnia* to the possessor who was unlawfully deprived of her peaceful and undisturbed possession.²⁰¹ This reflects the fundamental

¹⁹⁷ See Lewis CH "The Prevention of Illegal Squatting Act: The promotion of homelessness?" (1989) 5 SAJHR 233-239 235 ("Lewis "The promotion of homelessness") where this development is criticised for being contrary to established authorities in common law.

¹⁹⁸ These cases are discussed at 2 3 3 below.

¹⁹⁹ This remedy originated in canon law with the *condictio ex canone redintegranda* that flowed from the famous *canon redintegranda* in the *Decretum Gratiani*. Originally the *condictio* enabled a bishop who was removed from his office by a worldly authority, to insist on being restored to this office in terms of the maxim *spoliatus ante omnia restituendus est* before the merits of his dismissal could be discussed. The *condictio* was subsequently received in French law (*réintégrande*), German law (*actio spoli*) and in Roman-Dutch law (*mandament van spolie*). See Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* (2006) 287 ('Badenhorst, Pienaar and Mostert *The Law of Property*'); Kleyn DG *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (1986) Unpublished LLD dissertation University of Pretoria and Van der Merwe CG *Sakereg* (1989) 118 ('Van der Merwe *Sakereg*').

²⁰⁰ See Badenhorst, Pienaar and Mostert *The Law of Property* 288-292 and Van der Merwe *Sakereg* 119-122.

²⁰¹ See Badenhorst, Pienaar and Mostert *The Law of Property* 292-296 and Van der Merwe *Sakereg* 129-133.

principle in South African law that no one is allowed to take the law into their own hands.²⁰² The threat of the spoliation order serves as a warning to any person who can assert a real right in terms of a particular thing to rather take recourse to the courts of law and not to succumb to the allure of self-help.

With the ouster clause in section 3B(4)(a) of PISA in place, landowners and local authorities could demolish the buildings or structures and remove the building material without a court order, knowing that the squatters would be unable to approach the court for temporary relief in terms of the *mandament van spolie*. This significantly increased the power to evict and ensured that the safety and security of white people was enforced through swift government action.

2 3 2 2 Administrative provision - section 5

When the health and safety of the public in general was endangered a magistrate, after hearing representations by the squatters,²⁰³ was entrusted with the power to order their eviction and the demolition of any buildings or structures erected upon that land in terms of section 5.²⁰⁴

The 1988 amendment of PISA²⁰⁵ restricted the discretion of the magistrate by removing the requirement that he must be satisfied that the public in general will be exposed to health and safety dangers. The magistrate would subsequently only have to

²⁰² See *Yeko v Qana* 1973 (4) SA 735 (A) at 739G where Van Blerk JA stated that “[t]he fundamental principle of the remedy is that no one is allowed to take the law into his own hands” and *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W) at 619H where Zulman J stated that “[a]ll this is of course based upon the fundamental principle that no man is allowed to take the law into his own hands and that no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable”.

²⁰³ Section 5(1)(aa) provided for three days’ notice to be given to the squatters that afforded them some time to obtain legal assistance and the opportunity to be heard prior to the order being made. Before *Mofokeng v Minister of Native Affairs* 1949 (3) SA 784 (T) subsection (b) of the 1944 War Measure, upon which section 5 is founded, did not provide for notice to be given to the squatters prior to an eviction order being granted.

²⁰⁴ In *Thubela v Pretorius NO* 1961 (4) SA 506 (T) the court considered whether an application for an inspection *in loco* could be refused where the magistrate had knowledge of the prevailing conditions in Sieten Polla, a Bantu village, which enabled him to order the eviction from the land and demolition of the buildings or structures without having regard to the conflicting accounts of these conditions presented to him in affidavits. Claassen J found that the knowledge the magistrate obtained in the capacities of Bantu Commissioner and Controller of Census placed him in a unique position to evaluate the facts and did not amount to a gross irregularity because the attorney for the applicant was timeously informed of this fact. See also *Zungu v Acting Magistrate, Umlazi* 1962 (3) SA 782 (D) and *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C).

²⁰⁵ Prevention of Illegal Squatting Amendment Act 104 of 1988.

be satisfied by the owner, lawful occupier, administrator or local authority of the fact that squatters have entered the land without consent, that they were congregating there and that they were refusing to move. Any review of this administrative decision would not affect the operation of the decision in terms of section 11B of PISA.

The effect was that section 5 of PISA afforded magistrates a wide discretion to order the eviction and removal of squatters from land or buildings/structures and the demolition of any buildings, without any guidance as to which factors to take into consideration in exercising the discretion.²⁰⁶ Some guidance could be gleaned from the general policy with regard to the prevention of illegal squatting that the Minister of Constitutional Development and Planning could publish in the *Gazette* in terms of section 11A of PISA.²⁰⁷ However, Budlender argued that any guidance from the Minister would not improve the position because the general policy that underpinned PISA was not apparent from its wording and that the failure to define “squatting” only exacerbated this.²⁰⁸

²⁰⁶ In *S v Govender* 1986 (3) SA 969 (T) Goldstone J identified a number of circumstances that may be relevant for a court when exercising its discretion to evict someone in terms of section 46(2) of the Group Areas Act 36 of 1966 after that person was found to be in contravention of section 26(1) of the Act. In this case an Indian woman was found guilty of an offence in terms of section 26(1) of the Act and sentenced to a fine of R 50 or fifteen days’ imprisonment. The court *a quo* added an eviction order *mero motu* to this sentence in terms of section 46(2) of the Act. Goldstone J found that the court *a quo* erred when it added the eviction order to the sentence. He pointed out that section 46(2) of the Act was amended so as to afford a court a discretion to add an eviction order to a sentence for the contravention of section 26(1) of the Act. In this regard Goldstone J (at 971f) stated that *inter alia* the following circumstances will be relevant in exercising the discretion:

“the nature of the area concerned; the attitude of the neighbours; the policy and views of the Department of Community Development or any other interested Department of State; the attitude of the landlord; the prospects of a permit being issued for continued lawful occupation of the premises; the personal hardship which such an order may cause and the availability of alternative accommodation.”

Goldstone J found that the court *a quo* made the eviction order as a result of an incorrect application of the law and therefore set the eviction order aside as requested by the appellant.

²⁰⁷ See Lewis “The promotion of homelessness” 239 where it is noted that according to *Mathebe v Regeering van die RSA* 1988 (3) SA 688 (A) ministerial policy is not usually given the force of law.

²⁰⁸ Budlender G “Urban land issues in the 1980s: The view from Weiler’s Farm” in Murray C and O’Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 66-85.

2 3 2 3 Administrative provision – section 6F

Section 6F was enacted to fill the void created by the repeal of the provisions in chapter 4 of the DTLA by the Abolition of Influx Control Act 68 of 1986.²⁰⁹ Section 6F afforded local authorities the power to evict black people from a farm outside their jurisdiction where these black people had permission to stay on that farm but were not in a direct employment relationship with the owner or lawful occupier. It has been argued that increased support for the erstwhile Conservative Party in the rural areas, together with the rapidly increasing black population on white farms and the dwindling white population, may have resulted in the creation of an instrument whereby unemployed residents on these farms could be evicted.²¹⁰

The eviction in terms of section 6F was triggered by an investigation²¹¹ into the status of the occupation of a farm where there were reasonable grounds to believe that the farm was occupied by black people who were not in the direct employ of the owner or lawful occupier. In the case where the belief was confirmed, the owner or lawful occupier had to be informed of the finding through service of a notice that directed the owner or lawful occupier to evict the black people within 30 days after receipt of the notice.²¹² It has been argued that, according to section 6F(6)(a), an owner or lawful occupier should merely have directed a request that these black people had to vacate the farm. Failure on their side to comply with this request of the owner or lawful occupier would then result in the issue of an eviction order by the local committee that was subject to the same procedural requirements enforced under section 5 of PISA.

²⁰⁹ See Lewis “The promotion of homelessness” 238, where she takes issue with the meaning of the terms “legal occupier” and “lawful occupation of the land” for purposes of section 6F of PISA.

²¹⁰ O’Regan “No more forced removals” 384.

²¹¹ These investigations were ordered by local committees that were established in terms of section 6E of PISA. See Lewis “The promotion of homelessness” 237, where this extension of the scope of PISA to include rural areas that fell outside the jurisdiction of local authorities was regarded as an “important innovation” for the promotion of homelessness.

²¹² Section 6F(2) of PISA. See Lewis “The promotion of homelessness” 239, where it is noted that the question whether a local committee could be compelled to conduct this investigation was up for debate. The owner or lawful occupier could thereafter submit written objections to the local committee within 14 days after receipt of the notice to the finding in terms of section 6F(3). The local committee had to consider these objections and make a final decision in terms of section 6F(4). Failure to adhere to the final decision of the local committee would constitute a criminal offence that was punishable with a fine of R10 000, five years imprisonment or both.

2 3 3 Powers to demolish

Section 3B afforded landowners, local authorities and provincial officials the power of summary²¹³ demolition of any building or structure²¹⁴ that was erected on a piece of land without the consent of the owner or lawful occupier.²¹⁵ It is important to note that these summary powers did not extend to the eviction of squatters who, in terms of section 1, could have possession of a building or structure (residing in) and the land (residing on).²¹⁶

Until 1977 squatters successfully relied on the *mandament van spolie* to restore possession to them of the building materials that they used to erect the buildings or structures which they occupied. However, according to traditional doctrine, the *mandament van spolie* loses its force when it is objectively impossible to restore possession. This will occur when the spoliated thing has, on the one hand, been purchased by a third party or, on the other hand, been destroyed, irreparably damaged or lost.²¹⁷ Local authorities accordingly adopted the practice of destroying the corrugated iron, plastic, wood and other materials used by the squatters to erect their shacks. The effect was that the squatters could not use the *mandament van spolie* to regain possession of their valuables. This position was legislatively enhanced with the introduction of section 3B(4)(a), which ousted the courts' jurisdiction to grant any relief to any person in civil proceedings that sought to prevent an intended or actual eviction

²¹³ PISA originally provided for a 7 day notice period before a building or structure could be demolished. This notice period, which afforded squatters time to make representations to the magistrate and/or to remove valuable possessions from the building or structure, was abolished after the *Fredericks* case with the enactment of the Prevention of Illegal Squatting Amendment Act 72 of 1977. The summary demolition powers were confirmed in section 3B(2), which expressly provided that no prior notice of the demolition was required.

²¹⁴ Section 3B(5) provided, prior to its abrogation by Prevention of Illegal Squatting Amendment Act 104 of 1988, that for purposes of section 3B(1)(a) the term "building or structure" included "any shack, hut, tent or similar structure". Berman J discussed the meaning of the term "building or structure" for purposes of section 3B(1)(b) in *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C).

²¹⁵ See *George Municipality v Vena and Another* 1989 (2) SA 263 (A) where Milne JA found that consent can be afforded expressly, tacitly or by implication. See the discussion of consent for purposes of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 in section 3 2 2 of chapter 3.

²¹⁶ O'Regan "No more forced removals" 387.

²¹⁷ See Badenhorst, Pienaar and Mostert *The Law of Property* 304; Van der Merwe *Sakereg* 134-135 and *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A).

or demolition unless that person could first satisfy the court that the action, or intended action, was conducted *mala fide*.

In *Fredericks* the Stellenbosch Divisional Council demolished the shacks that the applicants erected for their families. Both applicants stated in their affidavits that they received no notice from the Council prior to the demolition²¹⁸ and that they had to brave the rain during the weekend without any form of shelter to seek refuge under.²¹⁹ As a result the applicants sought an order that directed the Council to restore the building materials, to re-erect the shacks and to abstain from demolishing the shacks after re-erection.²²⁰ In their opposing affidavit the Council conceded that they had not given written notice of their intention to demolish the applicants' shacks and that it would "return these materials to the site where the houses had stood."²²¹ However, counsel for the respondent contended that the applicants had acted unlawfully because they occupied the land and erected structures on it without the permission of the Council in its respective capacities of owner and local authority.²²² Diemont J held that "it ill behove[d] the respondent to accuse the applicants of unlawfulness"²²³ after it acted "in flagrant contempt of the law" without expressing any "word of regret or apology"²²⁴ in the ensuing legal proceedings. Diemont J further held that the respondents' objections to the relief sought were without substance²²⁵ because in *Zinman v Miller*²²⁶ the court

²¹⁸ Section 3B(2) of PISA stated that

"[a] building or structure referred to in sub-sec. (1) may be demolished only after at least seven days' written notice of the intention to demolish has been given to the person who erected the building or structure or who caused it to be erected, if he and his whereabouts are known, and such period has expired."

²¹⁹ *Fredericks* at 114F-G.

²²⁰ *Fredericks* at 115B-C.

²²¹ *Fredericks* at 115F-G.

²²² *Fredericks* at 116A-B.

²²³ *Fredericks* at 116C.

²²⁴ *Fredericks* at 116H.

²²⁵ *Fredericks* at 117E.

²²⁶ 1956 (3) SA 8 (T). In this case the appellant, an electrical engineer, removed the main panel from the electrical meter chamber and cut the electrical wiring so that there was no flow of electrical current in the respondent's, the owner of the property, house. The court *a quo* found that it had no jurisdiction to decide the case in terms of section 46(2)(c)(ii) of the Magistrate's Courts Act 32 of 1944, which provides that "[a] court shall have no jurisdiction in matters (c) in which is sought *specific performance without an alternative payment of damages* except in (ii) the delivery or transfer of property, movable or immovable, not exceeding two hundred pounds in value ..." (emphasis added). On appeal Rumpff J found that section 46(2)(c)(ii) of the Act did not limit the jurisdiction of the magistrate to grant the extraordinary remedies of a temporary nature provided for in section 30(1) of the Act. Section 30(1) provides that "[s]ubject to the limits of jurisdiction prescribed by this Act, the Court may grant against persons and

ordered restoration *ante omnia*. Diemont J therefore stated that “[i]f the original sheets or corrugated iron cannot be found or if they have been so damaged by the bulldozer that they cannot now be used there is no reason why other sheets of iron of similar size and quality should not be used.”²²⁷

In *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others*²²⁸ (*Rikhotso*) the court considered the question whether it could grant relief to the applicants with the *mandament van spolie* by ordering the respondents to re-erect, with new materials, the shacks which were originally built with a combination of combustible materials, iron sheeting and wood before it was dismantled, removed from the premises and set alight.²²⁹ Nugent J emphasised that the underlying assumption of the *mandament van spolie* is “that the property exists and may be awarded in due course to the party who establishes an entitlement thereto.”²³⁰ Nugent J accordingly found that the nature of the *mandament van spolie* rendered its application inappropriate in instances where the property has been destroyed because “[t]here is nothing upon which the order can operate, and no possessory entitlement left to be adjudicated upon.”²³¹ Nugent J nonetheless confirmed that it was an established principle that “a spoliator is required to restore the property in the state it was at the time of the spoliation” if the property has not been destroyed and that this “may require him to do something to place it in its former condition.”²³² However, Nugent J found that this obligation to restore possession *ante omnia* could not be extended to “the rendering of a substitute when the property has been destroyed”²³³ because “[w]hatever the nature of the remedy may have been in

things orders for arrest *tanquam suspectus de fuga*, attachments, interdicts and mandamenten van spolie.” Rumpff J (at 12) confirmed that the purpose of the *mandament van spolie* was to restore possession *ante omnia* and therefore could include an order for “something to be done in addition to the mere putting of the spoliated back in possession of the thing spoliated.” In this case the *mandament van spolie* required the replacement of the main panel and the reconnection of the electrical wires.

²²⁷ *Fredericks* at 117H.

²²⁸ 1997 (1) SA 526 (W).

²²⁹ *Rikhotso* at 532C.

²³⁰ *Rikhotso* at 532I.

²³¹ *Rikhotso* at 532J. See Badenhorst, Pienaar and Mostert *The Law of Property* 304; De Waal MJ “Naidoo v Moodley 1982 4 SA 82 (T) - Mandament van Spolie” (1984) 47 *THRHR* 115-118; Kleyn DG “Die mandament van spolie as besitsremedie” (1986) 19 *De Jure* 1-16 and Van der Merwe *Sakereg* 119.

²³² *Rikhotso* at 533B-C. See *Jones v Claremont Municipality* (1908) 25 SC 651 where the respondent was ordered to rebuild a fence; *Zinman v Miller* 1956 (3) SA 8 (T) and *Tshabalala v West Rand Administration Board and Another* 1980 (2) SA 520 (W), where the respondent was ordered to restore a ceiling.

²³³ *Rikhotso* at 533G. Blecher MD “Spoliation and the demolition of legal rights” (1978) 97 *SALJ* 8-16; Van der Walt AJ “Naidoo v Moodley: Mandament van spolie” (1983) 46 *THRHR* 237-240; Van der Walt AJ

ancient law, it was received into the law of this country as a possessory remedy and not as a general remedy against unlawfulness.”²³⁴

Nugent J conceded that “[a] remedy providing summary reparation for unlawful loss of or damage to property, irrespective of the possessor’s rights in the property, would be a most powerful one.”²³⁵ However, Nugent J held that *Fredericks* could not be regarded as authority for the development of the *mandament van spolie* for this purpose because, according to his reading, Diemont J merely replied “to the practicality of restoring the dwellings” and could not have intended “to hold that it was competent to order that possession be restored by substitution.”²³⁶ In *Tswelopele Non-Profit Organisation and Others v City of Tswane Metropolitan Municipality and Others*²³⁷ the Supreme Court of

“Nog eens Naidoo v Moodley - ‘n repliek” (1984) 47 *THRHR* 429-439 argues that the *mandament van spolie* could be applied outside of its traditional restorative framework in the specific circumstances where the property was destroyed on purpose to frustrate a restoration order and where the destroyed property was fungible. Where an owner or local authority has taken the law into their own hands by demolishing and destroying the property of squatters the *mandament van spolie* should be used to order them summarily to restore possession given the general policy function of preventing breaches of the peace.

²³⁴ *Rikhotso* at 533I-J. Van der Walt AJ “Squatting, spoliation and the new constitutional order” (1997) 60 *THRHR* 522-529 criticised Nugent J for justifying his refusal to apply the *mandament van spolie* by arguing that it was not a general remedy for the protection of law and order. Van der Walt argues that the strict interpretation of the requirements of the *mandament van spolie* should not thwart the development of an otherwise robust remedy that is uniquely equipped to respond to the self-help of government with unparalleled urgency. See also Blumberg M “*Mandament van spolie* - Restoration of the *status quo ante* revisited” (1997) 60 *THRHR* 529-533.

²³⁵ *Rikhotso* at 534A-B.

²³⁶ *Rikhotso* at 534D.

²³⁷ 2007 (6) SA 511 (SCA). In this case the court considered the question whether the appellants were entitled to relief at all after a perfectly orchestrated operation “to eradicate alien vegetation”; “to identify non-documented illegal immigrants” and to fight crime in Garsfontein resulted in the burning of shacks which left 100 unlawful occupiers exposed to the elements. At the outset Cameron JA (as he then was) clearly expressed his inclination, much like Diemont J (*Fredericks* at 118D) and Nugent J (*Rikhotso* at 532F) did, to order relief for the flagrant disregard the defendants expressed for the law and for their violation of various constitutional rights of the unlawful occupiers (paras 15-16). He conceded that there was no remedy at common law that simultaneously presented a disincentive for self-help and that required the substitution of unlawfully destroyed property. He further conceded that this “could create a perverse incentive for those taking the law into their own hands to destroy the disputed property, rather than leaving it substantially intact” (par 25). However, he cautioned that this “does not mean that where a remedy for a constitutional infraction is required, a common law figure with an analogous operation must be seized upon for its development” (par 20). He accordingly stated that “it may sometimes be best to leave a common-law institution untouched, and to craft a new constitutional remedy entirely” (par 20). He noted that this new constitutional remedy not only had to vindicate the claims of the occupiers, but also had to vindicate the Constitution (par 26). He subsequently ordered the respondents, jointly and severally, to re-erect temporary habitable dwellings that afforded the unlawful occupiers shelter, privacy and amenities equivalent to that which they enjoyed prior to the demolition of their original shacks (par 28). He made this order after he clearly cautioned against the formulation of a constitutional remedy that is couched in similar terms to that of an existing common law analogy (par 26). See Van der Walt AJ “Developing the law on unlawful squatting and spoliation” (2008) 125 *SALJ* 24-36 for a critical discussion of this judgment.

Appeal confirmed *Rikhotso* and avoided the constitutional imperative to develop the common law by constitutional remedy to discourage self-help which bears resemblance to the relief sought in terms of the *mandament van spolie*.

However, Nugent J left the door open for the application of the *mandament van spolie* in cases where “there has been only partial destruction, leaving a substantial part of the property intact” because in those instances “[d]ifferent considerations may arise”²³⁸ that would require consideration.

Rikhotso removed the last option that squatters could have recourse to for relief in those instances where the land owners or local authorities destroyed the building materials of their buildings or structures. As a result, *Rikhotso* implicitly gave owners and local authorities the licence to destroy the building materials that squatters used to erect their buildings or structures. This strengthened the power to demolish unlawfully erected buildings or structures and proved to be a very useful complement for the power to evict squatters.

2 3 4 Powers to approve informal settlement areas

Local authorities had the power to relocate the squatters whom they evicted, or had caused to be evicted, and whose buildings or structures they demolished, or had caused to be demolished, to certain approved informal settlement areas.²³⁹ Since the 1944 War Measure and until the 1988 amendment of PISA,²⁴⁰ these settlement areas were known as “emergency camps”. The purpose of these emergency camps was to accommodate homeless people²⁴¹ and, once established,²⁴² their use and occupation were governed by regulations.²⁴³

²³⁸ *Rikhotso* at 535D.

²³⁹ Lewis “The promotion of homelessness” 237.

²⁴⁰ Prevention of Illegal Squatting Amendment Act 104 of 1988.

²⁴¹ In *Makama and Others v Administrator, Transvaal* 1992 (2) SA 278 (T) the court considered the meaning of “homeless” for purposes of establishing an emergency camp in terms of section 6. The local authority adopted a policy during 1953 whereby the Oukasie township near Brits, which was established in 1928, would cease to exist as such and that the residents should be moved to the Lethlabile township near Motutlung, which was established in 1979. After about 10 000 of the residents voluntarily moved a further policy was adopted whereby vacant sites or houses in Oukasie would not be allocated to those residents that did not move voluntarily in order to force them to move to Lethlabile. Some residents remained in Oukasie and continued to pay their site rent despite the fact that the township had been deproclaimed in terms of section 37(2) of the BCDA. The area was declared an emergency camp because the local authority had stopped rendering services to it, which resulted in living conditions that

In 1988 the concept of emergency camps was replaced²⁴⁴ with a similar form of temporary accommodation known as “transit areas”.²⁴⁵ Local authorities could use land they owned²⁴⁶ or, alternatively, expropriate land for the purpose of establishing these transit areas.²⁴⁷

posed serious health threats. Van Dijkhorst J found that the residents could not be regarded as “homeless” for purposes of section 6 of PISA because they lived in homes of a permanent or semi-permanent nature which sheltered them from the elements and provided some of the comforts of life.

²⁴² Before 1976 all regulations issued by the local authority for the administration of these “emergency camps” had to be approved by either the Minister of Justice or the Minister of Native Affairs (section 6(1)) and then published in the *Government Gazette* (section 6(3)). This position changed with the 1976 amendment of PISA so that only the Bantu Affairs Administration Boards would have the powers to establish “emergency camps” for the occupation of black people. The 1986 amendment of PISA returned the power to establish “emergency camps” to the local authorities and granted the Minister of Constitutional Development and Planning the power to direct them to do so. See O’Regan “No more forced removals” 391-392.

²⁴³ In *S v Lutu* 1989 (2) SA 279 (T) the court considered the question when duly promulgated regulations became effective within the ambit and meaning of section 6(3) of PISA as read with the specific regulation. In the present case the appellant was convicted for a contravention of regulation 25(1)(a) of Board Notice 85 of 1987 for failing to pay the requisite charges of R35 per month for the accommodation and services rendered to her site in the Weiler’s Farm emergency camp from March 1988 to May 1988. Kirk-Cohen J found that the inhabitants did not become aware of the regulation before 18 April 1988 because it had been displayed until then in a small room where the general public did not have access to it. The appellant could as a result not have contravened the regulation which, according to the period of grace allowed for the inhabitants to arrange their financial affairs, only came into operation on 18 July 1988.

²⁴⁴ All “emergency camps” established under the previous provision are considered to be “transit areas” in terms of section 6(11).

²⁴⁵ In terms of section 6(5) a local authority could make regulations for the establishment of “transit areas” which, in terms of section 6(3) had to be published in the *Official Gazette* of each province. In *Executive Suite (Pty) Ltd and Others v Pietermaritzburg-Msunduzi Transitional Local Council* 1997 (4) SA 695 (N) at 710F-H the court commended the local authority for attempting to alleviate the plight of homeless people by adopting a policy whereby no steps would be taken to prevent further land invasions on “transit areas” where they had both the knowledge of intended unlawful erection and occupation of buildings or structures. However, Booysen J directed the local authority to ensure that structures were erected under supervision once the “transit area” had been properly proclaimed and regulations issued.

²⁴⁶ In *Africa v Boothan* 1958 (2) SA 459 (A) the court considered whether the Durban City Council had the power to establish an emergency camp which included the respondent’s property. The appellant, a licensed native trader within the Cato Manor Native Emergency Camp, alleged that the respondent, a registered owner of immovable property that fell within the perimeter of the emergency camp, was conducting a business that competed with his in contravention of *inter alia* regulation 4 in chapter 4 of the regulations governing the emergency camp. Schreiner JA rejected all the arguments of counsel for the appellant and found that although notice was given to the respondent, none of the ordinary steps towards expropriation were carried out and thus could not result in private property within the bounds of an emergency camp being regarded as expropriated as soon as the boundaries of the camp are fixed.

²⁴⁷ Section 6(2) read with section 6(4) provided that where land was occupied by homeless people a local authority could expropriate that land without paying compensation for it unless the owner or lawful occupier could prove that the occupation of these destitute people was without their consent. The purpose of this provision was without a doubt to discourage landowners from allowing squatters to live on their land. See O’Regan “No more forced removals” 393.

Section 6A, the result of an amendment to PISA made by the Abolition of Influx Control Act 68 of 1986, introduced a second type of informal settlement known as “designated areas”. The provision enabled the Minister of Constitutional Development and Planning to designate a portion of land that was owned by the local authority or which could be expropriated,²⁴⁸ to people to settle and reside on if they were unable to find alternative accommodation.²⁴⁹ Unlike transit areas, the establishment²⁵⁰ of these designated areas would amount to permanent accommodation for the otherwise destitute people.

A decision by parliament to exclude the operation of the Group Areas Act 36 of 1966,²⁵¹ the Slums Act 76 of 1979²⁵² and ordinary town planning rules²⁵³ in both transit areas and designated areas provided a “flexible tool for managing urbanisation” to local authorities and proved to be an alternative to forced removals for vulnerable communities.²⁵⁴

2 3 5 Conclusion

PISA was a dynamic piece of legislation that was progressively tailored through repeated amendments to minimise the prospect of resisting forced evictions. The gradual erosion of the rights of squatters and the limitation of judicial powers to intervene in cases where government departed from normal legal procedures, afforded land owners and the government draconian powers to evict squatters and demolish the buildings or structures that they occupied. The insecure tenure of squatters was perpetuated by the fact that they could be relocated to another piece of land where they

²⁴⁸ In terms of section 6A(2) of PISA.

²⁴⁹ In *Kayamandi Town Committee v Mkwaso and Others* 1991 (2) SA 630 (C) the court considered whether a local authority first had to think about what is to become of squatters after the eviction. In this case the local authority approached the court to obtain an eviction order, without there being any obligation to do so in terms of its summary powers, to evict 150 people from land that has been earmarked for residential development. The court held that availability of alternative accommodation would remain a relevant consideration for the reasonable and fair administration of section 3(1)(c) in these circumstances. Conradie J found that in the particular case a failure to do think about what would happen to the squatters posed a serious threat to the stability of a community that has already rejected the squatters for a lack of living space and subsequently pushed their tolerance to breaking point.

²⁵⁰ Provincial administrators had the authority to establish these “designated areas” and to issue regulations for their administration in terms of sections 6A(3) and 6A(10).

²⁵¹ Section 6A(4) of PISA.

²⁵² Section 6A(5) of PISA.

²⁵³ Section 6A(9) and (10) of PISA.

²⁵⁴ O’Regan “No more forced removals” 393.

would be subjected to further eviction proceedings by the owner of that land or the local authority in whose jurisdiction that land was located. PISA was used by the government as part of its normal police powers to evict people for health, safety and public interest reasons in terms of the Slums Act 53 of 1934, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977. As a result PISA entrenched an absolute right for owners and the government to evict squatters from both private and public land without any regard for their personal circumstances or housing needs. PISA remained in force for four years post-1994 and was eventually repealed by section 11(1), read with schedule 1, of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

2 4 Conclusion

The law of evictions underwent a dramatic transformation throughout apartheid. During this period government abused its normal police powers to evict them under the veil of ensuring their health, safety and security. This normal exercise of regulatory powers was in actual fact undertaken to further the government's "less wholesome and far more contentious ideological goals" of racial segregation and the systemic oppression of black people.²⁵⁵ Van der Walt argues that evictions during apartheid could not be characterised as remarkable for their political motivation but was in fact extraordinary "for the particular politics relied upon in and served by the evictions."²⁵⁶ In the process a negative link was established between the regulatory powers of government and property law because the requirements of the *rei vindicatio* accommodated the eviction of squatters "through its supposedly neutral and scientific application."²⁵⁷ Adherence to the strictly legal requirements of the *rei vindicatio* made it impossible for a court to refuse an eviction application based on the personal circumstances of the occupiers or other general policy considerations based on the housing needs or circumstances of the occupiers. The legislation discussed above

"created a situation in which Black occupiers and users of land were legally classified as unlawful occupiers (or 'squatters') – who could therefore be evicted without any conceivable defence – by the very legislation that allowed and regulated

²⁵⁵ Van der Walt AJ *Property in the Margins* (2009) 60 ('Van der Walt *Property in the Margins*').

²⁵⁶ Van der Walt *Property in the Margins* 62.

²⁵⁷ Van der Walt *Property in the Margins* 63.

eviction of unlawful occupiers in the first place or, even worse, by the same authorities who had established and housed them in a particular location.”²⁵⁸

The rural and urban land tenure measures discussed in this chapter extended the scope of the *rei vindicatio* far beyond its traditional application, where it protected the stronger of competing rights “in an objective, neutral and legitimate fashion.”²⁵⁹ This broadened scope of the *rei vindicatio* transformed an already powerful remedy into an even stronger remedy whereby an individual owner could vindicate her property from unlawful occupiers and the government could “uphold a socially engineered, state-sponsored and state-enforced system of racially segregated land use.”²⁶⁰

In *Port Elizabeth Municipality v Various Occupiers*²⁶¹ the Constitutional Court observed that apartheid land law resulted in the creation of “large, well-established and affluent” white neighbourhoods that co-existed alongside “crammed pockets of impoverishment and insecure” black ones.²⁶² The spatial separation that Sachs J described above was not only premised on racial differentiation, but served as a constant reminder of the grave assaults on the equality, human dignity and freedom of those living in intolerable conditions and abject poverty. It is against this background that the exploration of the process to “transform our society into one in which there will be human dignity, freedom and equality”²⁶³ must begin so that we can appreciate and understand the social and historical context of the Bill of Rights in general and the right of access to adequate housing in particular. A renewed appreciation of the legal-historical context of forced evictions will enable courts to understand the social and historical context of section 26 of the Constitution and to develop a substantive meaning for the right of access to adequate housing.

²⁵⁸ Van der Walt *Property in the Margins* 65.

²⁵⁹ Van der Walt *Property in the Margins* 60.

²⁶⁰ Van der Walt *Property in the Margins* 66.

²⁶¹ 2005 (1) SA 217 (CC).

²⁶² Par 10.

²⁶³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) par 8.

An Analysis of the Legal Framework of Evictions

3 1 Introduction

In *Port Elizabeth Municipality v Various Occupiers*¹ (*PE Municipality*), Sachs J explained that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'), the Act that repealed the Prevention of Illegal Squatting Act 52 of 1951² ('PISA'), must be understood and applied within "a defined and carefully calibrated constitutional matrix."³ While the purpose of PIE is, in part, to excise all that is racist from the common law of evictions and to promote compassion for those living in abject poverty, it is also to affirm the inherent human dignity, equality and freedom of the people who were deprived of these rights during apartheid.⁴ These rights also form the foundational values upon which the Constitution of the Republic of South Africa, 1996 ('Constitution') is built⁵ and must therefore serve as a guide to define the special relationship that exists between land owners and unlawful occupiers.

On the one hand, the property rights of land owners must be respected and protected against any arbitrary deprivation of that property that the government may cause. However, Sachs J added that the property rights of the owner must also be understood against the social and historical background of forced evictions that created a need for the establishment of secure property rights for those that were either denied access to land or who were deprived of such rights during apartheid.⁶ On the other hand, the Constitution affords unlawful occupiers a right of access to adequate housing that requires courts to consider all the relevant circumstances before it grants an

¹ 2005 (1) SA 217 (CC).

² See section 3 in chapter 2 for a detailed discussion of the Act and the powers that it conferred on private land owners and the government to eviction squatters, demolish their buildings/structures and relocate them to distant patches of land on the fringes of society.

³ *PE Municipality* par 14.

⁴ *PE Municipality* par 14.

⁵ Section 1(a) of the Constitution. See Roederer C "Founding provisions" in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original Service, June 2008) chapter 13.

⁶ *PE Municipality* par 15. See section 2 in chapter 2 for an overview of the urban and rural land tenure measures that deprived people of their land during apartheid.

eviction order. The right of access to adequate housing demonstrates that special regard must be had for a person's place of abode because, beyond providing shelter for its inhabitants against the elements, it is often the only place where individuals have some privacy in an otherwise unsympathetic world.⁷ It is against this background that it becomes clear that judicial control and oversight is needed of evictions because it is an exceptionally traumatic social process and has the potential to lead to situations of severe conflict.⁸

Sachs J explained further that the conflicting interests of land owners and unlawful occupiers should not be characterised as diametrically opposed because the special cluster of relationships that flow from these rights shows that they are in fact closely linked.⁹ Both sections 25 and 26 of the Constitution place an obligation on the government to take reasonable legislative and other measures, within its available resources to, on the one hand, "foster conditions which enable citizens to gain access to land on an equitable basis",¹⁰ and on the other hand, "achieve the progressive realisation" of the right of access to adequate housing.¹¹ The Constitution adds that people who currently have insecure tenure as a result of past racially discriminatory laws or practices are entitled to legally secure tenure or comparable redress.¹² The Constitution also states that people who were dispossessed of their property as a result of past racially discriminatory laws or practices are entitled to restitution of that property or to equitable redress.¹³ Sections 25 and 26 of the Constitution create a broad overlap between the rights of access to land and access to adequate housing that the government must seek to achieve on a progressive basis.¹⁴

It is against this background that Sachs J identifies three significant features of the way in which evictions must be approached in terms of the Constitution. Firstly, the rights of access to land and access to adequate housing are not cast in unqualified terms. The result is that these rights cannot give rise to arbitrary seizures of land or to

⁷ *PE Municipality* par 17.

⁸ *PE Municipality* par 18.

⁹ *PE Municipality* par 19.

¹⁰ Section 25(5) of the Constitution.

¹¹ Section 26(2) of the Constitution.

¹² Section 25(6) of the Constitution.

¹³ Section 25(7) of the Constitution.

¹⁴ *PE Municipality* par 19.

claims of access to these rights immediately on demand. Government must ensure that both the rights in sections 25 and 26 of the Constitution are achieved progressively, in an orderly manner and within its available resources.¹⁵ Secondly, section 26(3) of the Constitution acknowledges that evictions from overcrowded informal settlements and dilapidated inner city buildings will continue even though it may lead to homelessness.¹⁶ However, courts must be reluctant to evict relatively settled occupiers unless they are satisfied that temporary alternative accommodation will be made available upon eviction.¹⁷ Finally, the phrase in section 26(3) of the Constitution that requires courts to consider all relevant circumstances emphasises that courts must consciously seek specific solutions for each individual eviction case and the intricacies that it presents in a manner that broadens the range of circumstances that a court can have regard to for purposes of considering whether it is just and equitable to evict the unlawful occupiers.¹⁸ Sachs J explained the cumulative effect of these features as follows:

“In sum, the Constitution imposes new obligations on the court 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 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.”¹⁹

The aim of this chapter is to provide an analysis of the impact of section 26 of the Constitution and PIE to show how the law of evictions has changed since the advent of democracy. The first part of the chapter is divided into sections for each of the three subsections of section 26 of the Constitution. In the first of these sections a theoretical concept of “home” is developed in an effort to build on the normative foundation created for the right of access to adequate housing in *Government of the Republic of South*

¹⁵ *PE Municipality* par 20.

¹⁶ *PE Municipality* par 21.

¹⁷ *PE Municipality* par 28.

¹⁸ *PE Municipality* par 22.

¹⁹ *PE Municipality* par 23.

*Africa and Others v Grootboom and Others*²⁰ ('*Grootboom*') when the Constitutional Court stated that the right amounts to "more than bricks and mortar".²¹ The second section provides a brief overview of the positive obligations that government must take to ensure the realisation of the right of access to adequate housing. The third section is devoted to a discussion of the negative obligation in section 26(3) of the Constitution and the prohibition against arbitrary evictions. The second part of the chapter provides a detailed analysis of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 with reference to its drafting history, the concept of unlawful occupation, the notice requirement for imminent eviction proceedings; the requirement that courts must be satisfied that evictions from private land, urgent evictions and evictions from public land must be "just and equitable", and the form of the eviction order and ancillary matters thereto.

3 2 The right of access to adequate housing

3 2 1 Section 26(1) - Access to adequate housing

3 2 1 1 Introduction

Section 26(1) of the Constitution states that everyone has a right of access to have adequate housing. In *Grootboom* the Constitutional Court found that this right was distinct²² from article 11(1) of the International Covenant on Economic, Social and Cultural Rights²³ ('ICESCR'). The Court found it to be significant that section 26(1) only provides for the right of access to adequate housing, while article 11(1)²⁴ of the ICESCR

²⁰ 2001 (1) SA 46 (CC).

²¹ *Grootboom* par 35.

²² *Grootboom* par 35.

²³ 993 UNTS 3. The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976. As at 18 March 2011, the Covenant has been ratified by 160 countries. South Africa signed the Covenant on 4 October 1994 but has not yet ratified it. The result is that the Covenant only serves as an interpretive guide for South African courts in interpreting the Bill of Rights through section 39(1)(b) of the Constitution.

²⁴ Article 11(1) of the ICESCR reads:

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

provides for the right to adequate housing.²⁵ The Court explained that section 26(1) of the Constitution amounted to “more than bricks and mortar” because it also required the acquisition of land, the actual construction of the house and the provision of municipal services.²⁶ Sadly, in the eleven years since the *Grootboom* judgment the Constitutional Court has not engaged with what it considered to be more than bricks and mortar. This can be attributed to the fact that the Constitutional Court has not given content to the right of access to adequate housing. In turn, this can be attributed to the interpretive approach that the Constitutional Court has followed for considering the positive obligations that section 26 of the Constitution imposes on government. According to this approach sections 26(1) and (2) must be read together, with the emphasis falling on the reasonableness of the measures that the government has taken for purposes of progressively realising the right within its available resources. The result is that we have no idea what the scope this right in section 26(1) of the Constitution is against which the reasonableness of the government’s measures must be tested.²⁷

However, Fox recently developed the foundations upon which a legal concept of “home” could be constructed for South Africa by relying on theoretical findings in the social sciences of the affective value of a home.²⁸ It is instructive to use the concept of home that Fox developed in the eviction context because it captures the range of interests that unlawful occupiers have in their home. These home interests open up a whole new set of considerations that courts can have regard to in determining the justice and equity of an eviction. These home interests can also play a role in the crafting of innovative remedies with regard to the rights and needs of those people who stand to be affected by eviction and relocation to alternative accommodation.

²⁵ *Grootboom* par 28. Liebenberg S “The interpretation of socio-economic rights” in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original Service, December 2003) (“Liebenberg “Interpretation”)” 33-22 argues that this distinction “is more apparent than real.”

²⁶ *Grootboom* par 35.

²⁷ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 135-177 and Liebenberg S *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 173-186.

²⁸ Fox L “The meaning of home: A chimerical concept or a legal challenge?” (2002) 9 *Journal of Law and Society* 580-610 (“Fox “The meaning of home”), Fox L “The idea of home in law” (2005) 2 *Home Cultures* 1-25 and Fox L *Conceptualising Home - Theories, Laws and Policies* (2007) (“Fox *Conceptualising Home*”). Fox developed the concept of home in the context of the United Kingdom to show how courts could weigh the tangible, monetary interests of creditors against the intangible, affective interests of occupiers who face eviction claims from the creditors.

3 2 1 2 Conceptualising home

Fox developed this concept of home in the specific context of disputes that arise between creditors, who want to reclaim possession of a house or sell the house in execution of a mortgage bond, and occupiers, who are either completely innocent or have defaulted on their rental or mortgage repayments. Fox argues that the creditor/occupier context is a good basis from which to analyse the theories, laws and policies about the home interests of occupiers because the particular interests concerned come into conflict with each other in an unique way in these cases.²⁹ Creditors, on the one hand, have a commercial interest in realising the capital asset represented by a house, while occupiers, on the other hand, have an interest in the continued use and occupation of the house as a home. In *Re Citro*,³⁰ Nourse LJ noted that it was by no means an easy task to weigh the financial interests of the creditors against the personal and human interests of the occupiers because they were in no way commensurable. He added that the only way in which these interests could be weighed against each other would have to involve a value judgment of some kind by the court.³¹

Courts can determine the value of the creditor's financial interest with ease because it is tangible, measurable, rational and objective.³² Courts can similarly appreciate what the consequences would be if the credit supply market contracted or collapsed.³³ The home interests of occupiers, on the other hand, are inherently subjective and intangible because they are premised on the sentimental and emotive value that the property acquired through its use as a home. Lawrence argues that a home transcends quantitative measureable dimensions because it includes qualitative subjective dimensions which make it difficult to define and comprehend.³⁴

Courts, that traditionally pride themselves on rigorous and objective legal analysis,³⁵ are understandably hesitant to engage with this vague concept of home.³⁶ Courts

²⁹ Fox *Conceptualising Home* 11.

³⁰ [1991] Ch 142.

³¹ 150.

³² Fox *Conceptualising Home* 133.

³³ See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) par 38. See also Fox *Conceptualising Home* 79-108 where she considers the economic arguments that have been canvassed in support of the prioritisation of the commercial interests of creditors.

³⁴ Lawrence RJ "Deciphering home: An integrative historical perspective" in Benjamin DN (ed) *The Home: Words, Interpretations, Meanings and Environments* (1995) 53-68 58.

³⁵ Fox *Conceptualising Home* 132.

therefore invariably find that the commercial interests of creditors outweigh the home interests of occupiers. However, this predisposition of courts to favour the commercial interests of a creditor cannot be wholly attributed to an inherent bias in legal reasoning.³⁷ Fox notes that courts have struggled to find sufficient grounds on which to hold that the home interests of occupiers outweigh the commercial interests of creditors because there is no framework of values against which the home interests of an occupier can be delineated.³⁸ As a result, legal representatives find it challenging to conceptualise and canvas a persuasive argument in favour of the interests of occupiers without a central organising framework within which to locate the home interest of the occupiers.³⁹

Rapoport recommended that home should be conceptualised in terms of the mathematical equation $home = house + x$.⁴⁰ This equation distinguishes between the fact that a home is valued, on the one hand, as a physical structure, and on the other hand, for the social, psychological, and cultural significance that it acquires through use as a home.⁴¹ Fox acknowledges that the emotional connection between occupiers and their homes are inherently subjective and that the same connectedness may not be held by all occupiers in the same way. Fox argues that the unique link that is fostered between occupiers and their homes must be divided into the following value-types: firstly, home as a physical structure; secondly, home as territory; thirdly, home as identity; and finally, home as a social and cultural unit.

Home, as a physical structure, provides its occupiers with the requisite shelter from the elements and the facilities that sustain and support them.⁴² It is impossible to understate the importance of a home as a physical structure because the most immediate need after losing a home is to obtain any form of shelter to take refuge in or

³⁶ Rapoport J "A critical look at the concept 'home'" in Benjamin DN (ed) *The Home: Words, Interpretations, Meanings and Environments* (1995) 25-52 29 ("Rapoport "A critical look").

³⁷ Fox *Conceptualising Home* 132.

³⁸ Fox *Conceptualising Home* 132.

³⁹ Fox *Conceptualising Home* 12. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (Centre for Housing Rights and Evictions and Another, *Amici Curiae*) ('Residents of Joe Slovo') 2010 (3) SA 454 (CC) par 113.

⁴⁰ Rapoport "A critical look" 38.

⁴¹ Fox "Meaning of home" 590.

⁴² Altman I and Werner CM (eds) *Home Environments* (1985) xix.

under.⁴³ However, the absence of a physical structure to take shelter in or under does not encapsulate the magnitude of being homeless.⁴⁴ It is important to recognise that a house also provides its occupiers with a space to experience the intangible values of their home. Fox notes that the physical structure of a home provides occupiers with the basis from which they can experience all the attributes of a home.⁴⁵ The house as a physical structure is an important starting point in the conceptualisation of the home because it is the physical presence of the home that acts in combination with the x factor to create the phenomenon of a home.⁴⁶

Home, as territory, is closely linked to the physical structure because it affords the occupiers of the home the opportunity to exercise control over the space in the home and the activities within it.⁴⁷ This territory provides the occupiers of a home with a locus in space where they can build family relationships, express themselves and feel secure.⁴⁸ The sense of belonging, rootedness and continuity that this locus in space fosters fulfils a range of social and psychological needs which are beneficial and necessary for the psychological well-being of the occupiers.⁴⁹ Fox acknowledges that the occupiers of a home can build family relationships, express themselves and feel secure in other types of territory that cannot be described as home. However, she argues that the home presents a unique setting that is significant not only because it represents the very intimate values of family, privacy and security, but also because it foster a sense of belonging and rootedness.⁵⁰

Home, as identity, embraces the adage “home is where the heart is” and reveals the fact that occupiers forge strong emotional connotations with their homes through the

⁴³ Fox *Conceptualising Home* 155.

⁴⁴ See Somerville P “Homelessness and the meaning of home: Rooflessness or rootlessness?” (1992) 16 *International Journal of Urban and Regional Research* 529-539.

⁴⁵ Fox *Conceptualising Home* 157. In *PE Municipality*, Sachs J (par 17) stated that “[s]ection 26(3) [of the Constitution] evinces special constitutional regard for a person’s place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people) is a turbulent and hostile world.”

⁴⁶ Fox *Conceptualising Home* 157.

⁴⁷ Sebba R and Churchman A “The uniqueness of home” (1986) 3 *Architecture and Behaviour* 7-24 21 (“Sebba and Churchman “The uniqueness of home”).

⁴⁸ Rapoport “A critical look” 30 and Sebba and Churchman “The uniqueness of home” 21.

⁴⁹ Porteous JD “Home: The territorial core” (1976) 66 *Geographical Review* 383-390.

⁵⁰ Fox “Meaning of home” 598.

experience of living in a particular place over a period of time.⁵¹ These emotional connotations ensure that the phenomenon of the home is more than the experience of being oriented within a familiar order. The home also creates a direct link between the occupiers of a home and the place in which they dwell.⁵² The symbolic significance of a home as identity is accentuated by the fact that a home is often perceived to be, on the one hand, an extension of an occupier's self-identity⁵³ and, on the other hand, a central component of the occupier's social identity.⁵⁴

A home, as a social and cultural unit, creates an intimate link between the family and their place of residence⁵⁵ that is sustained through a complex process of social interaction between members of the household.⁵⁶ The central importance and role of the family in these interactions provide the gateway through which occupiers can experience their home.⁵⁷

3 2 1 3 Conclusion

Using the home interests of unlawful occupiers to flesh out the *dictum* that the right of access to adequate housing is more than bricks and mortar adds richness and texture to the way in which the right is understood. This also shows a unique development of the law of evictions from a position where evictions were conducted during apartheid without any regard for the personal circumstances of the squatters to a position in the constitutional dispensation where the personal circumstances of the unlawful occupiers are relevant circumstances to consider before granting an eviction order. This development in terms of the Constitution accords with the interpretive approach that the Constitutional Court laid down in *Grootboom* for the interpretation of section 26 because

⁵¹ Fox *Conceptualising Home* 168.

⁵² Dovey K "Home and homelessness" in Altman I and Werner CM (eds) *Home Environments* (1985) 33-64 39.

⁵³ See Csikszentmihalyi M and Rochberg-Halton E "The home as symbolic environment" in Csikszentmihalyi M and Rochberg-Halton E *The Meaning of Things - Domestic Symbols and the Self* (1981) 121-145 123 for the significance of the home as part of an individual's identity.

⁵⁴ See Fichten J "When toxic chemicals pollute residential environments: The cultural meanings of home and home ownership" (1989) 48 *Human Organisation* 313-324 317 for a description of the social significance of a home.

⁵⁵ Fox L *Conceptualising Home* 175.

⁵⁶ Perkins HC and Thorns DC "House and home and their interaction with changes in New Zealand's urban system, households and family structures" (1999) 16 *Housing, Theory and Society* 124-135 133.

⁵⁷ Dovey K "HOME: An ordering principle in SPACE" (1978) 22 *Landscape* 27-30 27.

it acknowledges the fact that the forced evictions conducted during apartheid did not afford those affected the requisite respect for their human dignity, freedom and right to receive equal treatment before the law. Such treatment of individuals and communities in the constitutional dispensation would be grossly at odds with the foundational values of the Constitution and their rights to equality, human dignity and freedom and security of the person.

This development further emphasises the fact that the right of access to adequate housing is an enforceable human right like all the other rights in the Bill of Rights. Liebenberg argues that the right of access to adequate housing is more than a mere commodity to meet the basic material needs of people because it enables people to reach their potential as human beings and afford them the opportunity to participate in society as equals.⁵⁸ Liebenberg adds the following crisp observation about the value of the home interest:

“The significance of the concept of a home will also vary for differently placed groups and this must also be taken into account in developing the meaning and purpose of housing as a human right. Similarly, an understanding of the significance of housing as right requires a detailed and nuanced appreciation of the historical and social context of housing in South Africa.”⁵⁹

The challenge then is how to use this developed understanding of the normative underpinnings of the right of access to adequate housing to give substantive content to the right of access to adequate housing.⁶⁰ It is important to give substantive content to the right of access to adequate housing because individuals and communities need to know what they can claim from government in terms of this right. Giving substantive content to the right serves the dual purpose of providing government with a clear benchmark towards which it can progressively realise the right of access to adequate housing within its available resources and it will act as a standard against which government can be held accountable.

⁵⁸ Liebenberg S *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 177 ('Liebenberg *Socio-Economic Rights*').

⁵⁹ Liebenberg *Socio-Economic Rights* 177.

⁶⁰ See chapter 4 for a detailed analysis of how the South African courts can give content to the right of access to adequate housing through section 39(1)(b) of the Constitution by having regard to the ICESCR and the jurisprudence generated in terms of the European, Inter-American and African regional human rights systems.

3 2 2 Section 26(2) - Positive obligation

3 2 2 1 Introduction

Section 26(2) of the Constitution imposes a positive obligation on the government to adopt reasonable legislative and other measures to achieve the progressive realisation of the right of access to adequate housing and to do so within its available resources. In *Grootboom* the Constitutional Court made it clear that this subsection must always be read with section 26(1) of the Constitution because it delineates the scope of the right.⁶¹ Together sections 26(1) and (2) form the positive obligations that are imposed on government to provide access to adequate housing. In *PE Municipality* and in *Residents of Joe Slovo* the Constitutional Court made it clear that this positive obligation also included a negative obligation to the effect that government should be reluctant to institute eviction proceedings against unlawful occupiers of public land in instances where that eviction will lead to homelessness.⁶² In *Grootboom* the Constitutional Court made it clear that this obligation also applied to the eviction of unlawful occupiers from private land. This construction of section 26 of the Constitution makes it clear that there is a definite link between negative obligations to desist from preventing people from enjoying their current access to housing and the positive obligations to provide access to adequate housing. In this regard *Grootboom* is not only the first Constitutional Court case to deal with the interpretation of section 26 of the Constitution, but it also explained in detail the extent of the positive obligation in section 26(2) of the Constitution.

In *Grootboom*, Mrs Irene Grootboom and the majority of the other respondents initially lived at the Wallacedene informal settlement with relatives in small shacks. Some of the shacks had electricity but there were no water, sewage or refuse removal services and the area was partially waterlogged. Several of the respondents had been on a waiting list for nearly seven years after their initial application for subsidised low-cost housing to the Oostenberg municipality. After numerous enquiries and no definite answers as to when they could expect the much needed help from the municipality, they could no longer face the prospect of continuing to live in these appalling conditions. The respondents subsequently moved onto vacant land that was privately owned and was

⁶¹ *Grootboom* par 34.

⁶² *PE Municipality* par 28 and *Residents of Joe Slovo* par 148.

designated for low-cost housing. Since they did not have the owner's consent to stay on the property a magistrate's court granted an eviction order. The respondents realised that they could not return to their former sites because those had been filled by others. Almost four months passed before renewed eviction proceedings were instituted against the occupiers for refusing to vacate the property. When they did not vacate the land, the respondents were forcibly evicted in an apartheid-style fashion after the municipality refused to mediate with the purpose of finding alternative land for their occupation. With no, or very little possessions, the occupiers sought refuge on the Wallacedene sports field under such temporary structures as they could assemble. An urgent application was launched when the municipality once again refused to meet its constitutional obligations and provide temporary accommodation to the respondents.

The respondents sought an order in the Western Cape High Court, Cape Town that directed the appellants to provide adequate basic shelter or housing of a temporary nature for them and their children in terms of section 26 of the Constitution. In the alternative the respondents sought relief against the appellants in the form of the provision of sufficient basic nutrition, shelter, health care and social services to all of the applicants and their children in terms of section 28 of the Constitution. In support of the relief sought the respondents contended that the inability of the state to provide immediate access to adequate housing did not justify failure to take any steps to provide some form of housing or shelter (however inadequate) during the time in which it implemented its programme to provide access to adequate housing. Davis J dismissed the application for the primary relief sought, but made a declaratory order in terms of the alternative relief sought that the children of the community were entitled to shelter and that their parents were entitled to be accommodated with their children until such time as the parents were able to provide shelter to their own children.⁶³

On appeal to the Constitutional Court, Yacoob J stated that the positive obligation in section 26(2) of the Constitution did not impose an absolute or unqualified obligation on government to provide access to adequate housing.⁶⁴ Yacoob J emphasised that this positive obligation was limited by the fact that firstly, government only had to take

⁶³ *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) at 293I-J.

⁶⁴ *Grootboom* par 38.

reasonable legislative and other measures that, secondly, had to enable the progressive realisation of the right and that, finally, this should be done only to the extent that its available resources allowed it.⁶⁵ What follows is a brief overview of how the Constitutional Court described this positive obligation and the academic debate around it.

3 2 2 2 Reasonable legislative and other measures

The wording of this qualifying phrase implies that there should be some standard against which government's social programmes can be measured. In *Grootboom* the *amici curiae* encouraged the Court to approve the notion of a minimum core obligation for this purpose.⁶⁶ The Court rejected this notion of a minimum core obligation because it would be a complex task to define in the abstract what the minimum core should be for access to adequate housing. The court further stated that the opportunities for fulfilling this right varied considerably and the needs were diverse in the South African context.⁶⁷

Instead, the Court stated that the core inquiry should be whether the measures taken by the government to realise section 26 of the Constitution are reasonable.⁶⁸ The central question flowing from this inquiry is whether the means chosen by the government are reasonably possible of facilitating the realisation of section 26 of the Constitution. The Court emphasised that it was the prerogative of the legislature and the executive to decide on the precise contours of the measures that had to be adopted to fulfil the rights in sections 26 and 27 of the Constitution. The Court added that a wide range of possible measures could be adopted by the legislature and the executive to

⁶⁵ *Grootboom* par 38.

⁶⁶ The Committee on Economic, Social and Cultural Rights developed this notion in General Comment No 3 *The nature of State parties' obligations (art 2(1) of the Covenant)*, UN Doc E/1991/23. The purpose of this document is to give interpretative direction to the scope and application of article 2(1) of the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3. In paragraph 10 of General Comment No 3 the Committee states that every State Party to the Covenant incurs a minimum core obligation to ensure that the minimum essential levels of each right contained in the Covenant is satisfied. According to the Committee any State Party would *prima facie* be in violation of its obligations if any significant number of individuals were deprived of an essential level of any of the rights contained in the Covenant. The Committee further stated that the Covenant would be deprived of its *raison d'être* if it was interpreted in a way that did not establish such a minimum core obligation.

⁶⁷ *Grootboom* paras 32-33.

⁶⁸ *Grootboom* par 33.

meet this obligation.⁶⁹ In this regard the Court added that the government should be afforded a margin of discretion in developing and implementing these legislative and other measures. The Court emphasised that it was not the place of a court to question whether a better measure could have been adopted or whether public funds could have been expended more effectively. The sole enquiry must be whether the measures that have been adopted are reasonable.⁷⁰

The Court proceeded to flesh out this standard of “reasonableness review” by enumerating a few factors that would be relevant when reviewing the reasonableness of a programme that government adopted to give effect to a socio-economic right in the Constitution. In summary, a reasonable programme must firstly, be comprehensive and co-ordinated in the sense that it clearly allocates responsibilities and tasks to all the spheres of government and ensures that appropriate financial and human resources are available;⁷¹ secondly, be capable of facilitating the realisation of the right;⁷² thirdly, be reasonable both in its conception and its implementation;⁷³ fourthly, it must be balanced and flexible in the sense that it makes provision for short, medium and long term needs;⁷⁴ and finally, must include a component that answers to the exigencies of those in desperate need.⁷⁵

However, the Court cautioned that in some instances it may not be enough to show that the legislative and other measures that have been adopted are merely capable of facilitating statistical access to the rights in sections 26 and 27 of the Constitution.⁷⁶

⁶⁹ *Grootboom* par 41.

⁷⁰ *Grootboom* par 41.

⁷¹ *Grootboom* paras 39-40. See sections 3, 7 and 9 of the Housing Act 107 of 1997, which clearly states what the statutory obligations of national, provincial and local government are respectively. See chapter 5 for a discussion of how these obligations come into play in a specific eviction case with reference to the necessary joinder of local government due to its direct and substantial interest in the matter, the obligation to engage meaningfully with unlawful occupiers and the obligation to provide alternative accommodation.

⁷² *Grootboom* par 41.

⁷³ *Grootboom* par 42. See section 2 2 in chapter 5 for a discussion of why meaningful engagement, which is squarely grounded in section 26(2) of the Constitution, transcends procedural fairness in terms of sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000, which focuses only on the moment of decision making and not on the preceding and subsequent process of interaction between the parties.

⁷⁴ *Grootboom* par 43.

⁷⁵ *Grootboom* par 44.

⁷⁶ *Grootboom* par 44.

Yacoob J explained that legislative and other measures that only achieve this would be grossly at odds with the animating values of equality⁷⁷ and human dignity.⁷⁸

The Court concluded that the programme which was in place in the Cape Metro at the time that eviction proceedings were launched was not reasonable in that it failed to provide any form of relief for those in desperate need of access to adequate housing.⁷⁹ The Court therefore made a declaratory order that required the government to fulfil the obligations imposed on it by section 26(2) of the Constitution and to do that by devising, funding, implementing and supervising measures to provide relief for those in desperate need of housing.⁸⁰

As a direct result of this judgment the government adopted Chapter 12 of the National Housing Code, entitled *Housing Assistance in Emergency Housing Situations*. This chapter creates rules to assist people who find themselves in an emergency situation as a result of reasons beyond their control. The chapter foresees that such emergency situations may flow from the damaging or destruction of current shelter; the immediate threat that prevailing living circumstances may pose to their life, health and safety; or the threat of imminent eviction proceedings. The chapter establishes a fund from which municipalities can obtain grants to provide basic services and shelter in the interim while land is being developed. The relief that this chapter provides falls short of access to formal housing that people may get access to in the medium or long term as provided for in terms of the housing subsidy scheme.

The Court's rejection of the notion of a minimum core obligation has been criticised by many commentators for characterising the notion as involving complex questions, for its failure to engage in priority-setting and for arguing that it is impossible to fulfil such an obligation.⁸¹ In turn, the model of reasonableness review that the Constitutional

⁷⁷ *Grootboom* par 44. See also *PE Municipality* par 29.

⁷⁸ See *PE Municipality* paras 12, 18 and 41-41.

⁷⁹ *Grootboom* par 95.

⁸⁰ *Grootboom* par 96 and par 99, Order 2.

⁸¹ See S Liebenberg "Interpretation" 33-27 for a summary of these arguments. See also Young KG "The minimum core of economic and social rights: A concept in search on content" (2008) 33 *The Yale Journal of International Law* 112-175 138-140; Lehman K "In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core" (2006) 22 *American University International Law Review* 163-197; Porter B "The crisis on economic, social and cultural rights and strategies for addressing it" in Squires J, Langford M and Thiele B (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 43-69 48-55; Wesson M "*Grootboom* and beyond:

Court developed in *Grootboom* and subsequently applied in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*,⁸² *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Others v Minister of Social Development and Others*,⁸³ and *Mazibuko and Others v City of Johannesburg and Others*⁸⁴ has also attracted criticism. The discussion below will focus only on Liebenberg's critique of the model of reasonableness review to make the point that the adjudication of the right of access to adequate housing is dominated by the enquiry into the reasonableness of the legislative and other measures which government has adopted.

Liebenberg explains that some authors have argued that the model of reasonableness review amounts to an administrative law model because it fails to engage in a substantive analysis of the content of the right of access to adequate housing and the obligations that flow from this right.⁸⁵ The vagueness and open-ended nature of the model allow courts to avoid giving content to the right of access to adequate housing.⁸⁶ To this extent the model may be described as weak because it is at risk of being highly deferential to the state.⁸⁷ This could explain why the allure of the minimum core is so strong because it responds to this weakness by carving out a clear

Reassessing the socio-economic rights jurisprudence on the South African Constitutional Court" (2004) 20 *SAJHR* 284-308; Sachs A "The judicial enforcement of socio-economic rights" (2003) 56 *Current Legal Problems* 579-601; Kende MS "The South African Constitutional Court's construction of socio-economic rights: A response to the critics" (2003-2004) 19 *Conn J Int'l L* 617-629; Kende MS "The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective" (2003) 6 *Chap L Review* 137-160 153-154; Liebenberg S "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002) 6 *Law, Democracy and Development* 159-191; Roux T "Understanding *Grootboom* - A response to Cass R Sunstein" (2002) 12 *Constitutional Forum* 41-51 47; Scott C and Alston P "Adjudication constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise" (2000) 16 *SAJHR* 206-268 244-245, 250-252 and De Vos P "Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67-101 97.

⁸² 2002 (5) SA 721 (CC).

⁸³ 2004 (6) SA 505 (CC).

⁸⁴ 2010 (4) SA 1 (CC).

⁸⁵ Liebenberg *Socio-Economic Rights* 173. See Brand D "The proceduralisation of South African socio-economic rights jurisprudence or 'What are socio-economic rights for?'" in Botha H, Van der Walt AJ and Van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33-56.

⁸⁶ Liebenberg *Socio-Economic Rights* 173. See Pieterse M "Coming to terms with the judicial enforcement of socio-economic rights" (2004) 20 *SAJHR* 383-417 410-411.

⁸⁷ Liebenberg *Socio-Economic Rights* 173. See Davis DM "Adjudicating the socio-economic rights in the South African Constitution: Towards 'deference lite'?" (2006) 22 *SAJHR* 301-327 311 and Davis DM "Socio-economic rights in South Africa: The record of the Constitutional Court after ten years" (2004) 5(5) *ESR Review* 3-7 5

normative content for the right of access to adequate housing.⁸⁸ Liebenberg notes that, on the other hand, some authors are convinced that the model enables courts to attain a skilful balance between judgments that dictate how government should set its priorities and abdicating the role of the judiciary in enforcing socio-economic rights.⁸⁹ To this extent these authors argue that government acquires a burden to justify or explain its actions.⁹⁰

Liebenberg agrees that the model provides courts with a tool that is both flexible and allows context-sensitive engagement with the socio-economic rights claims of people because it ensures that government has the space to conceptualise and implement legislation, policies and programmes.⁹¹ The model ensures that these measures are reasonable, inclusive and caters for the emergency needs of those living in abject poverty.⁹² She notes further that the stringency of the review standard adopted in the model could vary according to the position of the claimant group, the nature of the resource or service that is claimed, and what the impact would be on the claimant group if access to the resource or service is denied.⁹³ However, she identifies the following problems with the model.

Firstly, the fact that the Constitutional Court has persistently held that sections 26(1) and (2) must be read together has ensured that both the initial determination of the content of the right and the consideration of the possible reasons why the right is limited are conflated into one single enquiry into the reasonableness of the measures taken by government.⁹⁴ The result is that there is no clear distinction between what the scope of the right is, whether it has been infringed, and the weight of the reasons that

⁸⁸ Liebenberg *Socio-Economic Rights* 173. See Bilchitz D *Poverty and Fundamental Rights* (2007) 135-237; Bilchitz D "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *SAJHR* 1-26 and Bilchitz D "Giving socio-economic rights teeth: The minimum core and its importance" (2002) 118 *SALJ* 484-501.

⁸⁹ Liebenberg *Socio-Economic Rights* 173. See Sunstein CR "Social and economic rights? Lessons from South Africa" (2000-2001) 11 (4) *Constitutional Forum* 123-131.

⁹⁰ Mureinik E "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 31-48 introduced the concept of a culture of justification.

⁹¹ Liebenberg *Socio-Economic Rights* 174.

⁹² Liebenberg *Socio-Economic Rights* 174. See Steinberg C "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" (2006) 123 *SALJ* 264-284.

⁹³ Liebenberg *Socio-Economic Rights* 174.

⁹⁴ Liebenberg *Socio-Economic Rights* 175.

government advanced in justifying any limitation of the right.⁹⁵ She argues that this allows the courts to elide an initial principled engagement with the purpose and underlying values of the rights and the impact of the deprivations on those people before the court.⁹⁶ The result is that the model focuses exclusively on the justifiability of the reasons advanced for limiting the right of access to adequate housing, without first engaging with the purpose and underlying values of the right of access to adequate housing.⁹⁷

This links up with the second problem of the model, namely that the analysis of whether the legislation and other measures taken are capable of facilitating the progressive realisation of the right of access to adequate housing takes place in a normative vacuum.⁹⁸ Put differently, without any clear indication on what it means to have access to adequate housing, the government has no benchmark or goal to progressively realise towards. Thirdly, the result of this failure to engage with the content of the right of access to adequate housing has narrowed the dialogic space in the adjudication of the right and precludes the people claiming the benefit and protection of the right from articulating their needs.⁹⁹ This places a significant limitation on the ability of South African courts to function as forums for deliberation on the meaning of constitutional rights and the values that underpin them.¹⁰⁰ This links up with the fourth problem of the model, namely that the failure to develop an independent content of the right of access to adequate housing and engagement with its underlying values precludes the assignment of an appropriate weight to it in the evaluation of the reasonableness of the measures that the government has taken. Put differently, it is impossible to really determine the reasonableness of the measures that government has taken without knowing what it means to have access to more than bricks and mortar.¹⁰¹ Finally, the Constitutional Court has consistently neglected – perhaps even

⁹⁵ Liebenberg *Socio-Economic Rights* 175.

⁹⁶ Liebenberg *Socio-Economic Rights* 175.

⁹⁷ Liebenberg *Socio-Economic Rights* 175.

⁹⁸ Liebenberg *Socio-Economic Rights* 176.

⁹⁹ Liebenberg *Socio-Economic Rights* 176.

¹⁰⁰ Liebenberg *Socio-Economic Rights* 176. See Pieterse M “On ‘dialogue’, ‘translation’ and ‘voice’: A reply to Sandra Liebenberg” in Woolman S and Bishop M (eds) *Constitutional Conversations* (2008) 331-347 343-347.

¹⁰¹ See section 3.2 above for a discussion of the affective value of the home and how the home interests of occupiers can be used to develop the normative content of the right of access to adequate housing

refused – to consider international law.¹⁰² Section 39(1)(b) of the Constitution places an explicit obligation on courts to consider international law when it interprets any right contained in the Bill of Rights. The burgeoning jurisprudence on the right to housing in international law provides a wealth of material that the Constitutional Court should consider in terms of section 39(1)(b) of the Constitution for purposes of developing the content of the right of access to adequate housing and for considering how persuasive arguments based on the ability of measures to progressively realise the right and scarcity of resources are. This obligation to consider international law is complemented by the obligation in section 39(1)(a) of the Constitution which requires courts to promote the values of human dignity, equality and freedom when it interprets any right contained in the Bill of Rights. Taken together, sections 39(1)(a) and (b) requires courts to interpret the right of access to adequate housing in a purposive, value-orientated¹⁰³ manner that is informed by an international law understanding of the content of the right.

3 2 2 3 Progressive realisation

The concept of progressive realisation in section 26(2) is derived¹⁰⁴ from article 2(1) of the International Covenant on Economic Social and Cultural Rights ('ICESCR'). Article 2(1) reads:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

In General Comment No 3 the Committee on Economic, Social and Cultural Rights ('CESCR') explained that progressive realisation is used to describe the intent of article 2.¹⁰⁵ The concept of progressive realisation appreciates the fact that the full realisation

from merely being “more than bricks and mortar” to the place where people can find the peace, privacy and intimacy to forge strong family ties, to recuperate after a long day, to discover their identity and to practice their culture and religion.

¹⁰² Liebenberg *Socio-Economic Rights* 178.

¹⁰³ See section 2 1 2 above for the arguments that Fox make about the values that underpin the phenomenon of the home.

¹⁰⁴ *Grootboom* par 45.

¹⁰⁵ General Comment No 3 par 9.

of socio-economic rights will not be achieved immediately.¹⁰⁶ However, the concept must not be interpreted in a manner that deprives it of its meaning.¹⁰⁷ The concept is a flexible device that reflects the realities of the world and which appreciates the difficulties that State Parties may face in ensuring the full realisation of the rights in the ICESCR. Progressive realisation should therefore be interpreted in accordance with the *raison d'être* of the Covenant which is to establish clear obligations for States Parties in respect of the full realisation of the rights in the ICESCR.¹⁰⁸ In *Grootboom* the Constitutional Court echoed this approach to the interpretation of progressive realisation when it stated that the government must take steps to provide for the basic needs of everyone in society.¹⁰⁹ This duty to take steps requires States Parties to adopt legislative and other measures that are deliberate, concrete and targeted as clearly as possible towards the achievement of the full realisation of the rights in the ICESCR.¹¹⁰ The CESCR explained that while enacting legislation is desirable,¹¹¹ such enactments will not be exhaustive of the obligations of States Parties.¹¹² Each State Party is encouraged to decide which means are most appropriate for the circumstances that prevail in its context and to then report to the CESCR what measures have been taken and on what basis it has been taken.¹¹³ In addition, the CESCR has stated that the obligation to realise rights progressively contains a general prohibition against adopting retrogressive measures which would undermine the existing provision of economic, social and cultural rights.¹¹⁴

3 2 2 4 Available resources

The concept of available resources similarly has its origin in article 2 of the ICESCR. Under this obligation States Parties must make a conscious effort to ensure that as many people as possible enjoy the benefits flowing from the rights in the ICESCR under

¹⁰⁶ General Comment No 3 par 9.

¹⁰⁷ General Comment No 3 par 9.

¹⁰⁸ General Comment No 3 par 9.

¹⁰⁹ *Grootboom* par 45.

¹¹⁰ General Comment No 3 par 2.

¹¹¹ General Comment No 3 par 3.

¹¹² General Comment No 3 par 4.

¹¹³ General Comment No 3 par 4.

¹¹⁴ General Comment No 3 par 9.

the prevailing circumstances of that particular State Party.¹¹⁵ The obligation further requires States Parties to ensure that the most vulnerable in society are protected in terms of programmes that do not require major capital outlay in instances where the resources are demonstrably inadequate.¹¹⁶ McLean argues that the margin of appreciation that States Parties have to allocate resources must be restricted so as not to undermine the rationale behind the obligation.¹¹⁷

3 2 2 5 Conclusion

Section 26(2) of the Constitution imposes an obligation on government to take reasonable legislative and other measures within its available resources to provide access to adequate housing for those people that currently do not have such access. The Constitutional Court has developed a model of reasonableness review under this subsection to evaluate whether the measures that the government has taken are reasonably capable of facilitating the progressive realisation of the right of access to adequate housing. In this regard the Court will have regard to *inter alia* the fact that many people in South Africa currently live in intolerable conditions. This obligation to pay attention to the immediate needs of those living in abject poverty ensures that the legal-historical social significance of section 26 is highlighted with reference to the constitutional and statutory obligations that government now have to provide access to adequate housing. However, the weakness of the model of reasonableness review is that it conflates the two stages of constitutional adjudication and thereby precludes the development of an independent substantive content for the right of access to adequate housing. The result is that the Constitutional Court focuses disproportionately on the reasons advanced for limiting access to the right. The corollary of this focus is that courts have failed to appreciate properly the fact that evictions more often than not lead to homelessness, which undermines the right of access to adequate housing.

¹¹⁵ General Comment No 3 par 11.

¹¹⁶ General Comment No 3 par 12.

¹¹⁷ McLean K "Housing" in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original Service, July 2006) 55-38.

3 2 3 Section 26(3) - Eviction

3 2 3 1 Negative obligation

In *Grootboom*, the Constitutional Court held that section 26(1) of the Constitution places a negative obligation on the government, organs of state and private individuals to “desist from preventing or impairing” the right of access to adequate housing.¹¹⁸ Yacoob J noted that this negative obligation is further spelt out in section 26(3) of the Constitution. Section 26(3) of the Constitution states that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” Liebenberg notes that the Court does not explain what actions would amount to a prevention or impairment of the right of access to adequate housing.¹¹⁹ She adds that the terminology that the Court used to describe this negative obligation is broad enough to argue that a prevention or an impairment of the right of access to adequate housing could flow from a lack of positive action from the government.¹²⁰

In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*¹²¹ (*Jaftha*) the Constitutional Court developed the meaning of this negative obligation to desist from preventing or impairing the right of access to adequate housing. In this case the appellants, two poor and disadvantaged women from Prince Albert, lost their homes in sales-in-execution proceedings to satisfy extraneous debts.¹²² The appellants sought an order setting aside the sales-in-execution and an order that interdicted certain of the respondents from taking transfer of the properties that were sold in execution.¹²³ Ms van Rooyen sought a further order that interdicted *inter alia* the Sheriff of Prince Albert from evicting previously disadvantaged residents of Prince Albert who acquired homes since the advent of democracy with the assistance of low cost housing subsidies from the government.¹²⁴ All the respondents, except for the Minister for Justice and

¹¹⁸ *Grootboom* par 34. The Constitutional Court recalled that in *Certification Judgment, Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) par 78 it held that socio-economic rights could at the very least be “negatively protected from improper invasion.”

¹¹⁹ Liebenberg *Socio-Economic Rights* 214.

¹²⁰ 214.

¹²¹ 2005 (2) SA 140 (CC).

¹²² *Jaftha* par 3-5.

¹²³ *Jaftha* par 6.

¹²⁴ *Jaftha* par 6.

Constitutional Development, indicated that they would abide by the order of the court.¹²⁵ The appellants and the respondents furthermore reached agreement on the relief sought by the appellants. The Constitutional Court therefore only had to engage with the constitutional validity of the provisions that were used to sell the properties of the appellants in execution in the magistrates' court.

Section 66(1)(a) of the Magistrates' Court Act 32 of 1944 instructs the Sheriff of a magistrates' court to execute a court order for the payment of money or the payment of money in instalments against the moveable property of a debtor if that debtor fails to pay the money without delay. The clerk of the magistrates' court is obliged¹²⁶ to issue a warrant of execution against the immovable property of the debtor if the Sheriff issues a *nulla bona* return to indicate that there is insufficient moveable property to satisfy the debt. This warrant of execution may be set aside if the debtor can show good cause for this to be done¹²⁷ or if the debtor is willing to pay the debt in instalments.¹²⁸ If the warrant of execution is not set aside and the debtor does not enter an appearance to defend, the clerk of the magistrates' court may enter judgment in favour of the creditor of the liquidated debt. The result is that the entire execution process can occur without any judicial oversight. The appellants argued that this makes section 66(1)(a) of the Act unconstitutional to the extent that it is overbroad, because it permits the violation of a person's right to have access to adequate housing in circumstances where it may not be justified.¹²⁹ The unconstitutionality of the execution process in the magistrates' court is exacerbated by the fact that section 67 of the Act does not shield the home of the debtor from being attached and sold in execution.¹³⁰ The appellants argued that this

¹²⁵ *Jaftha* paras 7 and 9.

¹²⁶ See Rule 36 of the Magistrates' Courts Rules of Court, Government Notice R1108 (21 June 1968).

¹²⁷ See section 62 of the Act for the powers of magistrates' courts to grant or set aside a warrant.

¹²⁸ See section 73 of the Act for the powers of magistrates' courts to make orders for payment by instalments.

¹²⁹ *Jaftha* par 17.

¹³⁰ Section 67 of the Act reads:

"In respect of any process of execution issued out of any court the following property shall be protected from seizure and shall not be attached or sold, namely: (a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family; (b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed [R 2000]; (c) stock, tools and agricultural implements of a farmer in so far as they do not exceed [R 2000]; (d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month; (e) tools and implements of trade, in so far as they do not exceed [R 2000]; (f) professional books, documents or instruments necessarily used by

violates their right to have access to adequate housing in terms of section 26(1) of the Constitution.

Mokgoro J observed that this case was different from all the other socio-economic rights cases that had come before the Constitutional Court. The appellants did not seek relief against the government that would require it to take positive measures to realise the right of access to adequate housing.¹³¹ Instead the appellants alleged that the negative aspects of section 26 of the Constitution were violated through the operation of sections 66(1)(a) and 67 of the Act which prevented and impaired their current access to adequate housing. Mokgoro J noted that the appellants already had access to adequate housing that required protection against the government, in the form of the Sheriff of the magistrates' court, and against private individuals such as the respondents who purchased the properties of the appellants during sales-in-execution.¹³² This protection was required because it was common cause that the appellants would firstly, not qualify for another low cost housing subsidy from the government if they lost their homes; and secondly, not be provided with suitable alternative accommodation upon eviction from their homes.¹³³ While she did not find it necessary to enumerate all the circumstance that may lead to a violation of the negative obligations of the right of access to adequate housing, she held that any measure which permitted a person to be deprived of existing access to adequate housing would limit the rights protected in section 26(1) of the Constitution.¹³⁴ She added that such a limitation would have to be justified in terms of section 36 of the Constitution.¹³⁵

In considering the nature of section 26 of the Constitution Mokgoro J emphasised the link between the right of access to adequate housing and the inherent dignity of all

such debtor in his profession, in so far as they do not exceed [R 2000]; (g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment”

¹³¹ *Jaftha* par 31.

¹³² *Jaftha* par 32.

¹³³ *Jaftha* par 12.

¹³⁴ *Jaftha* par 34.

¹³⁵ Section 36 of the Constitution reads:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) *the nature of the rights*; (b) *the importance of the purpose of the limitation*; (c) *the nature and extent of the limitation*; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose” (emphasis added).

people. She explained that the ability to call a place a home had the potential of being the “most empowering and dignifying human experience.”¹³⁶ Sections 66(1)(a) of the Act posed a serious threat to this experience because these provisions placed the appellants in a position where they would never again be able to obtain a housing subsidy from the government.¹³⁷ While she conceded that it was important to have a framework for debt recovery in place, it was difficult to see how the need for collection of extraneous debts could be compelling enough to allow the permanent termination of the right of access to adequate housing in circumstances where there are alternative means to recover debts. She added that her finding did not mean that every sale in execution to satisfy an extraneous debt would be unreasonable and unjustifiable.¹³⁸ There will be instances where it will be reasonable and justifiable to allow the sale in execution to recover extraneous debts because the creditor’s interests outweigh the harm caused to the debtor.¹³⁹ However, section 66(1)(a) of the Act was sufficiently broad to allow sales-in-execution against indigent debtors to proceed where it would not be reasonable and justifiable.¹⁴⁰ She therefore held that section 66(1)(a) of the Act was unconstitutional to this extent.

Mokgoro J held that an appropriate remedy in the circumstances would have to be sufficiently flexible to ensure that, on the one hand, the interests of the debtors in keeping their homes, and on the other hand, the interests of the creditors in recovering the debt owed to them, is taken into consideration.¹⁴¹ She held that peremptory judicial oversight of the execution process, as opposed to the judicial oversight upon which a debtor can insist in terms of sections 62 and 73 of the Act, would satisfy the need for flexibility in remedying the constitutional defect in section 66(1)(a) of the Act.¹⁴² She added that magistrates should, when exercising their discretion to issue a warrant of execution, have regard to *inter alia* whether the interests of the creditor in obtaining payment of the judgment debt is significantly less than the interests of the debtor in

¹³⁶ *Jaftha* par 39.

¹³⁷ *Jaftha* par 39.

¹³⁸ *Jaftha* par 40.

¹³⁹ *Jaftha* par 42.

¹⁴⁰ *Jaftha* par 44.

¹⁴¹ *Jaftha* par 53.

¹⁴² *Jaftha* par 55.

retaining security of tenure of her home,¹⁴³ what the size of the debt is,¹⁴⁴ what the circumstances were in which the debt arose,¹⁴⁵ and whether there are alternative measures available of ensuring debt recovery.¹⁴⁶ She concluded that the most precise way of remedying the lack of judicial oversight in section 66(1)(a) of the Act would be to add the phrase “a court, after consideration of all the relevant circumstances, may order execution” immediately before the words “against the immovable property of the party”.¹⁴⁷

In *Gundwana v Steko Development and Others*¹⁴⁸ (*Gundwana*) the Constitutional Court had the opportunity to grapple with the constitutional validity of sale in execution proceedings that are conducted in the High Court. In *Gundwana* the applicant purchased land in George for R 52 000 during 1995. R 25 000 of the purchase price was financed by registering a mortgage bond against the property. Ms Gundwana fell in arrears with her bond repayments during 2003 and default judgment was obtained against her by Nedcor Bank Limited in terms of Rule 31(5)(b) of the Uniform Rules of Court.¹⁴⁹ Between November 2003 and August 2007 the bank took no action in relation to the execution while the applicant continued to make infrequent payments of variable amounts. The property was sold in execution on 15 August 2007 to Steko Development CC which then instituted eviction proceedings against the applicant after she failed to vacate the property. The applicant failed in her attempts to obtain leave to appeal against the eviction order to the Western Cape High Court, Cape Town and the Supreme Court of Appeal. The applicant subsequently launched proceedings to obtain direct access to the Constitutional Court to challenge the constitutional validity of Rule 31(5)(b) of the Uniform Rules of Court. In the latter application she sought a declaratory order to the effect that the power of the Registrar to order default judgment in terms of

¹⁴³ *Jaftha* par 56.

¹⁴⁴ *Jaftha* par 57.

¹⁴⁵ *Jaftha* par 58.

¹⁴⁶ *Jaftha* par 59.

¹⁴⁷ *Jaftha* par 64.

¹⁴⁸ 2011 (3) SA 608 (CC).

¹⁴⁹ Rule 31(5)(b) of the Uniform Rules of Court reads:

“The registrar may - (i) grant judgment as requested; (ii) grant judgment for part of the claim only or on amended terms; (iii) refuse judgment wholly or in part; (iv) postpone the application for judgment on such terms as he may consider just; (v) request or receive oral or written submission; (vi) require that the matter be set down for hearing in open court.”

Rule 31(5)(b) of the Uniform Rules of Court is unconstitutional. The applicant further sought an order rescinding the default judgment and an order setting aside the eviction order.

Froneman J recalled that the Constitutional Court stated in *Chief Lesapo v North West Agricultural Bank and Another*¹⁵⁰ and *Jaftha* that sales in execution of claims that sound in money may only follow upon a court order. He noted further that judicial oversight over the execution process was required if the execution was against the homes of indigent debtors who ran the risk of losing their security of tenure.¹⁵¹ The bank did not dispute the necessity of judicial oversight in these circumstances, but sought to argue that the applicant's case was different. First, the bank argued that the applicant and her property did not attract the protection that *Jaftha* afforded. Froneman J held that this argument was flawed because the constitutional validity of Rule 31(1)(5)(b) could not depend on the subjective position of a particular applicant. He further held that the fact-based nature of each case required an evaluation of the specific circumstances of the case which fell beyond the executive functions of the Registrar.¹⁵² Secondly, the bank argued that mortgaged property is a type of property that did not fall within *Jaftha*'s reach. Froneman J accepted that a mortgagor willingly provided her immovable property as security for the mortgage bond and that she thereby consents that the immovable property may be executed upon in order to satisfy the debt.¹⁵³ However, he could not accept that the mortgagor also provided consent to firstly, enforce the mortgage bond without a court order; secondly, the waiver of her rights in terms of section 26(1) and 26(3) of the Constitution; and finally, *mala fide* enforcement of mortgage bond repayments.¹⁵⁴

Froneman J found that the fact that mortgagors willingly place homes at risk by registering a mortgage over them did not put it beyond the reach of *Jaftha*. He explained that the specific circumstances of each case required a determination of whether the hypothecated property constituted a mortgagors home before it could be declared specially executable. This kind of evaluation must be done by a judicial officer. He

¹⁵⁰ 2000 (1) SA 409 (CC).

¹⁵¹ *Gundwana* par 41.

¹⁵² *Gundwana* par 43.

¹⁵³ *Gundwana* par 44.

¹⁵⁴ *Gundwana* par 44.

therefore found that Rule 31(5)(b) of the Uniform Rules of Court was unconstitutional to the extent that it allowed the registrar to make this determination.¹⁵⁵ He further set aside the eviction order and referred both the application for eviction and the finalisation of the rescission application back to the magistrates' court in George.¹⁵⁶

The case discussions of *Jaftha* and *Gundwana* above illustrate that the interests of poor people in the protection of their homes are important considerations in a judicial process which was previously solely concerned with the rights and interests of creditors.¹⁵⁷ Prior to these decisions a judgment creditor was entitled to a writ of execution against the immovable property of the judgment debtor once the Sheriff of the court issued a *nulla bona* return. Neither the clerk, in the magistrates' court, nor the Registrar, in the High Court, had a discretion to refuse this writ. *Jaftha* and *Gundwana* confirm that judicial oversight of sale in execution proceedings is required if the property to be executed against is the home of the judgment debtor. These judgments enjoin judicial officers to weigh the interests of the creditor in securing payment of the judgment debt against the interests of the debtor in retaining the tenure security that her home provides her. This balancing requires more than the mechanical application of legal rules to objective facts. It requires engagement with all the relevant circumstances of the case - crucially, whether current access to adequate housing will be impaired or prevented. In *Jaftha* the appellants would not only be left without any alternative accommodation upon eviction, but would also be disqualified from securing a low cost housing subsidy from the government. In *Gundwana* the applicant would also be left without any alternative accommodation upon eviction and would arguably find it very difficult in the future to obtain financing from a bank for purposes of purchasing a home.

3 2 3 2 Relevant circumstances

The obligation to consider all relevant circumstances is significant in the context of evictions because it represents a drastic departure from the common law position where eviction was dealt with as, on the one hand, an abstract or absolute remedy for a private land owner without regard for the personal circumstances of the occupiers and, on the

¹⁵⁵ *Gundwana* par 49.

¹⁵⁶ *Gundwana* par 65, Order F and G.

¹⁵⁷ See section 2 1 2 above for an analysis of the home interests of occupiers.

other hand, an instrument of state-sponsored eviction from either public or private land with little or no court intervention and no regard for the harsh consequences that the eviction may have on the occupiers. The impact of section 26(3) of the Constitution lies in the fact that courts are required to consider the personal circumstances of the unlawful occupiers to satisfy themselves of the justice and equity of the eviction.

To succeed with the *rei vindicatio* the owner merely had to allege and prove that she was the owner of the land (registered owner on the title deed) and that the land was in possession of the defendant.¹⁵⁸ The onus then shifted onto the defendant to establish any right to occupy the land (for example in terms of a lease). If the defendant succeeded with this or the owner acknowledged this fact, the onus shifted back onto the owner to prove that the right to occupy no longer existed or was no longer enforceable.¹⁵⁹ Once the owner discharged her onus a court had no discretion to refuse the eviction order based on the personal circumstances of the unlawful occupiers, the factors that contributed to their vulnerability and weakness or by counter-weighting the values underpinning housing as a fundamental right.

In *Ross v South Peninsula Municipality* ('Ross') the Western Cape High Court, Cape Town considered the question of how these relevant circumstances should be placed before a court.¹⁶⁰ Josman AJ found, with reference to how evidence is placed before a court in an adversarial system, that section 26(3) of the Constitution amended the common law to the extent that it now requires an owner to allege circumstances that will be relevant for a court to issue an eviction order.¹⁶¹ The decision in *Ross* was strongly criticised in subsequent High Court cases.¹⁶² The High Courts argued, in summary, that it would be impossible for an owner to place the personal circumstances of the

¹⁵⁸ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A.

¹⁵⁹ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 21. See Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* (2006) 243 ('Badenhorst, Pienaar and Mostert *The Law of Property*') and Van der Walt AJ *Constitutional Property Law* (2005) 410-411 ('Van der Walt *Constitutional Property Law*').

¹⁶⁰ 2000 (1) SA 589 (C) at 595I.

¹⁶¹ *Ross* at 596H.

¹⁶² *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) at 475F-I; *Ellis v Viljoen* 2001 (5) BCLR 487 (C) at 497B-H. These cases are discussed in Roux T "Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law" (2004) 121 SALJ 466-492 478-484 ('Roux "Continuity and change"'). See also *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W) at 392B-F and *Transnet t/a Spoornet v Informal Settlers of Good Hope and Others* [2001] 4 All SA 516 (W) at 522G.

defendant before a court because it was within the exclusive knowledge of the defendant. It would thus be impossible for an owner to obtain an eviction order if the defendant did not place her personal circumstances before the court. The landowner would consequently be arbitrarily deprived of her property in terms of section 25(1) of the Constitution until the occupier decided to leave.

In *Brisley v Drotzky*¹⁶³ (*'Brisley'*), dealing with the impact of section 26 of the Constitution on the common law, the Supreme Court of Appeal confirmed that an eviction order could only be granted once all the relevant circumstances have been considered. However, the court qualified this by stating that, in the absence of explicit statutory provisions, the personal circumstances of the occupier do not constitute relevant circumstances.¹⁶⁴ As a result the impact of section 26(3) of the Constitution on the common law of ownership remained limited¹⁶⁵ and the owner therefore only had to satisfy the requirements of the *rei vindicatio*. In *Ndlovu v Ngcobo; Bekker and Another v Jika*¹⁶⁶ (*'Ndlovu'*), dealing with the impact of PIE on the common law, the Supreme Court of Appeal adopted an approach that appeared to be different from that of *Brisley* when it held that PIE explicitly overrides the common law and that the personal circumstances of occupiers are relevant circumstances.¹⁶⁷ However, the court seemed to echo all the previous case law on onus when it found that the burden was on the owner to prove that she was owner and that the occupier was in unlawful occupation of the land. This would shift the burden onto the shoulders of the occupier to present the court with special circumstances for her occupation.¹⁶⁸ This looks like an amended version of the requirements for the *rei vindicatio* requiring, in addition, that the owner must prove unlawful occupation, whilst leaving the occupier to prove a ground for lawful occupation.¹⁶⁹ Van der Walt argues that the courts have interpreted *Ndlovu* as if it left the burden of proof unchanged despite the fact that PIE clearly overrides the common

¹⁶³ 2002 (4) SA 1 (SCA).

¹⁶⁴ *Brisley* paras 42-46.

¹⁶⁵ Van der Walt *Constitutional Property Law* 423.

¹⁶⁶ 2003 (1) SA 113 (SCA).

¹⁶⁷ Van der Walt *Constitutional Property Law* 423.

¹⁶⁸ *Ndlovu* par 19.

¹⁶⁹ Van der Walt *Constitutional Property Law* 330.

law¹⁷⁰ by requiring courts to grant an eviction order when it is just and equitable to do so after it has considered all the relevant circumstances. The onus of the owner was thus incrementally increased to the extent that she would have to allege that the procedural protections of PIE have been complied with in addition to the requirements of the *rei vindicatio*.¹⁷¹ However, the onus also imposes a further obligation on the owner in terms of section 26(3) and PIE to show that the eviction is just and equitable in the circumstances.

In *PE Municipality* the Constitutional Court emphasised the fact that a technical issue such as onus should not play a significant role where a court is asked to deprive people of their homes. On the other hand, Sachs J stressed that a court may not be able to fulfil its statutory duty of having regard to all relevant circumstances if the parties do not place the requisite information before it.¹⁷² In these cases it may be necessary for a court to obtain the requisite information through extraordinary means such as “active judicial management”.¹⁷³ Sachs J duly noted that this would have significant implications for the manner in which courts would deal with cases in terms of allowing evidence to be submitted, exercising its powers and the range of orders it might make.¹⁷⁴

In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*¹⁷⁵ Horn AJ found that a court, with all the relevant information at its disposal, must balance the opposing interests concerned in an eviction application.¹⁷⁶ These interests represent, on the one hand, the applicant owner who seeks to protect her constitutional right to property by evicting the unlawful occupiers from the land and as a result reserving

¹⁷⁰ Section 4(1) of PIE states 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”. See Badenhorst, Pienaar and Mostert *The Law of Property* 653; Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 519 (‘Carey Miller *Land Title in South Africa*’) and Van der Walt *Constitutional Property Law* 419-424.

¹⁷¹ Confirmed in *Wormald NO and Others v Kambule* [2005] JOL 15547 (SCA) par 11. See also Roux “Continuity and change” 492.

¹⁷² *PE Municipality* par 32.

¹⁷³ *PE Municipality* par 36.

¹⁷⁴ *PE Municipality* par 36. In recent case law the courts have held that is insufficient for municipalities to merely allege that they do not have suitable alternative accommodation or land available to resettle unlawful occupiers. As a result the courts have postponed applications *sine die* and ordered the joinder of the municipalities with the instruction to compile individualised reports on the availability of alternative accommodation. See section 2.1.2 in chapter 5 for an exhaustive overview of the case law on joinder of local authorities to eviction proceedings.

¹⁷⁵ 2000 (2) SA 1074 (SECLD).

¹⁷⁶ 1081D-E.

exclusive use of the land for herself and, on the other hand, the respondent unlawful occupiers who are in desperate need of alternative accommodation as a result of a dispensation where they were marginalised by exclusion and prosecution. This balancing exercise breaks away from “a purely legalistic approach” and equips a court with the discretion to refuse an eviction order based on equitable principles like “morality, fairness, social values and implications”.¹⁷⁷

PIE was enacted to give effect to abovementioned principles of section 26(3) of the Constitution and as a result it forms the primary source of protection for unlawful occupiers of land against the abuse of power and arbitrary evictions.¹⁷⁸

3 3 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

3 3 1 Introduction

The overarching purpose of PIE can be ascertained from the title, the long title and the preamble.¹⁷⁹ It is easy to derive from the title that PIE seeks to prevent both illegal evictions from land and unlawful occupation of land. According to the long title the purpose of PIE is to provide for the prohibition of illegal eviction; provide for procedures for the eviction of unlawful occupiers; repeal PISA¹⁸⁰ and other obsolete laws; and provide for matters incidental thereto. The memorandum on the objects of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Bill¹⁸¹ fleshed out the second purpose of the long title by stating that one of the main objects of PIE is to include procedural protections for occupiers who occupy land without the permission of

¹⁷⁷ Although the Supreme Court of Appeal in *Brisley* decided that section 26(3) of the Constitution did not grant courts the discretion to deprive owners of something that they were entitled to in terms of common law, it later held in *Ndlovu* that PIE indeed equipped courts with such a discretion. See Liebenberg *Socio-Economic Rights* 311-313 and Van der Walt *Constitutional Property Law* 422-423.

¹⁷⁸ Other statutory enactments that give effect to section 26(3) of the Constitution are the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Tenants) Act 3 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Rental Housing Act 50 of 1999.

¹⁷⁹ Pienaar JM and Mostert H “Uitsettings onder die Suid-Afrikaanse Grondwet: Die verhouding tussen artikel 25(1), artikel 26(3) en die uitsettingswet (deel 1)” 2006 *TSAR* 277-299 283. The authors (at 285-298) conducted a detailed analysis of case law where the courts grappled with the purpose of PIE and deduced ten aims of PIE from these cases.

¹⁸⁰ See section 3 in chapter 2 for an overview of the powers that PISA afforded both private owners and local authorities to forcibly remove squatters from land, demolish the buildings/structures that they erected and to approve informal settlement areas on the fringes of society.

¹⁸¹ B 89B-97.

an owner or the person in charge of such land.¹⁸² The preamble finally foresees that the purposes of PIE are closely linked to the two competing interests that present themselves in eviction case - the property rights of the landowner and the housing rights of the unlawful occupiers.

In this sense PIE fits in neatly with one of the land reform programmes provided for in the Constitution.¹⁸³ Land tenure reform has been described as the reform of the legal basis of landholding that is usually directed towards the implementation of social change.¹⁸⁴ The eviction context calls for social change through the establishment of a land use system that, as a minimum requirement, is not segregated along racial lines. The mere abolition of discriminatory apartheid land law legislation, in this case PISA in particular, is insufficient and simply signalled the start of a process which requires further legislative enactment to stabilise and strengthen weak and vulnerable rights and interests in land.¹⁸⁵

Since PIE applies to unlawful occupiers, who do not have any rights to occupy, the purpose is limited to stabilising existing unlawful occupation of land so as to guarantee that eviction only takes place when it is just and equitable and then only in a fair, equitable and controlled manner.¹⁸⁶ This departure from the common law position, where the right of ownership entitled an owner and statutory powers entitled the state to demand eviction regardless of contextual or personal circumstances, has been described as a deliberate reaction to the role of arbitrary evictions under apartheid and the current housing crisis.¹⁸⁷ Ownership and statutory powers of the state will therefore no longer triumph automatically or by default over the housing interests of unlawful

¹⁸² B 89B-97 at 18.

¹⁸³ The three land reform programmes in section 25 of the Constitution are: the land redistribution programme (section 25(5)); the land tenure reform programme (section 25(6)) and the restitution programme (section 25(7)).

¹⁸⁴ Carey Miller *Land Title in South Africa* 456.

¹⁸⁵ Carey Miller *Land Title in South Africa* 556-557. See section 3 1 in chapter 4 for a discussion of the case law of the European Court of Human Rights on the obligations that article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 placed on the United Kingdom to change its land use system to more accommodating of the personal circumstances of gypsies/travellers in awarding planning permission to station caravans on land.

¹⁸⁶ Van der Walt *Constitutional Property Law* 327.

¹⁸⁷ Van der Walt *Constitutional Property Law* 327. See section 2 3 in chapter 1 for statistics on the housing crisis in South Africa and how this explains the fact that service delivery protests have become more frequent and violent in the past seven years.

occupiers, nor is it discarded wholesale. Instead the eviction enquiry is subjected to substantive fairness and strict due process requirements.¹⁸⁸

The objective of PISA was to reinforce common law remedies for landowners while reducing the common law protections at the disposal of the unlawful occupiers. PIE has effectively reversed this position, replacing the common law remedies with strong procedural protections and substantive safeguards.¹⁸⁹ These safety measures establish a threshold of requirements for eviction in accordance with the principles laid down in section 26(3) of the Constitution.

In this regard it should first be determined whether the occupiers are unlawful occupiers for purposes of PIE. Once this is established the unlawful occupiers must be informed of the fact that eviction proceedings are being instituted against them. The court may then, after considering all the relevant circumstances, order the eviction and has the power to make certain ancillary orders if it is satisfied that it would be just and equitable to do so.

3 3 2 Unlawful occupation

3 3 2 1 Occupier

An unlawful occupier is a person who occupies land without the express or tacit consent of the owner or person in charge,¹⁹⁰ or without any other right in law to occupy.¹⁹¹ Eviction proceedings may therefore be instituted as soon as it is realised or it comes to the attention of the owner, person in charge or the municipality within whose jurisdiction the land in question falls.¹⁹² The early case law that grappled with the application of PIE stumbled over this threshold requirement of unlawful occupation.

¹⁸⁸ Van der Walt *Constitutional Property Law* 419.

¹⁸⁹ *PE Municipality* par 12.

¹⁹⁰ Section 1(x) of PIE defines a “person in charge” as “a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question”.

¹⁹¹ Section 1(xi) of PIE. However, all persons who qualify as occupiers for purposes of the Extension of Security of Tenure Act 62 of 1997 and persons whose informal rights to land would normally be protected by the Interim Protection of Informal Land Rights Act 31 of 1996 are excluded from this definition of “unlawful occupier”.

¹⁹² Pienaar JM and Muller A “The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework” (1999) 10 *Stell LR* 370-396 380. See also Badenhorst, Pienaar and Mostert *The Law of Property* 652 and Van der Walt *Constitutional Property Law* 328.

Early case law focussed on the overarching function of PIE and interpretation of the term “unlawful occupier”. This gave rise to divergent opinions and reasons for construing the application of PIE narrowly (classical squatting) or broadly (all instances of unlawful occupation). In *Absa Bank Ltd v Amod*¹⁹³ (‘*Absa*’) the former Witwatersrand Local Division of the High Court held that PIE only applied to vacant land, and not to formalised housing or landlord and tenant cases, where there was occupation of structures that were erected in conflict with building laws and regulations and where there has never been consent.¹⁹⁴ Although this position was followed in subsequent decisions of the High Court,¹⁹⁵ some clarity was brought to the matter in *Ndlovu*. The Supreme Court of Appeal held that PIE applied to all cases where there was no consent¹⁹⁶ to occupy the property when the proceedings were instituted and where the buildings or structures were used as a home or to obtain some form of shelter.¹⁹⁷ As a result PIE currently applies to all instances of unlawful occupation (land invasions, squatting, holding over and former mortgagors),¹⁹⁸ in both rural and urban areas, where the property is used for residential purposes,¹⁹⁹ but does not apply if the property is used for business or commercial purposes.²⁰⁰

¹⁹³ [1999] 2 All SA 423 (W).

¹⁹⁴ *Absa* at 429J. See Badenhorst, Pienaar and Mostert *The Law of Property* 653 and Van der Walt *Constitutional Property Law* 328.

¹⁹⁵ *Ross, Betta Eiendom v Ekple-Epoh* 2000 (4) SA 468 (W) and *Ellis v Viljoen* 2001 (5) BCLR 487 (C).

¹⁹⁶ Section 1 of PIE defines “consent” as “the 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.”

¹⁹⁷ *Ndlovu* paras 11-16. See Badenhorst, Pienaar and Mostert *The Law of Property* 653 and Van der Walt *Constitutional Property Law* 330.

¹⁹⁸ See *Ridgway v Janse van Rensburg* 2002 (4) SA 186 (C) at 190B-C.

¹⁹⁹ In *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 1 (SCA) the Supreme Court of Appeal found that the holiday cottages that the appellants erected on the Transkei Wild Coast in contravention of a Decree promulgated by the former President of the Transkei did not qualify as homes and could therefore not attract the protection afforded to unlawful occupiers in terms of PIE. Van der Walt *AJ Constitutional Property Law* 2007 (4) JQR 2.3 argues for a different approach in terms of which PIE would apply to the unlawful occupation of holiday homes that are occupied intermittently, and that a court should then decide on the justice and equity of the eviction after considering all the relevant circumstances.

²⁰⁰ See also *Ross* at 596A-B; *Ndlovu* par 20; *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) par 14 and *Manguang Local Municipality v Mashale and Another* 2006 (1) SA 269 (O) paras 6 and 7. With the exception of the Rental Housing Act 50 of 1999 which does not override the common law, this is the only area of the law where evictions will still occur in terms of the *rei vindicatio* because the Extension of Security of Tenure Act 62 of 1997 covers lawful occupation of land used for residential purposes in rural areas; the Land Reform (Labour Tenants) Act 3 of 1996 affords protection to labour tenants that occupy land lawfully in rural areas; and the Interim Protection of Informal Land Rights Act 31 of 1996 provides for the temporary protection of certain rights to and interests in land that are not otherwise adequately protected in law.

3 3 2 2 Consent

The meaning of consent was considered for the first time by the Constitutional Court in *Residents of Joe Slovo Community*. In this case the applicants alleged that the City of Cape Town tacitly consented to their occupation of the publicly owned land which comprised the Joe Slovo informal settlement. The applicant argued that the City never sought to evict them since their occupation commenced in 1990 and the fact that the City started rendering services to the settlement acknowledged the lawfulness of their occupation.²⁰¹ This, so the argument went, afforded the residents a defensible right of occupation for purposes of PIE which could only be terminated with reasonable notice and upon good cause shown. The key issue that the Court had to determine was whether the residents of the Joe Slovo informal settlement had the consent of the local authority to occupy the land when the eviction proceedings were launched in terms of PIE.²⁰² This issue was approached differently in each of the five separate judgments that Yacoob J,²⁰³ Moseneke DCJ,²⁰⁴ Ngcobo J (as he then was),²⁰⁵ O'Regan J and Sachs J²⁰⁶ prepared in supporting the order of the Court that the residents were unlawful occupiers.²⁰⁷

Yacoob J commenced his analysis of consent by drawing a distinction between actual authority and ostensible authority. Actual authority comprises express and tacit consent while ostensible authority is based on the doctrine of estoppel.²⁰⁸ The definition of unlawful occupier only refers to the former species of authority and therefore excludes the latter.²⁰⁹ The residents therefore had to prove that they acquired a defensible right of occupation²¹⁰ in the sense that there was a bilateral,²¹¹ voluntary

²⁰¹ See *Rademeyer and Others v Western Districts Council and Others* 1998 (3) SA 1011 (SE).

²⁰² *Residents of Joe Slovo* par 4.

²⁰³ Langa CJ and Van der Westhuizen J concurred in the judgment of Yacoob J.

²⁰⁴ Sachs J concurred in the judgment of Moseneke DCJ.

²⁰⁵ Moseneke DCJ and Sachs J concurred in the judgment of Ngcobo J.

²⁰⁶ Moseneke DCJ and Mokgoro J concurred in the judgment of Sachs J.

²⁰⁷ Section 1 of PIE defines an "unlawful occupier" as

"a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act [62 of] 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act [31 of] 1996."

²⁰⁸ *Residents of Joe Slovo* par 49.

²⁰⁹ *Residents of Joe Slovo* par 50.

²¹⁰ *Residents of Joe Slovo* par 51.

agreement²¹² between them and the City of Cape Town. In the absence of a written or verbal agreement that afforded the residents a right of occupation, the residents had to provide the Court with evidence that fell short of establishing the existence of an express agreement.²¹³ Yacoob J reasoned that the residents simply could not provide proof of such tacit consent because it is impossible for a local authority to give consent without adopting an authorised resolution to that effect.²¹⁴

He proceeded to consider the argument advanced by the residents that the Court had to give a broad meaning to tacit consent. He held that there was no room to assign a broad meaning to tacit consent because it had to be assumed that the legislature deliberately used the phrase “express or tacit consent of the owner” and that it fully understood that courts would interpret these terms to mean what has always been ascribed to them.²¹⁵ He also held that any other interpretation of tacit consent would be inconsistent with the purpose of section 26(3) of the Constitution²¹⁶ and PIE.²¹⁷ He further held that a broad interpretation of tacit consent would disturb the balancing of interests required by PIE itself.²¹⁸ Yacoob J accordingly found that it had to be accepted²¹⁹ that the City intervened on account of humanitarian reasons.²²⁰ It was reasonably plausible that the City helped to rebuild burnt down shacks and started rendering services to the settlement because its constitutional obligations required it to do so.²²¹ He explained that he could not accede to an argument that would find that a local authority conceded a right of occupation simply because the peremptory nature of the City’s constitutional obligations required it to provide certain municipal service.²²² He furthermore found that, even if the City consented to the occupation, it would have been

²¹¹ See *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) par 24.

²¹² See *Tsaperas and Others v Boland Bank Ltd* 1996 (1) SA 719 (A) at 724G-H.

²¹³ *Residents of Joe Slovo* par 58. In *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) Corbett JA stated “that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the proved facts and circumstances is that a contract came into existence” (at 165B-C).

²¹⁴ *Residents of Joe Slovo* paras 59 and 77.

²¹⁵ *Residents of Joe Slovo* par 60.

²¹⁶ *Residents of Joe Slovo* par 63.

²¹⁷ *Residents of Joe Slovo* par 64.

²¹⁸ *Residents of Joe Slovo* par 68.

²¹⁹ *Residents of Joe Slovo* par 74.

²²⁰ *Residents of Joe Slovo* par 46.

²²¹ *Residents of Joe Slovo* par 75.

²²² *Residents of Joe Slovo* par 79.

highly improbable to do so without requiring them to pay rent or service charges.²²³ He accordingly held that the residents never enjoyed any right of occupation and that it was therefore unnecessary for the City to terminate something that never existed.²²⁴

Moseneke DCJ found that both the definitions of unlawful occupier and consent in PIE are “cast in wide language with an explicitly broad tenor.”²²⁵ Courts are therefore under an obligation to interpret consent in a manner that affords unlawful occupiers the broadest possible protection against evictions.²²⁶ He found that this approach to the interpretation of consent was consistent with section 39(2) of the Constitution and did not rely on “a mechanic application of legal rules of private law in a terrain which is clearly intended to give fulsome protection derived from the Bill of Rights.”²²⁷ This approach furthermore acknowledges the historical and current patterns of land occupation where many homeless and landless people are forced to occupy land without proof of the right to be on the land.²²⁸

Against this background Moseneke DCJ found that he was able to draw a reasonable inference from the facts that the City tacitly gave the residents consent to occupy the site. He supported his reasoning by pointing out that the City took a number of positive steps that included the provision of essential services to the settlement and guidance on where to locate their shacks to ensure the safety of its inhabitants.²²⁹ Conversely, the City did not evict the residents, nor did it inform them that they had to vacate the site.²³⁰ He therefore reasoned that the proper position would be to acknowledge that occupiers in these circumstances have a temporary right of occupation in respect of that land which, in turn, is subject to the right of the organ of state to give notice of its intention to terminate that right on good cause.²³¹ He found it unnecessary to determine firstly, whether this right of occupation took the form of

²²³ *Residents of Joe Slovo* par 82.

²²⁴ *Residents of Joe Slovo* par 85.

²²⁵ *Residents of Joe Slovo* par 145.

²²⁶ *Residents of Joe Slovo* par 145.

²²⁷ *Residents of Joe Slovo* par 146.

²²⁸ *Residents of Joe Slovo* par 147.

²²⁹ *Residents of Joe Slovo* par 151.

²³⁰ *Residents of Joe Slovo* par 152.

²³¹ *Residents of Joe Slovo* par 154.

precarium or *commodatum*²³² and, secondly, what would constitute good cause for purposes of terminating the right of occupation.²³³ However, he did find that the residents must have ascertained from their negotiations with the government that they would have to vacate their homes at some stage so that the area could be developed and that this tacitly terminated their tacitly obtained right of occupation.²³⁴

Ngcobo J grounded his reasoning on the rendering of services to the settlement and the failure to evict the residents within the framework of constitutional obligations that require government to take reasonable measures to provide everyone living in deplorable conditions with access to adequate housing.²³⁵ He, like Yacoob J, stated that he was unable to accede to an argument that construed the performance of constitutional duties as conferring consent to occupy land. He found that such a construction would have a “chilling effect” on the willingness of local authorities to fulfil their constitutional and statutory obligations in relation to the people that stand to benefit from these obligations.²³⁶ This would be inconsistent with the Constitution’s commitment to promote orderly land reform²³⁷ and the further obligation of local authorities to be reluctant to evict relatively settled occupiers unless it can provide them with alternative accommodation.²³⁸

He reasoned that the central issue to be determined in this case was whether it was in the public interest to relocate the residents of the Joe Slovo settlement given that the

²³² *Residents of Joe Slovo* par 157. At common law both *precarium* and *commodatum* are based on bilateral and *bona fide* contracts. *Precairium* consisted of a gratuitous grant of the use and enjoyment of land or a moveable while *commodatum* consisted of a gratuitous loan of a corporeal thing for use. *Precairium* was generally not entered into for any fixed period of time and conferred a general right to use and enjoy the thing and its fruits. *Commodatum* was usually entered into for a specific period and purpose. In the event that the period was not fixed the borrower could keep the thing for a reasonable period of time considering the purpose of the loan. The grantee took possession of the thing in terms of *precairium* while the lender only took custody of the thing. The grantor in *precairium* could terminate the contract with the interdict *de precario* while the lender in *commodatum* could enforce the duties of the borrower with the *action commodati*. See Borkowski A *Textbook on Roman Law* (1997) 305-307 316; Zimmerman R *The Law of Obligations - Roman Foundations of the Civil Tradition* (1990) 188-205; Sohm R *The Institute - A Textbook of the History and System of Roman Private Law* translated by Ledlie JC (1907) 334-337 376; and Hunter WA *A Systematic and Historical Exposition of Roman Law in the Order of a Code* (1885) 380-383 411-412. Compare this with Sachs J’s reasoning in *Residents of Joe Slovo* par 343.

²³³ *Residents of Joe Slovo* par 158.

²³⁴ *Residents of Joe Slovo* par 160.

²³⁵ *Residents of Joe Slovo* par 209.

²³⁶ *Residents of Joe Slovo* par 211.

²³⁷ *Residents of Joe Slovo* par 212.

²³⁸ *Residents of Joe Slovo* par 214.

purpose of the relocation was to upgrade the area and to then resettle them in the same area afterwards. However, he noted that this approach to the question was immediately undermined by the phrasing of section 6(1) of PIE which requires an unlawful occupier to trigger the provisions of section 6(1)(b) of PIE.²³⁹ He accordingly emphasised that he had serious reservations about whether section 6(1) of PIE was the appropriate vehicle to address the situation of the residents in this case because it was inimical to their human dignity to first be branded as unlawful occupiers before they could be relocated.²⁴⁰ However, he conceded that PIE had to be given effect to²⁴¹ and therefore found that the residents must have known for some time prior to the eviction proceedings that they had to relocate to Delft.²⁴²

O'Regan J concurred with Yacoob J that the City did not give the residents tacit consent to occupy the site when it starting providing essential services to the site in terms of its constitutional and statutory obligations.²⁴³ She reasoned that the only factually correct inference that could be drawn from the provision of basic municipal services was that the City had constitutional and statutory obligations to provide these services.²⁴⁴ She further agreed with Moseneke DCJ that the City went beyond the mere provision of essential services when it established a database of residents, created residential blocks that were surrounded by paths to act as firebreaks, and embarked on extensive upgrading of the site after a fire swept through the settlement during 2002.²⁴⁵ Under these factual circumstances she was prepared to accept that the City gave the residents tacit consent to occupy the site, but noted that this consent was neither permanent nor indefinite.²⁴⁶ She therefore found that residents became precarious tenants of the site and that this right to occupy could be terminated by the City on good cause at any time.²⁴⁷ However, she explicitly left open, as Moseneke DCJ did, the question of what would in general constitute good cause for the termination of such a

²³⁹ *Residents of Joe Slovo* par 217.

²⁴⁰ *Residents of Joe Slovo* par 218.

²⁴¹ *Residents of Joe Slovo* par 219.

²⁴² *Residents of Joe Slovo* par 222.

²⁴³ *Residents of Joe Slovo* par 276.

²⁴⁴ *Residents of Joe Slovo* par 277.

²⁴⁵ *Residents of Joe Slovo* par 278.

²⁴⁶ *Residents of Joe Slovo* par 280.

²⁴⁷ *Residents of Joe Slovo* par 282. Compare this with Sachs J's reasoning in *Residents of Joe Slovo* par 343.

right of occupation. She did indicate her willingness to accept that relocating the occupiers in order to construct low-cost housing would constitute such good cause.²⁴⁸ On the question whether the City had to give the residents reasonable notice of the termination, she concurred with Moseneke DCJ that the announcement of the Project must have alerted the residents to the fact that their right of occupation would come to an end as soon as the development of the site got under way.²⁴⁹

Sachs J positioned his discussion on the nature of the occupation in the context of the special cluster of legal relationships that the Constitution and the Housing Act 107 of 1997 established between local authorities and occupiers.²⁵⁰ He found that these relationships were different from common law relationships because it flowed from “an articulation of public responsibilities in relation to the achievement of guaranteed social and economic rights.”²⁵¹ He explained that these relationships had multiple dimensions which involved clusters of reciprocal rights and duties that possessed an ongoing, organic and dynamic character which would evolve over time.²⁵² Against this background he reasoned that the reasonable measures that government were obliged to take began with the initial tolerance of the settlement on the land, proceeded to the devising of the Project, followed with the programme of actual implementation, and only concluded with the ultimate decision to institute eviction proceedings.²⁵³ He found that the City accepted the presence of the occupiers and negotiated with them about the provision of basic municipal services. The occupation could therefore not be “consensual and non-consensual at the same time; the consent was there, and the occupation was lawful.”²⁵⁴

However, Sachs J found that this consent was neither unqualified nor irrevocable because its purpose was to establish a point of stability from where further development in realisation of the right of access to adequate housing could begin.²⁵⁵ The lawfulness

²⁴⁸ *Residents of Joe Slovo* par 282.

²⁴⁹ *Residents of Joe Slovo* par 286.

²⁵⁰ *Residents of Joe Slovo* par 343.

²⁵¹ *Residents of Joe Slovo* par 343.

²⁵² *Residents of Joe Slovo* par 343.

²⁵³ *Residents of Joe Slovo* par 353.

²⁵⁴ *Residents of Joe Slovo* par 356.

²⁵⁵ *Residents of Joe Slovo* par 359.

of the occupation was therefore always premised on the understanding that the consent would be terminated once the land was needed for a legitimate purpose.²⁵⁶

These judgments suggest that courts cannot resort to the common law definition of consent to determine the meaning of consent for purposes of PIE, because the common law definition of consent limits the definition of unlawful occupation. The existence of consent for purposes of PIE must rather be determined with reference to the facts of each case. In this regard it will be particularly important whether the landowner is a local authority because organs of state, unlike private owners, are under a constitutional and statutory obligation to provide those living in deplorable conditions with access to adequate housing and essential services. Furthermore, the fact that a local authority fulfilled its obligations cannot be construed as giving tacit consent to those occupying the land because such a construction would firstly, fail to appreciate the peremptory nature of these obligations; secondly, discourage local authorities from fulfilling their obligations; thirdly, deprive those living in intolerable conditions of essential services; and fourthly, fall foul of the general obligation to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. A local authority, unlike a private owner, must have done more than simply fulfil its obligations before it can be held to have consented to the occupation. It is unclear what the exact scope of this additional positive action is, but it will definitely include the compilation of a report on the demography of the settlement,²⁵⁷ active engagement from the local authority in the planning of the settlement to make it safer and more habitable,²⁵⁸ the provision of services of a semi-permanent nature; and the rebuilding of homes after natural disasters like fires and floods. In these circumstances the occupiers will acquire a defensible right of occupation that flows from the special cluster of relationships that the Constitution and the Housing Act 107 of 1998 establishes between unlawful occupiers, land owners and organs of state. This right of occupation can be terminated if the people who stand to be relocated as a result of the eviction for development purposes

²⁵⁶ *Residents of Joe Slovo* par 359.

²⁵⁷ See sections 2 1 2 6 in chapter 5 for a discussion of *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Others* 2009 (1) SA 470 (W) par 66 where Masipa J ordered the City of Johannesburg to submit a report that provided the court with information on *inter alia* the availability of alternative accommodation for the relocation of the unlawful occupiers.

²⁵⁸ See section 2 2 in chapter 5 for a discussion of meaningful engagement.

will benefit from the eviction through the provision of housing opportunities. Finally, termination of this right of occupation does not have to occur in terms of formal notice because any eviction that follows upon such termination must in any event comply with the notice requirements of PIE.

3 3 3 Notice

Written and effective notice of eviction proceedings must be given to the unlawful occupiers and the local authority within whose jurisdiction the land falls²⁵⁹ by way of a court order²⁶⁰ at least 14 days before the contemplated hearing of the application. The rules of the Magistrate's Court will normally regulate the manner of and procedure for the serving and filing of notices. If the court deems this procedure unacceptable for specific reasons the court may prescribe an alternative manner of service.²⁶¹ The purpose of the notice is to provide the occupiers with protection by notifying them of the threat to their occupation, to inform them of the provisions of PIE and to inform them of their rights.²⁶² As a result the unlawful occupiers must receive information regarding the nature of the proceedings; the date and time of the hearing; the grounds for the proposed eviction; their right to appear and defend the case; and that they may request legal aid.²⁶³

However, the notices are often defective because they either fail to identify the unlawful occupiers properly²⁶⁴ or because the manner in which they are served is defective. Identification is often difficult because informal settlements fluctuate due to the fact that unlawful occupiers are itinerant.²⁶⁵ The manner in which the notice is

²⁵⁹ Section 4(2) of PIE. Badenhorst, Pienaar and Mostert *The Law of Property* 654 and Carey Miller *Land Title in South Africa* 520.

²⁶⁰ In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) par 11 Brand AJA found that the provision intended the notice to be "authorised and directed by an order of the court concerned".

²⁶¹ Pienaar JM and Muller A "The impact of the Prevention of Illegal Eviction from and Unlawful occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" (1999) 10 *Stell LR* 370-396 379.

²⁶² Badenhorst, Pienaar and Mostert *The Law of Property* 655.

²⁶³ Section 4(5) of PIE. Similar requirements apply to urgent proceedings for evictions in terms of section 5(3) of PIE and for eviction at the instance of an organ of state in terms of section 6(6) of PIE.

²⁶⁴ See *Illegal Occupiers of Various Erven, Philippi v Monwood Investment Trust Company (Pty) Ltd and others* [2002] 1 All SA 115 (C) at 121, where Ngwenya J emphasised the pivotal role that *audi alteram partem* rule plays in preventing the vulnerable and poor to remain faceless in these proceedings.

²⁶⁵ Badenhorst, Pienaar and Mostert *The Law of Property* 654.

served is further hindered by the fact that these unlawful occupiers are usually illiterate and can only speak an African language.²⁶⁶ As a result it has to be determined in each instance whether, despite the defects, the object of the statutory provision had been achieved.²⁶⁷ A further requirement is that a notice of motion is served on the unlawful occupier in terms of Rule 4 of the Uniform Rules of the High Court.²⁶⁸ The purpose of this notice is to afford the unlawful occupiers a further opportunity to place their personal circumstances before the court.

3 3 4 Justice and equity

3 3 4 1 Introduction

PIE makes provision for three types of eviction applications. Firstly, section 4 permits a private landowner or person in charge of land to institute eviction proceedings against unlawful occupiers “[n]otwithstanding anything to the contrary contained in any law or the common law”.²⁶⁹ If the duration of the unlawful occupation was less than six months at the time when the owner or person in charge of the land instituted the eviction proceedings, the court must have regard to the rights and needs of the elderly, children, disabled persons and female-headed households.²⁷⁰ If the duration of the unlawful occupation was for longer than six months at the time when the owner or person in charge of the land instituted the eviction proceedings, the court must, additionally, have regard to “whether land has been made available or can reasonably be made available

²⁶⁶ In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2000 (2) SA 67 (C) the notice was served in English on a community of which a substantial proportion was illiterate. Hlophe DJP held that this notice was not effective because it was not accompanied by a Xhosa translation of the notice and should have been conveyed by a loudhailer throughout the community in Xhosa. In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) par 28 Brand JA stated that “[i]t is obviously desirable that, where practicable, the s 4(2) notice should be in a language and through a medium of communication which is most likely to be understood by its intended audience”. Brand AJA also found the question whether effective notices had been served to be a question of fact that “would be capable of determination only after the event”.

²⁶⁷ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) par 22. See also *Moela v Shoniwe* [2005] JOL 14049 (SCA) par 7.

²⁶⁸ Section 4(3) and (4) of PIE. In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and others* 2001 (4) SA 1222 (SCA) par 12 the Supreme Court of Appeal found that this notice must be served in addition to the section 4(2) of PIE notice because “[a]ny other construction will render the requirements of section 4(3) meaningless”. See also *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) par 17.

²⁶⁹ Section 4(1) of PIE.

²⁷⁰ Section 4(6) of PIE.

by a municipality or other organ of state or another land owner” for the relocation of the unlawful occupiers.²⁷¹

Secondly, section 5(1) of PIE permits a private land owner or person in charge of land, notwithstanding the provisions of section 4 of PIE, to institute urgent eviction proceedings pending the outcome of proceedings for a final eviction order if a court can be satisfied of the fact that

“(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land; (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and (c) there is no other effective remedy available.”²⁷²

Finally, section 6(1) of PIE permits an organ of state to institute proceedings to evict unlawful occupiers that are occupying land that falls within its jurisdiction. However, the organ of state may only do so if those unlawful occupiers are occupying a building or structure on that land that had been erected without the consent of the organ of state or when it is in the public interest.²⁷³ A court is then enjoined to consider (a) the circumstances under which the unlawful occupier occupied the land and erected the buildings/structures; (b) the period the unlawful occupiers resided on the property; and (c) the availability of suitable alternative accommodation or land in determining whether it would be just and equitable to evict the unlawful occupiers.²⁷⁴

In all three types of eviction applications a court must satisfy itself, after considering all the relevant circumstances, that granting the eviction order will be “just and equitable”. In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*,²⁷⁵ Horn AJ stated that the term just and equitable related to both the property interests of the land owner and the housing interests of the unlawful occupiers.²⁷⁶ He stated further that the term implied that courts are obliged to break away from a purely legalistic approach to evictions and that courts must “have regard to extraneous factors

²⁷¹ Section 4(7) of PIE.

²⁷² Section 5(1) of PIE.

²⁷³ Section 6(2) of PIE states that “[f]or the purposes of this section, ‘public interest’ includes the interest of the health and safety of those occupying the land and the public in general.”

²⁷⁴ Section 6(3) of PIE.

²⁷⁵ 2000 (2) SA 1074 (SE).

²⁷⁶ At 1081E.

such as morality, fairness, social values and the implications and circumstances which would necessitate bringing out an equitably principled judgment.”²⁷⁷

In *PE Municipality*, the leading judgment on the interpretation of PIE, Sachs J endorsed this interpretation because it underlined the central philosophical and strategic objective of PIE which is to strike a balance between the property rights of land owners and the housing rights of unlawful occupiers.²⁷⁸ He explained that this required courts to “go beyond their normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.”²⁷⁹ Sachs J added that this would have major implications for the way in which courts have to exercise their adjudicative powers and go about crafting eviction orders.²⁸⁰ PIE explicitly requires courts to infuse the law of evictions with elements of grace and compassion and to balance the competing interests of land owners and unlawful occupiers in a principled way so as to “promote the constitutional vision of a caring society based on good neighbourliness and shared concern.”²⁸¹ This represents a decisive break from the position under apartheid, where the requirements of the *rei vindicatio* and the particular politics that underlined the police powers of the state allowed private land owners and the state to evict squatters without any regard for their personal circumstances or what will become of them after the relocation. It is against this background that the three types of eviction applications are discussed in turn below to show how the courts have grappled with the “justice and equity” requirement in given cases.

3 3 4 2 Evictions from private land

3 3 4 2 1 *Modderklip*

During May 2000 approximately 400 people invaded the applicant’s farm without his consent after they were evicted by the Ekurhuleni Metropolitan Municipality from the Chris Hani informal settlement. The applicant refused to comply with the request from

²⁷⁷ At 1081F-G.

²⁷⁸ *PE Municipality* par 35.

²⁷⁹ *PE Municipality* par 36.

²⁸⁰ *PE Municipality* par 36.

²⁸¹ *PE Municipality* par 37.

the second respondent²⁸² to institute eviction proceedings against the unlawful occupiers because he thought that the local authority should institute eviction proceedings. When the local authority did not institute eviction proceedings the applicant laid charges of trespassing against the unlawful occupiers and many were successfully prosecuted in terms of the Trespass Act 6 of 1959,²⁸³ but ultimately they returned to the applicant's farm upon discharge with a warning. The applicant then unsuccessfully sought assistance from various organs of state and even offered to sell two portions of the farm at a negotiable price of R 10 000 per hectare. When nothing came of the local authorities' initial interest to purchase these two portions the applicant instituted eviction proceedings in terms of section 4(6) of PIE in the South Gauteng High Court, Johannesburg.²⁸⁴ The number of people on the applicant's farm subsequently mushroomed to approximately 10 000 by the time eviction proceedings were instituted during October 2000 and increased further after that to about 15 000 by the time oral argument was heard during March 2001.

Marais J found that the first respondents deliberately invaded the applicant's farm without his consent and set up a squatter camp that not only damaged the economic interests of the applicant and infringed its property rights but also threatened to do so indefinitely without paying any compensation to the applicant.²⁸⁵ Marais J accordingly ordered the first respondents to vacate the applicant's farm within two months of the order²⁸⁶ and authorised the sheriff to evict the first respondents upon effluxion of that period.²⁸⁷ The unlawful occupiers did not vacate the applicant's farm and accordingly a warrant was issued which directed the sheriff to execute the eviction. However, the sheriff noted that she required the assistance of private contractors at a cost of R 1.8 million because the South African Police Service regarded the matter as a civil one and therefore refused to assist her with the execution of the eviction order. The applicant

²⁸² Section 6(4) of PIE reads: "An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier."

²⁸³ See section 3.5 in chapter 2 for an overview of how the government used PISA in conjunction with this Act, the Slums Act 53 of 1934, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977 to enhance its legislative competence to forcibly evict squatters during apartheid.

²⁸⁴ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W).

²⁸⁵ 395D-E.

²⁸⁶ 396D, Order 2.

²⁸⁷ 396E, Order 3.

argued that this cost was more than the estimated value of the land that the unlawful occupiers, at that stage approximately 36 000 people, occupied and therefore sought a declaratory order from the North Gauteng High Court, Pretoria²⁸⁸ that directed the President of the Republic of South Africa, the Minister of Safety and Security, the Minister of Agriculture and Land Affairs and the National Commissioner of Police to take immediate steps to execute the eviction order.

De Villiers J found that the sheriff was not in a position to ensure the efficient execution of the eviction order because a massive land invasion had taken place.²⁸⁹ However, he found that the respondents, when properly coordinated, collectively possessed the powers to ensure the effective execution of the eviction order.²⁹⁰ He furthermore found that the respondents' refusal to exercise their respective powers collectively threatened the preservation of the democratic dispensation and undermined the Constitution because it in effect prevented the provision of appropriate relief to the applicant to vindicate the violation of its property rights.²⁹¹ He accordingly ordered the respondents to formulate a comprehensive plan that ensured firstly, that the interference with the applicants' property rights was brought to an end either by way of expropriating the farm or in terms of other measures; secondly, compliance with the government's obligations in terms of section 165(4) of the Constitution;²⁹² thirdly, compliance with the government's obligations in terms of section 25(5)²⁹³ read with sections 26(1) and (2) of the Constitution; fourthly, the urgent development of a scheme for the provision of either land or housing to the unlawful occupiers; fifthly, the removal of the unlawful occupiers from the applicant's farm and, finally, effective monitoring of

²⁸⁸ *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en Andere* 2003 (6) BCLR 638 (T).

²⁸⁹ Par 51.

²⁹⁰ Par 51.

²⁹¹ Par 51. See Van der Walt *Constitutional Property Law* 47 where it is argued that "[t]oo much should not be read into the unsubstantiated and probably largely unconsidered statement" of De Villiers J that section 25(1) of the Constitution operates horizontally.

²⁹² Section 165(4) of the Constitution reads: "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

²⁹³ Section 25(5) of the Constitution reads: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

this plan and of its preservation.²⁹⁴ The government took this enforcement order on appeal to the Supreme Court of Appeal.²⁹⁵

Harms JA (as he then was) found that the invasion amounted to a *de facto* expropriation of the applicant's farm because it was precluded from securing the execution of the eviction order.²⁹⁶ He found that this could partly be attributed to the sheriff's inability to execute the eviction order effectively without assistance from a private security company. It was clear that the eviction order could not be executed "humanely or otherwise" by the sheriff unless the local authority provided land for the resettlement of the unlawful occupiers.²⁹⁷ This appeared unlikely because the local authority did not have an emergency housing programme or medium- and long-term housing programme in place.²⁹⁸ This explained why the unlawful occupiers had no choice but to invade the applicant's farm after they were evicted from the Chris Hani informal settlement to which they moved because the Daveyton Township was overcrowded.²⁹⁹ He accordingly found that this amounted to a violation of the unlawful occupiers' right of access to adequate housing.³⁰⁰

To this extent Harms JA was prepared to accept that the government was in violation of section 165(4) of the Constitution because it forced the private landowner to shoulder the burden of the occupiers' housing need.³⁰¹ It would only be acceptable for a private owner to carry this constitutional burden if the government compensated it in the circumstances where the execution of an eviction order was impossible. He therefore found that constitutional damages were the only remedy that would provide appropriate relief in the circumstances.³⁰² He accordingly upheld the appeal in part,³⁰³ set aside

²⁹⁴ *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en Andere* 2003 (6) BCLR 638 (T) Order 2.

²⁹⁵ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) ('*Modderklip SCA*').

²⁹⁶ *Modderklip SCA* par 21.

²⁹⁷ *Modderklip SCA* par 26.

²⁹⁸ *Modderklip SCA* par 22. See 2 2 2 above for a discussion of this as part of the model of reasonableness review.

²⁹⁹ *Modderklip SCA* par 25.

³⁰⁰ *Modderklip SCA* par 22.

³⁰¹ *Modderklip SCA* par 30.

³⁰² In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par 19, Ackermann J explained that "appropriate relief" would protect and enforce the rights in the Constitution. He added that courts may,

paragraphs 1 to 5 of De Villiers J's order,³⁰⁴ and replaced it with an order that declared firstly, that the State violated *inter alia* sections 25(1) and 26(1) of the Constitution for failing to provide land that the occupiers could occupy;³⁰⁵ secondly, that the applicant was entitled to receive payment of constitutional damages from the Department of Agriculture and Land Affairs;³⁰⁶ and thirdly, that the unlawful occupiers could occupy the land until alternative land was made available to them.³⁰⁷ The government took the matter on appeal to the Constitutional Court.³⁰⁸

Langa ACJ (as he then was) found it unnecessary to decide the case in terms of either section 25 or 26 of the Constitution.³⁰⁹ Instead he focused on the fact that section 1(c)³¹⁰ of the Constitution places an obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them.³¹¹ Associated with this value is the right of access to courts in section 34 of the Constitution.³¹² He explained that when the case is framed in terms of these provisions it becomes clear that the government was instrumental³¹³ to the resolution of the dispute between the landowner and the unlawful occupiers because it was responsible for setting up the legislative framework, the mechanisms and institutions, and the infrastructure necessary to facilitate the effective execution of court orders.³¹⁴ He reasoned further that the government additionally had to ensure that the execution of court orders did not result in large-scale disruptions in the social fabric because that, too, would undermine the rule

depending on the circumstances, be required to fashion new constitutional remedies if a declaration of rights, an interdict or a *mandamus* was insufficient.

³⁰³ *Modderklip SCA* par 52, Order (a).

³⁰⁴ *Modderklip SCA* par 52, Order (b).

³⁰⁵ *Modderklip SCA* par 52, Order (b)(i).

³⁰⁶ *Modderklip SCA* par 52, Order (b)(ii).

³⁰⁷ *Modderklip SCA* par 52, Order (b)(iii).

³⁰⁸ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) ('*Modderklip CC*').

³⁰⁹ *Modderklip CC* par 26.

³¹⁰ Section 1 of the Constitution states that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: ... (c) Supremacy of the constitution and the rule of law."

³¹¹ *Modderklip CC* par 39.

³¹² Section 34 of the Constitution states that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

³¹³ *Modderklip CC* par 42.

³¹⁴ *Modderklip CC* par 41.

of law.³¹⁵ The precise nature of the obligation will therefore be determined with reference to “the nature of the right or interest that is at risk as well as on the circumstances of each case.”³¹⁶

Langa ACJ found that this case was principally about a private landowner that sought relief from the government for the burden it was carrying on behalf of the government as a result of a massive land invasion. Langa ACJ explained that government had to respond appropriately in these circumstances because a failure to do so would approve future invasions of private property on a massive scale and that would lead to anarchy.³¹⁷ Conversely, to simply evict a large community without providing it with alternative accommodation would cause extreme hardship for the unlawful occupiers.³¹⁸

Against this background he found that the local authority acted unreasonably when it stood idly by and watched how the landowner actively explored all possible avenues to ameliorate the impact of the invasion on its rights and interests.³¹⁹ He noted that he appreciated the problems that local authorities faced in progressively providing access to adequate housing and land in terms of sections 25 and 26 of the Constitution.³²⁰ However, it may be necessary to respond appropriately if the plans that the government adopted did not respond to the evolving social circumstances of unlawful occupiers.³²¹ He therefore found that the Supreme Court of Appeal correctly held that constitutional damages were the only appropriate remedy to provide effective relief to the landowner.³²² He accordingly dismissed the appeal³²³ and substantially upheld the order of the Supreme Court of Appeal.³²⁴

All four judgments in this case confirm that the government cannot abdicate its responsibility to respect, protect, promote and fulfil rights when a dispute arises

³¹⁵ *Modderklip CC* par 42. See *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) par 22 for the importance of the right of access to courts.

³¹⁶ *Modderklip CC* par 43.

³¹⁷ *Modderklip CC* par 45.

³¹⁸ *Modderklip CC* par 47.

³¹⁹ *Modderklip CC* par 48.

³²⁰ *Modderklip CC* par 49.

³²¹ *Modderklip CC* par 49.

³²² *Modderklip CC* paras 60 and 65.

³²³ *Modderklip CC* par 68, Order 2.

³²⁴ *Modderklip CC* par 68, Order 3(a).

between private parties because the government may often hold the key to resolving the dispute.³²⁵ Liebenberg notes that it is unfortunate that the Constitutional Court did not decide the case in terms of sections 25 and 26 of the Constitution.³²⁶ She argues that while it was important to acknowledge the principle of the rule of law and the right of access to courts, it was similarly important to affirm that the government's abdication of its responsibility towards both the landowner and the unlawful occupiers directly affected their respective property and housing rights.³²⁷ However, both the Supreme Court of Appeal and the Constitutional Court affirmed that the dispute could not be resolved without the government providing temporary alternative accommodation pending the eventual provision of a permanent housing solution. Liebenberg notes that this represents a specific manifestation of the principle laid down in *Grootboom* that a reasonable housing programme should provide immediate relief "for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."³²⁸

In the specific circumstances of this case the immediate relief came in the form of an order that the unlawful occupiers could remain on the farm while a further order instructed the government to pay the landowner constitutional damages. Van der Walt explains that constitutional damages was appropriate in this case because, unlike the normal regulatory limitations imposed on ownership, the regulatory framework for the execution of eviction orders deprived an individual landowner of the opportunity to do so and therefore resulted in it bearing the resulting burden by itself for a substantial period of time.³²⁹ If the government stood by idly in these circumstances, the principle that flows from this case is that the private landowner may have a claim for constitutional

³²⁵ Van der Walt AJ "The State's duty to protect property owners v the State's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144-161 159 argues that the Supreme Court of Appeal ingeniously portrayed the failure to protect the right of access to adequate housing as the direct cause of the failure to protect the right to property and that this portrayal reflected "a fundamentally post-1994 perspective on ownership and on the problems surrounding access to housing."

³²⁶ Liebenberg *Socio-Economic Rights* 285.

³²⁷ Liebenberg *Socio-Economic Rights* 285.

³²⁸ *Grootboom* par 99.

³²⁹ Van der Walt *Constitutional Property Law* 136. Van der Walt notes that the constitutional damages awarded to the landowner in this case is similar to the equalisation payments paid to landowners in France and Germany when they bear the burden of "a quite legitimate regulatory action that has an unacceptably heavy impact on just one or a small number of property owners." See Van der Walt *Constitutional Property Law* 221-230 for an overview of such instances.

damages against the government.³³⁰ Liebenberg adds that the order for constitutional damages was intended to stimulate negotiations between the government, the landowner and the unlawful occupiers in order to find a solution that would protect both the property rights of the landowner and the housing rights of the unlawful occupiers.³³¹

Both the Supreme Court of Appeal and the Constitutional Court recognised that the most obvious solution to the dispute would be for the government simply to expropriate the farm and to then formalise the informal settlement accordingly.³³² Langa ACJ noted that the owner was willing and eager to sell his farm to the government.³³³ However, he found it unnecessary to determine whether it would be appropriate to order the government to expropriate the land because there was insufficient information before the court.

The *Modderklip* cases demonstrate in a unique way how courts are required to balance the property rights of the landowner and the housing rights of the unlawful occupiers in terms of the constitutionally defined relationship that exists between them and the government. Courts are no longer limited to granting an eviction order without more or refusing an application for an eviction order because section 172(1)(b) of the Constitution empowers a court to make “any order that is just and equitable” in the circumstances. Two recent decisions of the South Gauteng High Court, Johannesburg dealt with exactly this issue – namely, the limits of orders that can be made against local authorities to alleviate the plight of people living in desperate need on private land.

3 3 4 2 3 *Dada*

In *Dada and Others NNO v Unlawful Occupiers of Portion 41 of the Farm Rooikop and Another*³³⁴ (*Dada*) the trustees of a religious trust sought the eviction of 214 households living on portion 41 of the farm Rooikop. The Ekurhuleni Metropolitan Municipality was joined to the proceedings as a matter of necessity because the recent flooding triggered its constitutional and statutory obligations to provide access to adequate housing and services. To this end a counter application was launched that

³³⁰ Van der Walt *Constitutional Property Law* 333.

³³¹ Liebenberg *Socio-Economic Rights* 442.

³³² *Modderklip SCA* par 43 and *Modderklip CC* par 62.

³³³ *Modderklip CC* par 62.

³³⁴ 2009 (2) SA 492 (W).

requested the court to declare that the local authority had an obligation to formulate a housing policy which made provision for the short term housing needs of people living in crisis situations and afforded adequate priority to those people seeking a place to live without the threat of further eviction. The counter application further sought an order that interdicted the trust from evicting the households until the local authority provided alternative accommodation.³³⁵

Cassim AJ found that the local authority was not directing enough attention to the urgent improvement of the intolerable living conditions of the households on the farm. The local authority had not conducted an investigation to determine whether the farm, once purchased or expropriated, could be integrated into the nearby Buhle Park informal settlement. The local authority had not visited the farm in an effort to find practical solutions for the plight of the households, it appeared to be indifferent to the urgency of the crisis situation, and it used other legal impediments as an excuse not to find a solution.³³⁶ The indecisiveness of the local authority further precluded it from exploring opportunities that provided tangible relief for the households on the farm in a manner that would minimize disruption and preserve the community.³³⁷

He found that the local authority placed no evidence before him to show that it was doing something to address the plight of the households living on the farm. The failure of the local authority to do so was contrary to the obligations that the Housing Act 107 of 1997 imposed on it and neglected to explore the possibility of obtaining financial assistance from provincial and national government to provide emergency housing in terms of chapter 12 of the National Housing Code.³³⁸ He conceded that the local authority did in fact have a housing policy in place that set out to provide housing to homeless people within its jurisdiction by 2025. However, this policy did not contain any plan to provide emergency relief for the households of the farm.³³⁹ He held that it would be inappropriate to postpone the matter to allow both national and provincial government to be joined to the proceedings.³⁴⁰ He accordingly ordered the local

³³⁵ *Dada* par 5.

³³⁶ *Dada* par 27.

³³⁷ *Dada* par 29.

³³⁸ *Dada* paras 45 and 46.

³³⁹ *Dada* par 48.

³⁴⁰ *Dada* par 49.

authority to accept the offer of the trust to sell the property at R 250 000 and further directed it to provide essential services to the households on the property.³⁴¹

On appeal the Supreme Court of Appeal in *Ekurhuleni Metropolitan Municipality v Dada NO and Others*³⁴² ('*Dada SCA*') held that Cassim AJ correctly held that the local authority did not deal with the problems of the informal settlement on the property with the enthusiasm which could reasonably be expected of it.³⁴³ However, Hurt AJA found that Cassim AJ failed to have regard to the principles of the Constitution,³⁴⁴ misinterpreted the jurisprudence of the Constitutional Court,³⁴⁵ and even neglected the rule³⁴⁶ that the judiciary is constrained by the law³⁴⁷ when he formulated his order in an attempt "to get things moving."³⁴⁸ Hurt AJA accordingly upheld the appeal and set aside the order of Cassim AJ that the local authority should purchase the property from the trust.³⁴⁹

Dada can correctly be criticised for misunderstanding the constitutional mandate contained in section 172 of the Constitution to make any order that is just and equitable because it is clearly not just and equitable to force government to expropriate a farm to provide access to adequate housing. Such an order ignores the fact that the right of access to adequate housing must be achieved on a progressive basis and that it was not the order which the parties sought from the court.³⁵⁰ While courts may be frustrated - perhaps correctly so - with the slow pace at which the government is fulfilling its constitutional and statutory obligations in the face of severe housing shortages, courts cannot disregard the limits that are placed upon their powers or what would be an appropriate remedy in the circumstances of the case.³⁵¹ In this regard courts too must re-appreciate their role in the adjudication of eviction case because the special matrix of relationships that exist between landowners, unlawful occupiers and the government

³⁴¹ *Dada* par 50.

³⁴² 2009 (4) SA 463 (SCA).

³⁴³ *Dada SCA* par 14.

³⁴⁴ *Dada SCA* par 5.

³⁴⁵ *Dada SCA* par 10.

³⁴⁶ *Dada SCA* par 1.

³⁴⁷ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par 15.

³⁴⁸ *Dada SCA* par 13.

³⁴⁹ *Dada SCA* par 15.

³⁵⁰ Liebenberg *Socio-Economic Rights* 292.

³⁵¹ Liebenberg *Socio-Economic Rights* 292.

provide more than enough room for courts to show the appropriate measure of deference to the executive. It is still possible for courts to craft innovative remedies that are based on the constitutional and statutory obligations of government to provide access to adequate housing without venturing into the sphere of executive decision making by ordering the government to expropriate property.

3 3 3 2 4 *Blue Moonlight Properties*

In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another*³⁵² ('*Blue Moonlight Properties*') the applicant instituted eviction proceedings against the occupiers in terms of section 4(7) of PIE in the South Gauteng High Court, Johannesburg. The matter initially came before Masipa J, who instructed the municipality to investigate the circumstances of the case and to consult the interested parties so as to provide the court with a report on the housing situation that prevailed in its area of jurisdiction. She postponed the proceedings *sine die* and ordered the City to report back to the court on the steps that it has taken and what could be done in future to provide the respondents with emergency shelter.³⁵³ The municipality filed this report five months later under the threat of contempt proceedings. This report indicated that it only provided temporary alternative accommodation for the occupiers that stood to be evicted from publicly owned land and buildings.

In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another*³⁵⁴ ('*Blue Moonlight Properties II*'), Spilg J found that this report failed to appreciate the constitutional and statutory obligations that local government has in providing access to adequate housing³⁵⁵ for the people in desperate need of emergency housing.³⁵⁶ He found that the municipality failed to explain properly why it sought to exclude the unlawful occupiers of privately owned land from its relief programmes.³⁵⁷ He, unlike Cassim AJ in *Dada*, acknowledged that he was limited to determining

³⁵² 2009 (1) SA 470 (W).

³⁵³ *Blue Moonlight Properties* paras 75 and 78. See section 2 1 2 6 in chapter 5 for a discussion of Masipa J's reasoning on the joinder of the City of Johannesburg Metropolitan Municipality.

³⁵⁴ [2010] JOL 25031 (GSJ).

³⁵⁵ *Blue Moonlight Properties II* paras 128-130.

³⁵⁶ *Blue Moonlight Properties II* paras 114-127.

³⁵⁷ *Blue Moonlight Properties II* par 140.

whether the measures that have been adopted were reasonable.³⁵⁸ He found that the answer to this question had to sound in the negative because the unlawful occupiers of privately owned land were not only denied equal protection and benefit of the law but were also precluded from the full and equal enjoyment of all rights and freedoms in terms of section 9 of the Constitution.

He added that this failure of the municipality amounted to an abdication of its obligations in the private sphere because it in effect required private land landowners to provide housing indefinitely without any compensation. In this regard he found that he was bound by *Modderklip SCA* to craft an order that afforded the private landowner appropriate relief for the breach of its property rights. While he could not direct the local authority to expropriate the land, he held that there was a sufficiently close causal link between the deprivation of the land owner's use and exploitation of its property and the failure of the municipality to formulate a reasonable housing policy that accommodated all unlawful occupiers within its jurisdiction to make an order for constitutional damages.³⁵⁹

He found that it would be just and equitable to evict the unlawful occupiers in the circumstances³⁶⁰ and ordered them to vacate the property in question by no later than 31 March 2010.³⁶¹ He also ordered the municipality to pay constitutional damages to the applicant for the occupation of the property by the unlawful occupiers in the form of a monthly rental for the period between 1 July 2009 and 31 March 2010.³⁶² He further declared the municipality's housing policy unconstitutional to the extent that it excluded all persons within its jurisdiction who faced the threat of eviction from privately owned land.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*³⁶³ ('*Blue Moonlight Properties SCA*') the Supreme Court of Appeal commenced its judgment by setting out the constitutional and legislative

³⁵⁸ See *Grootboom* par 33.

³⁵⁹ *Blue Moonlight Properties II* par 162.

³⁶⁰ *Blue Moonlight Properties II* par 196, Order 1.

³⁶¹ *Blue Moonlight Properties II* par 196, Order 2.

³⁶² *Blue Moonlight Properties II* par 196, Order 3.

³⁶³ 2011 (4) SA 337 (SCA).

framework against which the issues raised on appeal should be determined.³⁶⁴ In this regard the Court emphasised that the primary source of the government's obligations to provide access to adequate housing can be found in sections 26(1) and (2) of the Constitution.³⁶⁵ The Court explained that this obligation is then fleshed out in sections 3, 7 and 9 of the Housing Act 107 of 1997, which details the precise obligations of national, provincial and local government respectively.³⁶⁶ These obligations are then supplemented by sections 4(1)³⁶⁷ and (2),³⁶⁸ 11(3) and 23(1)³⁶⁹ of the Local Government: Municipal Systems Act 32 of 2000 and Chapter 12 of the National Housing Code. The Court explained that these obligations taken together created a framework that sets out the obligations of each sphere of government in great detail.³⁷⁰ Within this framework all the spheres of government are required to work together³⁷¹ in a coordinated way³⁷² to achieve the progressive realisation of the right of access to adequate housing. The Court therefore endorsed Spilg's view in *Blue Moonlight Properties II*, that the City of Johannesburg was empowered to develop, fund and administer its own housing programme from its own resources and funding obtained from both provincial and national government.³⁷³ The City erred in portraying its role as that of a passive role player because it is empowered and constitutionally obliged to

³⁶⁴ *Blue Moonlight Properties SCA* par 25.

³⁶⁵ *Blue Moonlight Properties SCA* paras 26 and 27.

³⁶⁶ *Blue Moonlight Properties SCA* paras 28-31. See section 1 in chapter 5 for an overview of these provisions.

³⁶⁷ Section 4(1) of the Act states that a Municipal Council has the right to -

"(a) govern on its own initiative the local government affairs of the local community; (b) exercise the municipality's executive and legislative authority, and to do so without improper interference; and (c) finance the affairs of the municipality by - (i) charging fees for services; and (ii) imposing surcharges on fees, rates on property and, to the extent authorized by national legislation, other taxes, levies and duties."

³⁶⁸ Section 4(2) of the Act states that a Municipal Council has the duty, within its financial and administrative capacity, to - "exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;"

³⁶⁹ Section 23(1) of the Act reads:

"A municipality must undertake developmentally-orientated planning so as to ensure that it - (a) strives to achieve the objects of local government set out in section 152 of the Constitution; (b) gives effect to its developmental duties as required by section 153 of the Constitution; and (c) *together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution*" (emphasis added).

³⁷⁰ *Blue Moonlight Properties SCA* par 40.

³⁷¹ See sections 40(2) and 41(1)(h) of the Constitution in particular.

³⁷² See 2 2 2 above for a discussion of the co-ordination required between the three spheres of government as one of the criteria in the reasonableness model of review.

³⁷³ *Blue Moonlight Properties SCA* par 40.

take legislative and other measures to progressively realise the right of access to adequate housing within its area of jurisdiction.³⁷⁴

The Court proceeded to consider the related question of whether the City was able, in the circumstances of the case, to meet the needs of the unlawful occupiers within its area of jurisdiction from its own resources. The Court paused to note that the respondents only requested access to temporary accommodation while they awaited access to permanent housing in terms of the City's housing policy.³⁷⁵ In this regard Navsa JA and Plasket AJA observed that the City's affidavits failed to provide information on the relief sought by the respondents because it contained vague statements about the affordability and cost of providing permanent accommodation in the Inner City.³⁷⁶ They found that the City would have been able to adopt a viable long term strategy with support from provincial and national government to respond to the exigencies of those living in desperate need in the Inner City, had it not adopted such a firm position on providing assistance to people like the respondents.³⁷⁷

On the question whether the City's housing policy was discriminatory the court found that Spilg J erred in the following respects: firstly, the differentiation in treatment did not flow from a distinction between unlawful occupiers being evicted from public land by the government and unlawful occupiers being evicted from private land by a private owner. The difference was rather one between unlawful occupiers being evicted from private land by the government in terms of section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 and unlawful occupiers evicted from private land by private owners in terms of section 4 of PIE.³⁷⁸ Secondly, there was no differentiation in terms of a ground listed in section 9(3)³⁷⁹ of the Constitution, with the result that the differentiation stands to be considered against section 9(1)³⁸⁰ of the

³⁷⁴ *Blue Moonlight Properties SCA* par 48.

³⁷⁵ *Blue Moonlight Properties SCA* par 49.

³⁷⁶ *Blue Moonlight Properties SCA* par 50.

³⁷⁷ *Blue Moonlight Properties SCA* par 51.

³⁷⁸ *Blue Moonlight Properties SCA* par 57.

³⁷⁹ Section 9(3) of the Constitution states that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

³⁸⁰ Section 9(1) of the Constitution states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."

Constitution.³⁸¹ In this regard the court found that the City's housing policy is inflexible,³⁸² irrational³⁸³ and arbitrary³⁸⁴ because it rendered the City blind to the plight of unlawful occupiers of private land that happen to reside on land or in buildings that are not considered to be dangerous.³⁸⁵

The final issue that the Court considered was the award of constitutional damages to Blue Moonlight Properties. The court found that this order was far-reaching, given the fact that the constitutional damages remedy was developed in the unique set of circumstances that presented itself in *Modderklip SCA*. To that extent the award of constitutional damages would not always be available as an appropriate remedy wherever a fundamental right has been breached.³⁸⁶ The court pointed out that firstly, the constitutional damages in *Modderklip SCA* was only awarded after an eviction order was ignored; secondly, the purpose of the constitutional damages was to compensate the owner for the government's failure to assist it in executing an eviction order; thirdly, constitutional damages was the only appropriate remedy in the peculiar circumstance of the *Modderklip* cases because the owner was deprived of the use and enjoyment of its land; and finally, the unlawful occupiers in the *Modderklip* cases invaded the owner's farm, who in turn acted swiftly to safeguard his interests.³⁸⁷ The award of constitutional damages was inappropriate because none of these considerations were present in this case.³⁸⁸

Navsa JA and Plasket AJA accordingly found that it would be just and equitable to evict the unlawful occupiers³⁸⁹ and ordered them to vacate the property on or before 1 June 2011.³⁹⁰ The Court added, crucially, that the City had to provide the unlawful occupiers with temporary emergency accommodation in a location as near as feasibly possible to the area where the property is situated.³⁹¹

³⁸¹ *Blue Moonlight Properties SCA* par 58.

³⁸² *Blue Moonlight Properties SCA* paras 59 and 60.

³⁸³ *Blue Moonlight Properties SCA* par 61.

³⁸⁴ *Blue Moonlight Properties SCA* paras 62 and 63.

³⁸⁵ *Blue Moonlight Properties SCA* par 65.

³⁸⁶ *Blue Moonlight Properties SCA* par 70.

³⁸⁷ *Blue Moonlight Properties SCA* par 71.

³⁸⁸ *Blue Moonlight Properties SCA* par 72.

³⁸⁹ *Blue Moonlight Properties SCA* par 77, Order 5(1).

³⁹⁰ *Blue Moonlight Properties SCA* par 77, Order 5(2).

³⁹¹ *Blue Moonlight Properties SCA* par 77, Order 5(4).

3 3 4 2 5 Conclusion

Section 4 of PIE creates a framework in which a private landowner can institute eviction proceedings against unlawful occupiers and obtain the relief that she sought from the court. Within this framework courts must determine whether it is just and equitable to evict the unlawful occupiers with reference to the rights and needs of vulnerable people and the availability of alternative accommodation or land. The case law discussed in this section show that invasions of private property for whatever reason will not be tolerated by the courts because private individuals cannot be expected to bear the burden of providing housing to tens of thousands of people – even the government only has to do so within its available resources.

The Constitutional Court was undoubtedly correct in *Modderklip CC* when it found that land invasions chipped away at the core of the rule of law because the magnitude of these events often make the effective execution of eviction orders nearly impossible. When this happens the government cannot be a passive bystander because it has constitutional and statutory obligations to fulfil. As such, the government will be the player that breaks the stalemate between the landowner who has asserted her property rights and the unlawful occupiers who have established their right of access to adequate housing. If, then, a private landowner is expected to be vigilant in protecting her property rights by swiftly instituting eviction proceedings against unlawful occupiers, so too must the government be decisive about formulating its housing programmes to provide relief for those living in intolerable conditions.³⁹² It may therefore be just and equitable to evict the unlawful occupiers and to ask the private landowner to be patient while the government develops its programmes. In the meantime the private landowner may be entitled to constitutional damages for shouldering the burden. It is clear that a court may not order the government to expropriate the private landowner's land because that would encroach upon the functions of the executive, nor can it award constitutional damages unless a specific set of circumstances presents itself. The key point to be observed in the *Modderklip*, *Dada NO* and *Blue Moonlight Properties* cases is that section 4 requires courts to find case-specific solutions for complex cases by striking the appropriate balance between the conflicting property rights of the land

³⁹² See 2 2 2 above for a discussion of this as part of the model of reasonableness review.

owner and the housing rights of the unlawful occupiers by crafting innovative remedies that remain within its powers.

3 3 4 3 Urgent evictions

*Groengras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others*³⁹³ ('*Groengras Eiendomme*') provides an unique example to illustrate the operation of section 5 of PIE and also serves as an example of, on the one hand, the type of relief that the landowner in the *Modderklip* cases could have received had it instituted eviction proceedings under this section, and, on the other hand, how health and safety considerations are evaluated outside the context of section 6 of PIE.

The applicants instituted urgent eviction proceedings in the South Gauteng High Court, Johannesburg for the eviction of the first respondents, who co-ordinated a large scale land invasion of the first applicant's farm just north of Benoni. The first respondents invaded a piece of the farm over which Transnet Ltd, the second applicant, had a rural praedial servitude in the form of a right of way to access its railway reserve and railway line with a service road. Transnet also had an urban praedial servitude in the form of a right to run a fuel pipeline across the first applicant's farm. Eskom, the fourth applicant, similarly had an urban praedial servitude in the form of a right to run high voltage electrical cables over the first applicant's farm. The first respondents, who used the service road to transport their belongings and building materials to the farm, removed the fence next to the railway line and started erecting shacks on top of the fuel line and directly under the high voltage electrical cables. In less than a month from the invasion the size of the population mushroomed to in excess of 20 000 people.

Rabie J found that the part of the farm on which the first respondents settled was unfit for human habitation because it had no infrastructure, running water, sanitary facilities or facilities for garbage and waste disposal.³⁹⁴ He explained that there was a high probability that disease would break out under these living conditions and that the resulting risk of contamination would have widespread effects for those living

³⁹³ 2002 (1) SA 125 (T).

³⁹⁴ *Groengras Eiendomme* at 140H.

downstream along the way to the Rietvlei dam.³⁹⁵ The constant influx of people onto the farm posed a very real threat for the business and personal interests of the tenant because the unlawful occupiers were on the verge of moving on to the arable land of the property.³⁹⁶

He noted that the first respondents ran the risk of either igniting the highly flammable fuel in the pipeline by creating a spark or of contaminating the groundwater on the farm by damaging the pipeline in the process of digging trenches. This posed a very real and imminent threat to their health and safety.³⁹⁷ The first respondents erected their shacks and were living inside the free range radius of eight to eleven metres that the regulations permitted which put them directly at risk of being electrocuted seeing that the shacks could serve as conductors.³⁹⁸

He accepted that it was in the interests of justice and of the public to uphold the rule of law by firmly condemning any land invasions.³⁹⁹ He accordingly found that the applicants satisfied all the requirements of section 5(1) of PIE and that they were entitled to the relief sought.⁴⁰⁰ He issued an interim order⁴⁰¹ that evicted the first respondents from the first respondent's farm; directed them to vacate the farm within 48 hours of the order; and instructed the sheriff to execute the eviction order if the first respondents failed to vacate the farm as directed. The first respondents did not vacate the farm as ordered and the sheriff executed the eviction order on Friday, 13 July 2001, a mere eight days after the urgent eviction proceedings were instituted.

The fact that this case was brought as an urgent proceeding in terms of section 5 of PIE allowed Rabie J to focus on the health and safety concerns raised by the facts.⁴⁰² This allowed him to emphasise, like the Supreme Court of Appeal and the Constitutional Court in *Modderklip*, that the obligations of government to provide access to adequate housing could not be shifted onto the shoulders of a private landowner because to do so

³⁹⁵ *Groengras Eiendomme* at 140H-I.

³⁹⁶ *Groengras Eiendomme* at 141A.

³⁹⁷ *Groengras Eiendomme* at 141B-C.

³⁹⁸ *Groengras Eiendomme* at 141E-F.

³⁹⁹ *Groengras Eiendomme* at 142C.

⁴⁰⁰ *Groengras Eiendomme* at 142G.

⁴⁰¹ *Groengras Eiendomme* at 145C.

⁴⁰² *Groengras Eiendomme* at 130J.

would be “nothing less than an expropriation of the owner’s property.”⁴⁰³ This case is unique not only as a result of the exceptional conjuncture of truly life-threatening circumstances, but also because it is the only reported case to date that has been decided exclusively in terms of section 5(1) of PIE. This simultaneously confirms the exclusivity of urgent evictions in terms of section 5 and the normality of courts engaging in a substantive analysis of the rights and needs of vulnerable people in terms of sections 4 and 6.

3 3 4 4 Evictions from public land

In 2004 the government adopted the *Breaking New Ground Policy: Comprehensive Plan for the Development of Sustainable Human Settlements*⁴⁰⁴ (*BNG Policy*). The *BNG Policy* sets out a comprehensive plan for the eradication and urban development of informal settlements throughout South Africa. To this end the *BNG Policy* aims to integrate informal settlements with the surrounding residential areas by preventing the continued growth of informal settlements through the construction of adequate housing. As such the *BNG Policy* envisaged that all the people living in intolerable conditions would be accommodated in these developments. The N2 Gateway Project (‘Project’) was the first of nine pilot projects to be rolled out in each of the provinces of South Africa in terms of the *BNG Policy*. The purpose of the Project was to upgrade all the informal settlements along the N2 highway from Cape Town International Airport into Cape Town and to provide housing opportunities for approximately 15 000 households.

The Joe Slovo informal settlement became the starting point for the Project because it was vulnerable to fires sweeping through the settlement which made the living conditions precarious. The occupiers initially embraced the idea that they would be able to return from Delft – which is located approximately 15 kilometres away from Joe Slovo towards the northern suburbs of Cape Town - to low income housing that would be leased to them at rentals of between R 150 per month for a single unit to R 600 per month for a double unit. However, Phase 1 of the Project provided flats that could be

⁴⁰³ *Groengras Eiendomme* at 137H.

⁴⁰⁴ Available online at www.capegateway.gov.za/Text/2007/10/bng.pdf (accessed on 18 March 2011). See McLean K “Housing” in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original Service, July 2006) 55-26 - 55-29 for an overview of this policy.

leased for between R 300 per month for a single unit and R 1 050 per month for a double unit. The enthusiastic support for the Project quickly dwindled when the occupiers were informed that they would not be accommodated in Phase 2 either with its focus on bonded housing for those households that earned more than R 3 500 per month. The occupiers that were left on the Joe Slovo site subsequently refused to relocate to Delft because they feared that they would not be able to return to Joe Slovo. All the residents of Joe Slovo marched to parliament during 2006 and again in 2007 to demand that the government honour its commitment that ensured the occupiers a right of return to Joe Slovo. Roughly a month later the residents blocked the N2 highway during the early hours of the morning in an attempt to force the government to comply with their demand. Nine days later the government instituted eviction proceedings in the Western Cape High Court, Cape Town and obtained an order from Hlophe JP to that effect on 10 March 2008.⁴⁰⁵

On appeal to the Constitutional Court the appeal was upheld in part and dismissed in part.⁴⁰⁶ The Court agreed with Hlophe JP that the eviction was just and equitable and therefore issued an order that carried the unanimous support of all the members of the Court. This order was followed by five separate judgments in which the justices set out their respective reasons for supporting the order of the Court.

The order evicted the occupiers from the Joe Slovo informal settlement and ordered them to vacate the site according to a proposed timetable that envisaged the complete relocation of the occupiers from Joe Slovo to Delft over a period of 45 weeks, starting on 17 August 2009 and ending on 21 June 2010.⁴⁰⁷ The order also directed the parties to engage with each other on the date on which the relocation would begin, the timetable for the relocation, and “any other relevant matter upon which they agree to

⁴⁰⁵ *Thubelisha Homes and Others v Various Occupants and Others* [2008] JOL 21559 (C).

⁴⁰⁶ See *Residents of Joe Slovo* par 5 where the Court explained that its order differed from the order that Hlophe JP issued in the following respects: first, 70% of the low-income housing to be built on the upgraded Joe Slovo site must be allocated to the people who were residents of the Joe Slovo informal settlement at the time when the N2 Gateway Project was launched; secondly, the temporary residential units in Delft had to be of a certain quality; and thirdly, Thubelisha Homes, the Minister for Human Settlements and the MEC responsible for Local Government and Housing in the Western Cape had to initiate and maintain a process of meaningful engagement with the residents of the Joe Slovo informal settlement.

⁴⁰⁷ The timetable is attached as “Annexure A” to the order of the Court.

engage.”⁴⁰⁸ The order further directed the parties to engage with each other about each relocation to determine *inter alia* the names and personal circumstances of those who would be affected by the specific relocation, the precise procedure for and conditions of the relocation, the need for transport to the temporary residential units (‘TRUs’) and to local amenities, and the possibility of obtaining permanent housing.⁴⁰⁹ If the engagement resulted in the parties reaching an agreement, this agreement had to be submitted to the Court before 7 July 2009 for consideration and possible approval.⁴¹⁰ The Court specifically made the order conditional upon and subject to the provision of the TRUs at Delft “or another appropriate location”⁴¹¹ which had to comply with certain minimum requirements.⁴¹² The order, crucially, directed the respondents to allocate 70% of the 1500 houses that stood to be built on the upgraded Joe Slovo site⁴¹³ to both current and former residents of Joe Slovo who applied and qualified for this housing.⁴¹⁴ The order additionally interdicted the occupiers from returning to the Joe Slovo site once they had been relocated to the TRUs in Delft.⁴¹⁵ Finally, the order directed the parties to report back to the Court on or before 1 December 2009 about the implementation of the order⁴¹⁶ and afforded the parties the opportunity to approach the Court “for an amendment, supplementation or variation of this order” in the event that any part of the order was not complied with or if its implementation presented “unforeseen difficulties.”⁴¹⁷

All the Justices of the court found that the residents of the Joe Slovo settlement were unlawful occupiers for purposes of PIE⁴¹⁸ when the eviction proceedings were instituted in the High Court. Moseneke DCJ,⁴¹⁹ Ngcobo J⁴²⁰ and especially Sachs J⁴²¹ made it clear that the unlawfulness of the occupation had to be decided on the basis of a

⁴⁰⁸ *Residents of Joe Slovo* par 7, Order 5.

⁴⁰⁹ *Residents of Joe Slovo* par 7, Order 11.

⁴¹⁰ *Residents of Joe Slovo* par 7, Order 7.

⁴¹¹ *Residents of Joe Slovo* par 7, Orders 4 and 8.

⁴¹² *Residents of Joe Slovo* par 7, Order 10.

⁴¹³ *Residents of Joe Slovo* par 7, Order 18.

⁴¹⁴ *Residents of Joe Slovo* par 7, Order 17.

⁴¹⁵ *Residents of Joe Slovo* par 7, Order 13.

⁴¹⁶ *Residents of Joe Slovo* par 7, Order 16.

⁴¹⁷ *Residents of Joe Slovo* par 7, Order 21.

⁴¹⁸ *Residents of Joe Slovo* par 4. See discussion on consent at 3 2 2 above.

⁴¹⁹ *Residents of Joe Slovo* paras 146-147.

⁴²⁰ *Residents of Joe Slovo* paras 217-218.

⁴²¹ *Residents of Joe Slovo* para 343.

complex set of constitutional and statutory obligations and not according to the strict private law reading of the doctrine of authority that Yacoob J proposed.⁴²² What remained for the justices to grapple with was whether the respondents acted reasonably in seeking to evict the occupiers and if so whether the eviction would be just and equitable.⁴²³ It is important to note that the *dicta* by Moseneke DCJ, Ngcobo J and Sachs J regarding the determination of the unlawfulness of the occupation also materially influenced the starting point for the determination of the reasonableness analysis.

The Court found that the respondents did act reasonably when it instituted eviction proceedings against the occupiers⁴²⁴ and that the eviction was just and equitable. What follows is a summary of the collective reasoning of the respective judgments on these remaining issues.

Moseneke DCJ made a concerted effort to place the dispute between the occupiers and the respondents in its social and historical context. He reasoned that it was important to consider all the circumstances that gave rise to the housing crisis that prevails in the Western Cape.⁴²⁵ Yacoob J noted that the problem of overcrowding was particularly acute in all the informal settlements that are located along the N2 highway and it was therefore apt to launch the pilot project of the *BNG Policy* in this area because it promised to provide access to adequate housing in a sustainable manner for those that were living in intolerable conditions.⁴²⁶ Ngcobo J explained that the objective of the *BNG Policy* was to halt the growth of informal settlements and to upgrade these settlements with the construction of adequate housing in appropriate instances.⁴²⁷ In this regard Yacoob J held that a wide margin of discretion had to be afforded to the respondents in conceptualising the Project.⁴²⁸ O'Regan J emphasised that the details of the plan should be left to government and that “[c]ourts should be slow to interfere in the

⁴²² *Residents of Joe Slovo* paras 49-71.

⁴²³ *Residents of Joe Slovo* par 3.

⁴²⁴ *Residents of Joe Slovo* par 6.

⁴²⁵ *Residents of Joe Slovo* par 163. See *Residents of Joe Slovo* par 202 where Ngcobo J provides some statistics to illustrate the severity of the housing crisis in the Western Cape.

⁴²⁶ *Residents of Joe Slovo* par 30.

⁴²⁷ *Residents of Joe Slovo* par 203.

⁴²⁸ *Residents of Joe Slovo* par 111.

legitimate policy choices made by government in determining the plan.”⁴²⁹ While Sachs J agreed with this reasoning he added that any policy should ensure that the government deals “with the people most affected in a fair manner that invites their participation and respects their dignity.”⁴³⁰ All the judgments therefore agreed that the Project was reasonable in its conception, but added that the Project still required reasonable implementation.⁴³¹

All the judgments confirmed the central importance of meaningful engagement for purposes of determining whether the government acted reasonably in implementing the *BNG Policy* in terms of section 26(2) of the Constitution. All the judgments furthermore agreed that there was some engagement between the occupiers and the respondents. However, O’Regan J found it deplorable that the respondents openly admitted that their efforts to engage the occupiers could not be described as coherent or comprehensive and that their efforts were misleading at times.⁴³² Sachs J reasoned that the lack of clear and coherent communication could also be attributed to the fact that there were simply too many protagonists on the side of the government, so that it resulted in a surplus of acts of engagement.⁴³³ O’Regan J accordingly held that what had to be determined was “whether the failure to have a coherent and meaningful strategy of engagement renders the implementation of the plan unreasonable.”⁴³⁴ She emphasised that the Project was the first attempt to implement the *BNG Policy* and that it was therefore not surprising to see that its implementation resulted in some controversy given the severity of the housing crisis in the Western Cape.⁴³⁵

Moseneke DCJ added that the respondents openly admitted that they did not give the occupiers notice of the fact that they were about to launch urgent eviction proceedings.⁴³⁶ While Yacoob J agreed that the government should have taken more time to appreciate the severe hardship that would flow from the eviction and that a more

⁴²⁹ *Residents of Joe Slovo* par 295.

⁴³⁰ *Residents of Joe Slovo* par 403.

⁴³¹ See 2.2.2 above for a discussion of this as part of the model of reasonableness review.

⁴³² *Residents of Joe Slovo* par 302.

⁴³³ *Residents of Joe Slovo* par 379.

⁴³⁴ *Residents of Joe Slovo* par 302.

⁴³⁵ *Residents of Joe Slovo* par 302.

⁴³⁶ *Residents of Joe Slovo* par 167.

coordinated engagement process could have prevented the impasse that resulted,⁴³⁷ he found that reasonableness also involved “realism and practicality.”⁴³⁸ In this regard the Project promised not only to improve the precarious living conditions that prevailed in the informal settlements but also to provide housing for a wider range of people.⁴³⁹ O’Regan J agreed that the court should not overlook the interests of the people that were not involved in the case.⁴⁴⁰ Besides the provision of housing that would benefit thousands of people, the Project promised to bring about vast improvements to the general infrastructure of and service delivery to the area.⁴⁴¹ Moseneke DCJ observed that the installation of basic services would be the catalyst for the gradual improvement of informal settlements until it became a settled part of the town or city.⁴⁴²

However, all the judgments acknowledged that the human cost of the development was significant and that the relocation to Delft would cause considerable inconvenience and bring about immeasurable suffering for the occupiers. Moseneke DCJ explained that the consequences of the “trauma, frustration, grief, dull dragging apathy and [the] surrender of the will to live”⁴⁴³ caused by evictions traversed multiple areas of social life. Evictions frequently severed the support structures of families and rendered other social amenities inaccessible to them in addition to the very real possibility that they may be left to fend for themselves in the streets of a strange place.⁴⁴⁴ Yacoob J added that he had considerable sympathy with the applicants because “[t]he human price to be paid for this relocation and reconstruction is immeasurable.”⁴⁴⁵ O’Regan J too had no misgivings about the fact that the occupiers would suffer hardship upon eviction from Joe Slovo. The settlement provided them with a place where they felt at home and this fact was worthy of respect.⁴⁴⁶ Yacoob J added that the intricacies of the case presented the Court with circumstances in which it had no choice but to face the fact that hardship

⁴³⁷ *Residents of Joe Slovo* par 113.

⁴³⁸ *Residents of Joe Slovo* par 117.

⁴³⁹ See also *Residents of Joe Slovo* par 259 for the observation that Ngcobo J made in this regard.

⁴⁴⁰ *Residents of Joe Slovo* par 293.

⁴⁴¹ *Residents of Joe Slovo* par 108.

⁴⁴² *Residents of Joe Slovo* par 165.

⁴⁴³ Moseneke DCJ cites Bundy C “Land, law and power: Forced removals in the historical context” in Murray C and O’Regan C (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 3-13 8.

⁴⁴⁴ *Residents of Joe Slovo* par 169.

⁴⁴⁵ *Residents of Joe Slovo* par 107.

⁴⁴⁶ *Residents of Joe Slovo* par 321.

can only be mitigated by the fact that things will be much better later.⁴⁴⁷ Sachs J found that far greater inconvenience would be caused if the court ordered the government to start the Project all over again.⁴⁴⁸ He added that the occupiers should find comfort in the fact that the order specifically provides that the details of the relocation would be open to amelioration through court order failing attempts at engagement.⁴⁴⁹ The sacrifice that the respondents required the occupiers to make could therefore not be viewed as unreasonable. With that the judgments shifted focus to determine whether it would be just and equitable to evict the occupiers.

Yacoob J explained that the surge of people to the Joe Slovo informal settlement during the 1990s forced them to live increasingly closer to each other. In turn this led to the rapid deterioration of the site to a point where it was simply too dangerous and unhygienic to be living in Joe Slovo.⁴⁵⁰ O'Regan J took this point further by holding that the justice and equity of any eviction depended on the order that the court crafted and to that extent she held that any eviction order that ordered an eviction without making provision for alternative accommodation would not pass constitutional muster.⁴⁵¹

All the judgments accordingly agreed that this case was unique because the respondents offered to provide alternative accommodation in Delft at their expense. Yacoob J and Sachs J respectively observed that the unlawful occupiers would not be left out in the cold⁴⁵² nor would they have to fend for themselves on the streets.⁴⁵³ Yacoob J added further that the TRUs in Delft would be better than the current accommodation at Joe Slovo and that it would be more hygienic and less dangerous.⁴⁵⁴ Moseneke DCJ explained that he would have had great difficulty finding an eviction to be just and equitable if the unlawful occupiers would be left without any prospect of realising their own desire of obtaining access to adequate housing.⁴⁵⁵ In these circumstances unlawful occupiers would be “sacrificial lambs” in the process of ending

⁴⁴⁷ *Residents of Joe Slovo* par 107.

⁴⁴⁸ *Residents of Joe Slovo* par 384.

⁴⁴⁹ *Residents of Joe Slovo* par 388.

⁴⁵⁰ *Residents of Joe Slovo* par 24.

⁴⁵¹ *Residents of Joe Slovo* par 313.

⁴⁵² *Residents of Joe Slovo* par 106.

⁴⁵³ *Residents of Joe Slovo* par 388.

⁴⁵⁴ *Residents of Joe Slovo* par 105.

⁴⁵⁵ *Residents of Joe Slovo* par 138.

the formation of informal settlements.⁴⁵⁶ Sachs J concluded that an eviction order which ensured the provision of alternative accommodation satisfied the requirements of justice and equity because it amplified and embraced the concerns of the unlawful occupiers.⁴⁵⁷ The Court therefore concluded - “not without considerable hesitation”⁴⁵⁸ - that it was just and equitable to evict the occupiers and order their relocation to Delft.

The Court must be lauded for giving specific content to the obligation to provide alternative accommodation in this order because it is the “strongest affirmation to date of suitable alternative accommodation as a critical factor in evaluating the justice and equity of evicting a large settled community.”⁴⁵⁹ However, the focus of the order was still very much on the “bricks and mortar” side of the right of access to adequate housing and therefore failed to appreciate that the relocation to Delft might not appropriately respond to the rights and needs of the unlawful occupiers. The reality of an eviction for the residents of the Joe Slovo informal settlement is that the evictees are unable to take the physical site and its intangible elements as a home with them to Delft. The eviction order would thus break the strong emotional ties between the Joe Slovo community and the place that they called home since the early 1990s.⁴⁶⁰ The eviction would furthermore cause many of the residents to lose the support structure that they have established both for themselves as well as for others in the community who have come to rely thereon. The eviction would furthermore, perhaps most dramatically, destroy the livelihoods of individuals and their families because relocation to Delft brings with it various uncertainties which include, but are not limited to, their ability to earn an income as informal traders or take up other unskilled employment⁴⁶¹ that depends on living in

⁴⁵⁶ *Residents of Joe Slovo* par 138. See Chenwi L and Tissington K “Sacrificial lambs’ in the quest to eradicate informal settlements” (2009) 10(3) *ESR Review* 18-24.

⁴⁵⁷ *Residents of Joe Slovo* par 409.

⁴⁵⁸ *Residents of Joe Slovo* par 133 (Moseneke DCJ) and par 409 (Sachs J).

⁴⁵⁹ Liebenberg *Socio-Economic Rights* 311.

⁴⁶⁰ See 2 1 2 for a discussion of the intangible elements of the right to housing.

⁴⁶¹ The Presidency *Development Indicators 2009* (2010) 20 indicates that 2,109 million or 15,78% of the population in South Africa have employment in the informal sector and that 1,194 million or 8,93% of the population have employment as domestic workers. In contrast, 23,6% (official, narrow definition) and 32,5% (unofficial, broad definition) of the population were unemployed during June 2009. The indicators are available online at www.constitutionalcourt.org.za/Archimages/12720.PDF (accessed on 7 March 2010)

close proximity to those employment opportunities;⁴⁶² the general safety of the area and the prevalence of gang related violence; the closeness of health care facilities, recreational facilities, religious institutions and schools; infrastructure; and service delivery. While the Court was receptive to the submissions that the *amici curiae* made in this regard, it held that these factors were insufficient to tilt the scale against evictions and relocation.⁴⁶³

Since the judgment of the Constitutional Court in *Residents of Joe Slovo* on 10 June 2009 the parties have been unable to reach agreement through engagement with each other on the date on which the relocation will commence or on an alternative timetable for the relocation process. In the report that the parties filed with the Court on 4 August 2009 the MEC for housing and local government expressed grave concerns about the costs and timing of the construction of the TRU's in Delft. The MEC was furthermore concerned about the impact of the eviction and relocation order on the residents of the Joe Slovo informal settlement. The Court subsequently granted extensions to report on the results of the engagement process on 24 August 2009, 30 September 2009, 30 October 2009 and again on 17 November 2009. All of these extensions did not bear any fruit. On 24 May 2010 the Court issued directions that required the respondents to lodge affidavits with the Court by 25 June 2010 that firstly, indicated whether the respondents would be providing the residents of the Joe Slovo informal settlement access to adequate housing through a process of *in situ* upgrading of the site; and secondly, explained why the initial eviction order was still necessary. The MEC indicated that the provincial government had not taken a final decision on whether an *in situ* upgrade would be undertaken and stated that further engagement with the Joe Slovo community was necessary. This caused the Court to issue further directions that required the MEC and the Minister of Human Settlements to show cause on affidavit why the initial eviction order should not be discharged.

Nearly 21 months later the Constitutional Court handed down judgment in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on*

⁴⁶² See the arguments of the occupiers in *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W) par 20 and the submissions of the *amicus curiae* in *Residents of Joe Slovo* available online at www.constitutionalcourt.org.za/Archimages/12720.PDF (accessed on 7 March 2010).

⁴⁶³ *Residents of Joe Slovo* par 113.

Housing Rights and Evictions and Another as Amici Curiae)⁴⁶⁴ (*Residents of Joe Slovo II*) on the sole question of whether the order in *Residents of Joe Slovo* “can or should be rescinded or discharged in the light of the changed circumstances.”⁴⁶⁵ In this regard the Court emphasised that the prerequisite of the eviction order in *Residents of Joe Slovo* was that it was just and equitable.⁴⁶⁶ The Court added that it probably would not have made the relocation order had it not found that the relocation was necessary to facilitate the housing development.⁴⁶⁷ The Court emphasised that the change in circumstances since the judgment in *Residents of Joe Slovo* made it impossible to comply with various aspects of the order in that judgment.⁴⁶⁸ The Court therefore concluded that, save for the cost order contained in Order 22 of *Residents of Joe Slovo*, Orders 4-21 of *Residents of Joe Slovo* should be discharged for the following reasons: firstly, the government had failed to take adequate steps to carry out the supervised eviction order that the Court made on 10 June 2009; secondly, the respondents indicated that they had no intention of proceeding with the supervised eviction order because they had made alternative plans for an *in situ* upgrade of the site; thirdly, it would be impossible to execute the eviction order in the absence of an agreement between the parties or a complex amendment of the initial order; fourthly, the eviction and relocation order pertained to thousands of people; fifthly, the circumstances that underpinned the Court’s reasoning to grant the eviction order had since fallen away; and finally, the plans for the *in situ* upgrade of the Joe Slovo situ posed no threat to the appellants.⁴⁶⁹

Section 6 of PIE creates a framework in which an organ of state can institute eviction proceedings against unlawful occupiers of land within its jurisdiction and obtain the relief that it sought from the court. Within this framework courts must determine whether it is just and equitable to evict the unlawful occupiers with reference to *inter alia* the circumstances under which they started occupying the land. This is a decisive break from the position under apartheid, where this consideration simply did not matter.

⁴⁶⁴ 2011 (7) BCLR 723 (CC).

⁴⁶⁵ *Residents of Joe Slovo II* par 1.

⁴⁶⁶ *Residents of Joe Slovo II* par 29.

⁴⁶⁷ *Residents of Joe Slovo II* par 29.

⁴⁶⁸ *Residents of Joe Slovo II* paras 30-36.

⁴⁶⁹ *Residents of Joe Slovo II* par 37.

Courts are enjoined to consider the reasonableness of the measures taken by the government to improve the living conditions of those living in deplorable conditions. In *Residents of Joe Slovo* the Court confirmed that those who stand to benefit must be able to participate actively in the development of these measures through a process of meaningful engagement. However, in *Residents of Joe Slovo* the Court appeared to retreat from the very high standards it set for the process of meaningful engagement in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others*⁴⁷⁰ ('*Occupiers of 51 Olivia Road*') because it condoned serious deficiencies in the implementation of the Project. The Court concluded that this by itself could not render the Project unreasonable because many people stood to benefit from the Project. However, the Court must be lauded for its strong affirmation of alternative accommodation as a critical factor for the determination of the justice and equity of an eviction in *Residents of Joe Slovo*.

3 3 5 Order and execution

Once the court is satisfied that all the procedural requirements have been complied with and that it would be just and equitable to evict the unlawful occupiers, it must grant an eviction order.⁴⁷¹ Since unlawful occupiers have no rights to occupy they will not be able to raise any defence to the unlawfulness of their occupation.⁴⁷²

In its order a court must determine, with reference to *inter alia* the duration of the unlawful occupation,⁴⁷³ a just and equitable date on which the land must be vacated.⁴⁷⁴ In the event that the unlawful occupiers fail to vacate the land voluntarily the court must also determine a date on which the eviction order may be carried out.⁴⁷⁵ The sheriff, the

⁴⁷⁰ 2008 (3) SA 208 (CC).

⁴⁷¹ Section 4(8) of PIE. Rule 6(2) of the Uniform Rules of the High Court also requires a notice of motion to be served on *inter alia* the registrar of the High Court when relief is claimed against any person.

⁴⁷² Badenhorst, Pienaar and Mostert *The Law of Property* 659.

⁴⁷³ Section 4(9) of PIE.

⁴⁷⁴ Section 4(8)(a) of PIE. See Badenhorst, Pienaar and Mostert *The Law of Property* 659 and Carey Miller *Land Title in South Africa* 521.

⁴⁷⁵ Section 4(8)(b) of PIE. See Badenhorst, Pienaar and Mostert *The Law of Property* 659 and Carey Miller *Land Title in South Africa* 521.

South African Police Service or any person assisting them⁴⁷⁶ may not be obstructed or interfered with when executing of a court order.⁴⁷⁷

A court may also order the demolition and removal of any buildings or structures that were occupied or erected on the land.⁴⁷⁸ The court may also subject the order for the eviction, demolition or removal to any conditions that it deems reasonable. Section 6(6) of PIE state that all the procedural protections provided for in section 4 of PIE will apply, with the necessary changes, to all proceedings instituted in terms of section 6(1) of PIE.

3 4 Evictions in terms of the National Building Regulations and Building Standards Act 103 of 1977

The City of Johannesburg adopted its Inner City Regeneration Strategy in 2003. One of the pillars upon which this regeneration strategy rests is a project to address “sinkholes”. Sinkholes are properties that are slummed, abandoned, overcrowded, poorly maintained, often owned and neglected by the public sector. In terms of the Better Buildings Programme the City of Johannesburg offers to write off a portion of the municipal debt of these property owners and provide assistance with the eviction of unlawful occupiers if they upgrade the buildings at their own cost, maintain the buildings and lease it for residential purposes.⁴⁷⁹

In *Occupiers of 51 Olivia Road* the City of Johannesburg sought to evict approximately 400 people from six buildings in terms of the fire bylaws of the city, section 20 of the Health Act 63 of 1977 and section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 ('NBRSA'). Section 12(4)(b) of the NBRSA empowers a local authority to “order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified” in a notice if it considers it necessary for the safety of that person. Section 12(6) of the NBRSA further provides that failure to comply with such a notice will constitute a criminal offence and any offender will be fined a maximum of R 100 for

⁴⁷⁶ Section 4(11) of PIE.

⁴⁷⁷ Section 8(2), read with section 8(3), of PIE which makes obstruction and interference an offence.

⁴⁷⁸ Section 4(10) of PIE. See Badenhorst, Pienaar and Mostert *The Law of Property* 659 and Carey Miller *Land Title in South Africa* 521.

⁴⁷⁹ See City of Johannesburg *Johannesburg Inner City Regeneration Strategy Business Plan: Business Plan, Financial Years 2004 -2007* (2004) available online at www.joburg-archive.co.za/udz/04.doc (accessed on 7 March 2010).

each day of the contravention. The occupiers opposed the application because an eviction and relocation to an informal settlement on the outskirts of the city would destroy their livelihood strategies that depended on being able to conduct informal trading, domestic work and recycling in the inner city of Johannesburg.

In the South Gauteng High Court, Johannesburg⁴⁸⁰ (*Rand Properties*), Jajbhay J found that there was no guarantee that a court would grant an eviction order once a local authority established the existence of health and safety concerns in a building because these concerns merely triggered the discretion of the Court.⁴⁸¹ He noted that a court had to enquire further as to the extent of the emergency and desperation of the people, the duration of their occupation and the extent to which the local authority observed due process in bringing the application.⁴⁸² He explained that section 12(4)(b) had to be read subject to section 26(3) of the Constitution and therefore deemed it unnecessary to consider the constitutional challenge lodged against this provision.⁴⁸³ Instead he focussed on the constitutional and statutory obligations – specifically to provide emergency housing in terms of chapter 12 of the National Housing Code – which local authorities have in providing access to adequate housing.⁴⁸⁴ In this regard he found that the City had no emergency housing programme in place that would be able to accommodate the occupiers if they were evicted.⁴⁸⁵ This would undoubtedly place the occupiers in a much more precarious position since they did not have the means to obtain alternative accommodation within the inner city. An outcome of this nature would fly in the face of the principles of *Ubuntu* that serve as a guide in the interpretation of the Constitution as a whole but also the right to housing and the eviction of unlawful occupiers specifically.⁴⁸⁶

⁴⁸⁰ *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W).

⁴⁸¹ *Rand Properties* par 29.

⁴⁸² *Rand Properties* paras 29 and 36.

⁴⁸³ *Rand Properties* par 36.

⁴⁸⁴ *Rand Properties* paras 37-46.

⁴⁸⁵ *Rand Properties* par 47.

⁴⁸⁶ *Rand Properties* paras 62-63. See *S v Makwanyane and Another* 1995 (3) SA 391 (CC) par 308; *PE Municipality* par 37; *Dikiko v Mokhatla* 2006 (6) SA 235 (CC) paras 68-69 and 113-121; English R “Ubuntu, the quest for an indigenous jurisprudence” (1996) 12 *SAJHR* 641-648; Mokgoro Y “Ubuntu and the law in South Africa” (1998) 4 *Buffalo Human Rights Law Review* 15-23; and Mokgoro Y “Ubuntu, the Constitution and the rights of non-citizens” (2010) 21 *Stell LR* 221-229 on the meaning and use of *ubuntu* as an interpretive guide.

He accordingly held that the Inner City Regeneration Strategy failed to comply with the constitutional and statutory obligations of the City⁴⁸⁷ and that the City failed to prioritise the rights and needs of the people living in the inner city of Johannesburg.⁴⁸⁸ He directed the City to devise a comprehensive and co-ordinated housing programme that would enable the progressive realisation of the right to adequate housing for the people in the inner city of Johannesburg⁴⁸⁹ and interdicted the City from evicting the occupiers pending the implementation of such a programme or until the City could provide the occupiers with alternative accommodation.⁴⁹⁰

On appeal to the Supreme Court of Appeal⁴⁹¹ (*Rand Properties II*) the City submitted that Jajbhay J's reasons for refusing the eviction order and the order itself "were marred by normative confusion" because he failed to determine whether PIE was applicable in the circumstances and then also failed to set aside the notices despite finding that it amounted to an arbitrary eviction that was contrary to section 26(3) of the Constitution.⁴⁹² Against this background Harms ADP concluded that Jajbhay J erred in holding that courts have a discretion to refuse an eviction order on grounds other than those which are legally relevant. It was furthermore incorrect and contrary to the jurisprudence of the Constitutional Court to hold that the government could not obtain an eviction order unless it provided the occupiers with alternative accommodation.⁴⁹³ There was no evidence to suggest that the City was failing in its efforts to provide access to adequate housing on a progressive basis and within its available resources.⁴⁹⁴ The City was under an obligation to provide emergency housing upon eviction and the suitability of this type of accommodation could indeed be considered by a court in determining whether it would be just and equitable to evict the occupiers.⁴⁹⁵

⁴⁸⁷ *Rand Properties* at 98G.

⁴⁸⁸ *Rand Properties* at 98H.

⁴⁸⁹ *Rand Properties* at 98I.

⁴⁹⁰ *Rand Properties* at 98J-99A.

⁴⁹¹ *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 404 (SCA).

⁴⁹² *Rand Properties II* par 17.

⁴⁹³ See *PE Municipality* par 28 where Sachs J stated that there was "no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available."

⁴⁹⁴ *Rand Properties II* par 45.

⁴⁹⁵ *Rand Properties II* paras 47-48.

On the constitutionality of the section 12(4)(b) notice, he found that the notice was administrative in nature and that it therefore had to comply with the requirements of just administrative action.⁴⁹⁶ As such the notice amounted to an administrative order which would be transformed into a criminal sanction in the case of non-compliance and could therefore not be construed as constituting self-help.⁴⁹⁷ He also dismissed the argument that the notice permitted an eviction without considering all the relevant circumstances in terms of section 26(3) of the Constitution because it was based on the flawed assumption that the notice could be equated with a court order.⁴⁹⁸

Harms ADP dismissed the application to review the City's decision to issue the notices for the following reasons: firstly, the *audi alteram partem* rule does not apply in emergency situations where it is necessary to vacate buildings to ensure the safety of any person in that buildings;⁴⁹⁹ secondly, the argument that the City failed to consider the availability of alternative accommodation in the inner city was based on an assumption that "presupposes that the right to act under s 12(4)(b) and the right to access to adequate housing are reciprocal and that the former is dependent or conditional on the latter;"⁵⁰⁰ and finally, any inquiry into the sincerity of the City's concerns for the safety and well-being of the occupiers was entirely beside the point because the evidence indicated that it was indeed necessary for the City to issue the notices.⁵⁰¹

Despite holding that PIE did not apply to instances where section 12(4)(b) notices have been issued, he noted that a court "would be remiss" if it ignored the

⁴⁹⁶ *Rand Properties II* paras 52 and 56.

⁴⁹⁷ *Rand Properties II* par 53.

⁴⁹⁸ *Rand Properties II* par 54. Quinot G "An administrative law perspective on 'bad building' evictions in the Johannesburg inner city" (2008) 9(1) *ESR Review* 25-28 26 ("Quinot "An administrative law perspective") argues that this argument of Harms ADP harks back to the narrow common law construction of *audi alteram partem* that fell by the way side with the adoption of section 33(1) of the Constitution.

⁴⁹⁹ *Rand Properties II* par 63. Quinot "An administrative law perspective" 27 argues that the principal objection against this point is the fact that the Supreme Court of Appeal failed to seriously engage with procedural fairness requirements listed in section 3(4)(b) of the Promotion of Administrative Justice Act 3 of 2000.

⁵⁰⁰ *Rand Properties II* par 64.

⁵⁰¹ *Rand Properties II* par 65. Quinot "An administrative law perspective" 28 observes that the Supreme Court of Appeal was able to avoid an analysis of section 26 of the Constitution by focusing on the reasonableness of the necessity to evict the unlawful occupiers for health and safety reasons.

consequences that followed from an eviction.⁵⁰² In this regard Harms ADP attributed the City's inability to provide the occupiers with emergency housing for longer than a fortnight immediately following the eviction to the fact that it did not pursue the application for funding for emergency housing with any vigour.⁵⁰³ He nonetheless upheld the appeal against the order of the High Court⁵⁰⁴ and interdicted the occupiers from occupying the buildings until the City gave written approval that the buildings may be occupied or used again.⁵⁰⁵ The eviction order was combined with a further order that the City offer and provide temporary alternative accommodation for the occupiers who were evicted and were in desperate need of housing assistance.⁵⁰⁶ The temporary accommodation had to provide the occupiers with a place where they could stay without the threat of further evictions. This place also had to provide a waterproof structure with access to basic sanitation, water and refuse services.⁵⁰⁷ The location of the temporary alternative accommodation had to be determined after consultation with the occupiers.⁵⁰⁸

On appeal in *Occupiers of 51 Olivia Road* the Constitutional Court issued an interim order⁵⁰⁹ after hearing oral argument that directed the parties "to engage with each other meaningfully".⁵¹⁰ The purpose of this engagement was to determine whether firstly, the values of the Constitution, the constitutional and statutory duties of the municipality and the rights of the applicants could direct the parties to resolve the difficulties of the application amicably;⁵¹¹ and secondly, the applicants' plight would be alleviated if the

⁵⁰² *Rand Properties II* par 76.

⁵⁰³ *Rand Properties II* par 77.

⁵⁰⁴ *Rand Properties II* par 78.

⁵⁰⁵ *Rand Properties II* at 441E-F. This order gives effect to section 12(5) of the NBRSA which states that: "No person shall occupy or use or permit the occupation or use of any building in respect of which a notice was served or delivered in terms of this section or steps were taken by the local authority in question in terms of subsection (1), unless such local authority has granted permission in writing that such building may again be occupied or used."

⁵⁰⁶ *Rand Properties II* at 441H-I.

⁵⁰⁷ *Rand Properties II* at 441J.

⁵⁰⁸ *Rand Properties II* at 442B.

⁵⁰⁹ The interim order was issued on 30 August 2007 (Interim order *Occupiers of 51 Olivia Road*) available online at www.constitutionalcourt.org.za/Archimages/10731.PDF (accessed on 7 March 2010).

⁵¹⁰ Interim order *Occupiers of 51 Olivia Road*, Order 1. See section 2.2 in chapter 5 for a detailed analysis of the concept of meaningful engagement and the argument that it transcends procedural fairness in terms of sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000.

⁵¹¹ Interim order *Occupiers of 51 Olivia Road*, Order 1.

dangerous and ailing buildings they occupied could be upgraded.⁵¹² The interim order also directed the parties to report back to the Court on the results of the engagement between them.⁵¹³ This engagement process resulted in the parties reaching an agreement⁵¹⁴ on the measures that would be taken by the City in the interim to improve the conditions of the properties⁵¹⁵ and the eviction application.⁵¹⁶ The Court subsequently endorsed this agreement.⁵¹⁷

The remaining issues that required determination by the Court were firstly, whether the occupiers and similarly placed people in the inner city of Johannesburg were entitled to relief that would make permanent housing solutions available to them in the inner city; secondly, what the scope and application of section 26 of the Constitution was in the circumstances; thirdly, whether PIE was applicable in the circumstances; fourthly,

⁵¹² Interim order *Occupiers of 51 Olivia Road*, Order 2.

⁵¹³ Interim order *Occupiers of 51 Olivia Road*, Order 3.

⁵¹⁴ The parties reached the agreement on 29 October 2007. The agreement is available online at <http://web.wits.ac.za/NR/rdonlyres/4B183D1D-C77A-493C-9CEF-526A5076438C/0/197MainStreet51OliviaRoadAgreement.pdf> (accessed on 7 March 2010) ('Agreement *Occupiers of 51 Olivia Road*').

⁵¹⁵ Agreement *Occupiers of 51 Olivia Road* clause 1.1.1. Clause 2 stipulated that the City of Johannesburg would, at its own expense, erect a standpipe with 6 taps to supply potable water; provide 10 chemical toilets; provide 2 skips for the disposal of residential waste at the rear of the property; deliver refuse bags to the occupiers each week; close the lift doors on the ground floor to secure the lift shaft and conduct a once-off cleaning and sanitation operation of the property. Clause 3 contains provisions in similar terms to be provided in an alley next to the property, but adds that the City of Johannesburg would, at its own expense, remove certain panels from windows to improve the ventilation in the buildings and that it would open up the bricked up door at the back of the property.

⁵¹⁶ Agreement *Occupiers of 51 Olivia Road* clause 1.1.2. Clause 5, read with clause 18, of the agreement stipulated that the City of Johannesburg would provide temporary alternative accommodation to the occupiers of the property in the "Old Perm" Building and/or Phase 1 of the "MBV Hospital" Building and/or the "BG Alexander" Building or "in another building renovated in compliance with the provisions of this agreement located within the Urban Development Zone (UDZ) for the inner city of Johannesburg." The City of Johannesburg had to, in terms of clause 6 of the agreement, ensure that these properties provided the occupiers with "security against eviction; access to sanitation; access to potable water; access to electricity for heating, lighting and cooking." Clause 8 of the agreement further, crucially, provided that no occupier would be required to pay rental that was "in excess of 25% of his or her household's monthly income, or his or her individual income if he or she lives alone."

⁵¹⁷ The order was issued on 5 November 2007 and is available online at www.constitutionalcourt.org.za/Archimages/11584.PDF (accessed on 7 March 2010). However, In *Occupiers of 51 Olivia Road*, Yacoob J emphasised that it will not always be appropriate for a court to approve agreements that flowed from a process of engagement because "[i]t is always for the municipality to ensure that its response to the process of engagement is reasonable" (par 30). See Tissington K "Challenging inner city evictions before the Constitutional Court of South Africa: The *Occupiers of 51 Olivia Road* case in Johannesburg, South Africa" (2008) 5(2) *Housing and ESC Rights Law Quarterly* 1-6.

the constitutionality of section 12(4)(b) of the NBRSA; and finally, whether the Court should review the decision of the City to issue the notices.⁵¹⁸

Yacoob J found it unnecessary to consider whether the occupiers should be provided with permanent accommodation in the inner city because the City agreed to develop permanent housing solutions in consultation with the occupiers and there was “every reason to believe that negotiations will continue in good faith.”⁵¹⁹ He equally found it unnecessary to consider whether similarly placed people in the inner city should be provided with permanent accommodation because there was no reason to believe that the City would not engage meaningfully with other occupants whose evictions might become necessary or desirable in future.⁵²⁰ He also declined to elaborate further on the applicability of section 26 of the Constitution for purposes of eviction applications on the grounds of health and safety considerations.⁵²¹ He specifically declined to consider whether PIE applied in the circumstances because the question might never arise again if the City continued to engage meaningfully with the people who would become homeless if they were evicted.⁵²² He reasoned that it was likely that other local authorities would use section 12(4)(b) notices in future and therefore deemed it appropriate to provide guidance on the considerations that a city should have regard to when issuing these notices.⁵²³

Yacoob J conceded that Harms ADP was correct in holding that the right to act in terms of section 12(4)(b) and the right of access to adequate housing are not reciprocal and that the former is neither dependent nor conditional on the latter.⁵²⁴ He accordingly held that these two provisions should be read together because the alternative would result in a disastrous position where one department made a decision on whether someone should be evicted and some other department determined whether housing

⁵¹⁸ *Occupiers of 51 Olivia Road* par 31.

⁵¹⁹ *Occupiers of 51 Olivia Road* par 34.

⁵²⁰ *Occupiers of 51 Olivia Road* par 35.

⁵²¹ *Occupiers of 51 Olivia Road* par 37.

⁵²² *Occupiers of 51 Olivia Road* par 38. Chenwi L and Liebenberg S “The constitutional protection of those facing eviction from ‘bad buildings’” (2008) 9 *ESR Review* 12-17 16 (‘Chenwi and Liebenberg “Constitutional protection”) argues that the Constitutional Court missed an opportunity to establish a clear legal framework which would govern all future evictions on grounds of health and safety concerns.

⁵²³ *Occupiers of 51 Olivia Road* par 39.

⁵²⁴ *Rand Properties II* par 64.

should be provided.⁵²⁵ It was therefore unfortunate that Harms ADP characterised the dispute between the City and the occupiers as “only peripherally about the constitutional duty of organs of State towards those who are evicted from their homes and are in a desperate condition”⁵²⁶ because that laid the foundation for the Supreme Court of Appeal to incorrectly hold that the City was under no obligation to consider the availability of alternative accommodation before it issued the notices.⁵²⁷

Yacoob J finally took issue with the fact that Harms ADP found nothing objectionable about the fact that the failure to comply with an administrative order to vacate a building could be penalised with a criminal sanction.⁵²⁸ Yacoob J explained that

“[t]he provisions of section 26(3) would be virtually nugatory and would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal sanction without a court order. It follows that any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution. Section 12(6) provides for this criminal compulsion and is not consistent with the Constitution. Continued occupation of the property should not be a criminal offence absent a court order for eviction.”⁵²⁹

Yacoob J found that this was not a case in which there were countless ways in which the legislature could remedy the provision and therefore held that the following should be read into section 12(6) of the NBRSA to make it constitutionally compliant: “This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned.”⁵³⁰

Occupiers of 51 Olivia Road must be lauded for affirming the participatory nature of the right of access to adequate housing with the creation of the obligation that government must engage meaningfully with the unlawful occupiers that it wants to evict. On a substantive level this obligation to engage meaningfully with unlawful occupiers

⁵²⁵ *Occupiers of 51 Olivia Road* par 44.

⁵²⁶ *Rand Properties II* par 4. Liebenberg *Socio-Economic Rights* 303 argues that the context of a specific case should guide the formulation of an appropriate order where a local authority seeks an eviction order for health and safety reasons.

⁵²⁷ *Occupiers of 51 Olivia Road* par 46. Liebenberg *Socio-Economic Rights* 303 describes this part of the judgment as “perhaps the most significant” because it explicitly holds that courts must take, not only legally relevant circumstance but, all relevant circumstances into consideration for purposes of section 26(3) of the Constitution.

⁵²⁸ *Occupiers of 51 Olivia Road* par 48.

⁵²⁹ *Occupiers of 51 Olivia Road* par 49.

⁵³⁰ *Occupiers of 51 Olivia Road* par 51.

also created an express link between sections 26(1) and 26(3) of the Constitution because meaningful engagement has the potential to lead to immediate benefits for people living in abject poverty through an agreement with the City to either upgrade their current living conditions or to relocate to emergency accommodation pending the provision of permanent accommodation. Meaningful engagement further establishes a link between sections 26(2) and 26(3) of the Constitution because it also has the potential to lead to a change in the way the government perceives its constitutional and statutory obligations to provide access to adequate housing on a progressive basis and within its available resources.

Occupiers of 51 Olivia Road must be criticised for leaving the question of whether PIE will apply to evictions instituted in terms of the NBRSA or the Health Act 63 of 1971 open in the wake of *Rand Properties II* where Harms ADP found that PIE would not apply. This is an opportunity that the Constitutional Court missed to clarify what the position would be of unlawful occupiers who faced imminent eviction proceedings for health and safety reasons.⁵³¹

3 5 Conclusion

The inclusion of the right of access to adequate housing in the Constitution marked a decisive break with the past.⁵³² The law of evictions experienced a paradigm shift from a position where forced evictions were conducted without any regard for the personal circumstances of the unlawful occupiers or the severe hardship that may flow from the eviction to a position where these factors stand at the forefront of the enquiry into the justice and equity of the eviction. Put differently, courts must exercise their discretion to grant or refuse eviction orders in terms of the specific circumstances of each case. Courts can no longer apply the legal rules of eviction to the facts of a case in a mechanical fashion without any further enquiry as to what the rights and needs of the people are that stand to be affected by the eviction. This is a major impact of the right to have access to adequate housing.

⁵³¹ See section 4 in chapter 2 for a brief overview of how the Slums Act 53 of 1934, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977 was used by the government in the exercise of its police powers to remove people from land and buildings for health and safety reasons during apartheid.

⁵³² *Jaftha* par 29.

In *PE Municipality*, the Constitutional Court confirmed that the traditional enquiry into evictions had been recast into a new “constitutional matrix” of relationships that flow from the intersection of sections 25 and 26 of the Constitution. In this constitutional matrix the question of eviction will not be approached from the position where the property rights of the owner and the housing rights of the unlawful occupiers are characterised as diametrically opposed interests. Instead the question of eviction will be approached in a manner that tries to reconcile the interests of the landowner and the unlawful occupiers by engaging with the specific circumstances of the case so as to reach a just and equitable solution.⁵³³ Liebenberg observes that this balancing of conflicting constitutional rights in a manner that seeks to afford the most protection to both owners and unlawful occupiers at the same time is consistent with the deliberative spirit of the Constitution.⁵³⁴

During apartheid the government used its police power to evict people for health, safety and public interests reasons because it wanted to establish and maintain a land-use system that was segregated along racial lines.⁵³⁵ Section 26 of the Constitution envisages that the government will become involved in housing and eviction cases in a manner that is markedly different. Section 26(2) of the Constitution imposes positive obligations on the government to adopt reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of access to adequate housing. In *Grootboom* the Constitutional Court developed the model of reasonableness review which it uses to determine whether the measures taken by the government to realise section 26 of the Constitution are reasonable. The Court emphasised that it was not its prerogative to question whether better measures could have been adopted or whether public funds could have been better spent. The Court would focus on whether the measures that the government adopted could contribute to the realisation of the right of access to adequate housing. In this regard the Court will focus on whether the measures firstly, are comprehensive and coordinated; secondly, are capable of facilitating the progressive realisation of the right; thirdly, reasonable in their conception and implementation; fourthly, are balanced and flexible;

⁵³³ *PE Municipality* par 23.

⁵³⁴ Liebenberg *Socio-Economic Rights* 312.

⁵³⁵ Van der Walt AJ *Property in the Margins* (2009) 66.

and finally, includes components for short-, medium- and long-term relief. The imposition of positive obligations on government to provide access to adequate housing is a significant impact of section 26 of the Constitution.

However, the government also has negative obligations to desist from impairing or preventing the right of access to adequate housing. In *Jaftha* and *Gundwana* the Constitutional Court confirmed that judicial oversight was required of all sales in execution proceedings if the property to be executed against is the home of the judgment debtor. These judgments enjoin judicial officers to weigh the interests of the creditor in securing payment of the judgment debt against the interests of the debtor in retaining the tenure security that her home provides her. This balancing requires more than the mechanical application of legal rules to objective facts. It requires engagement with all the relevant circumstances of the case. The fact that the rights and interests of poor and otherwise destitute people must be taken into consideration in legal proceedings that threaten to deprive them of their current access to adequate housing, however basic, is a substantial addition to the law of evictions.

PIE was enacted to give effect to section 26(3) of the Constitution. With its enactment there was a shift in the focus of evictions - away from preventing squatting to preventing illegal eviction. This shift in focus coincided with the provision of procedural protections and substantive safeguards against illegal evictions. In *Residents of Joe Slovo* the Constitutional Court emphasised that courts cannot resort to the common law definition of consent to determine the meaning of consent for purposes of PIE because the common law definition of consent limits the definition of unlawful occupation and through that the application of PIE. Once it is clear that unlawful occupiers meet this threshold requirement they must receive notice of eviction proceedings that have been instituted against them. This notice must identify them as unlawful occupiers of the property, be properly served upon them and be in a language that they will be able to understand. Furthermore, this notice must contain information regarding the nature of the proceedings; the date and time of the hearing; the grounds for the proposed eviction; their right to appear and defend the case; and that they may request legal aid. Once a court is satisfied that the proposed eviction is just and equitable it must determine a date upon which the unlawful occupiers must vacate the property and a

date upon which the eviction order can be executed should the unlawful occupiers not vacate the property voluntarily. These procedural protections are significant because during apartheid the local authority officials did not give the squatters notice of pending eviction proceedings nor did they wait for a just and equitable day or time to execute the eviction order.

The substantive safeguards that PIE affords unlawful occupiers are animated by the overarching requirement that all evictions must be just and equitable - to both the unlawful occupiers and the landowner. This requires careful consideration of the rights and needs of the unlawful occupiers in general, but specifically the rights and needs of the elderly, people with disabilities, children and female-headed households. Courts are further required to ascertain whether land or alternative accommodation is available or can reasonably be made available to the unlawful occupiers upon their eviction. Finally, courts are also required to consider whether the local authority with jurisdiction over the area in which the property is situated made any mediation attempts to resolve disputes between the unlawful occupiers and the private landowners. These substantive safeguards to the eviction of unlawful occupiers arguably represent the most significant development in the law of evictions.

It is clear from the analysis of the legal framework of evictions in this chapter that firstly, unlawful occupiers cannot make demands for the immediate provision of access to adequate housing; secondly, evictions can occur if it is just and equitable in the circumstances; and finally, courts have an obligation to consider all relevant circumstances in order to craft the case-specific solutions that Sachs J called for in *PE Municipality*. In general courts have discharged their obligation to grapple with the conflicting interests of unlawful occupiers and landowners in any effort to find case specific solutions admirably. However, to date the Constitutional Court has refused to build on the normative foundations of the right of access to adequate housing which it laid in *Grootboom* when it stated that the right amounted to “more than bricks and mortar”. This chapter has shown that it is possible to do so with reference to the home interests of the unlawful occupiers. This development is uncontroversial and easy to accept as compelling for logical reasons. It therefore remains to show how it is possible to give substantive content to the right without defining a minimum core obligation.

International and Regional Norms

4 1 Introduction

Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996 ('Constitution') places an obligation on courts to consider international law when interpreting the Bill of Rights and therefore creates a gateway through which the courts have access to a rich body of international law on human rights. In *S v Makwanyane and Another*¹ ('*Makwanyane*') the Constitutional Court found that the ambit of international law, envisaged as an interpretive guide, included both binding and non-binding international law.² This is significant because many of the provisions in the Bill of Rights were inspired by and closely resemble the structure and language used in the formulation of comparable provisions in international law instruments. Section 39(1)(b) consequently creates a framework within which the Bill of Rights can be evaluated and interpreted.³

The inclusion of an explicit provision that mandates the consideration of international law acknowledges that the Constitution functions within an international context that is

¹ 1995 (3) SA 391 (CC).

² *Makwanyane* par 35, followed in *S v Williams and Five Similar Cases* 1994 (4) SA 126 (C) at 139G-H; *S v Lombard* 1994 (4) SA 776 (T) at 782F-G; *S v Shuma* 1994 (4) SA 583 (E) at 590E; *S v Vermaas* 1994 (3) BCLR 18 (T) at 28C; *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 643D; *Government of the Republic of South Africa v 'Sunday Times' Newspaper* 1995 (2) SA 221 (T) at 227D-E and *S v Zuma* 1995 (2) SA 642 (CC) at 662. It is important to note that the Constitutional Court relied on section 35(1) of the Constitution of the Republic of South Africa Act 200 of 1993 in formulating this framework with reference to the view of Dugard J "The role of international law in interpreting the Bill of Rights" (1994) 10 SAJHR 208-215 212 and Dugard J "International law and the final Constitution" (1995) 11 SAJHR 241-251 243 who construes the ambit of international law sources foreseen by section 35(1) of the Interim Constitution as including all the sources recognised by article 38(1) of the Statute of the International Court of Justice 33 UNTS 993, namely: (a) international conventions (both general or particular) which establish rules that contesting states recognize; (b) international custom; (c) the general principles of law recognized by civilized nations; and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations. The development of the Constitutional Court's reliance on international law in constitutional interpretation is discussed in Du Plessis LM "International law and the evolution of (domestic) human-rights law in post-1994 South Africa" in Nijman JE and Nollkaemper A (eds) *New Perspectives on the Divide Between National and International Law* (2007) 309-340 319-335 and Du Plessis LM "Interpretation" in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original Service, June 2008) 32-171 - 32-183.

³ *Makwanyane* par 35.

committed to international norms and standards.⁴ This receptiveness to “influences from outside”⁵ will help to realise the Constitutional commitment of building a united and democratic South Africa.⁶ Liebenberg notes that this commitment articulates South Africa’s ambition of being part of the international community of nations after apartheid and to abide by its normative standards.⁷ She adds that South Africa has a strong history of involvement with human rights and domestic transformation that can contribute to the development of international law.⁸

The deliberative nature of the South African constitutional dispensation was weaved into the fibre of the Constitution through section 39(1)(b), which opened South African constitutional law up to a human rights dialogue that extends beyond the South African context to the broader international community.⁹ By opening itself up to such a human rights dialogue, the drafters of the South African Constitution ensured that the foundation of its young democracy stood on firm ground and provided the courts with an opportunity to interpret the rights in the Bill of Rights in a manner that is influenced by multicultural dialogue on human rights that extended beyond national boundaries.¹⁰

This human rights dialogue is particularly useful in the housing context because it provides South African courts with the opportunity to engage with the jurisprudence of international adjudicative or supervisory bodies that have had to grapple with the rights of vulnerable groups like gypsies/travellers and Roma in terms of a range of international and regional human rights instruments. It is instructive to consider the jurisprudence generated by these bodies because the gypsies/travellers and Roma have historically also been pushed to the periphery of society, with the aid of racial profiling and numerous instances of police brutality, to live in squalid conditions.

⁴ Dugard J “International law and the ‘final’ Constitution” (1995) 11 *SAJHR* 241-251 241 and Du Plessis LM “International law and the evolution of (domestic) human-rights law in post-1994 South Africa” in Nijman JE and Nollkaemper A (eds) *New Perspectives on the Divide Between National and International Law* (2007) 309-340 316.

⁵ Botha N “The role of international law in the development of South African common law” (2001) 26 *SAYIL* 253-260.

⁶ Preamble of the Constitution.

⁷ Liebenberg S *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 101 (‘Liebenberg *Socio-Economic Rights*’).

⁸ Liebenberg *Socio-Economic Rights* 101.

⁹ Liebenberg *Socio-Economic Rights* 101.

¹⁰ Liebenberg *Socio-Economic Rights* 101.

The aim of this chapter is to identify international instruments that can be considered by South African courts in their effort to develop a more substantive understanding of the scope and content of the related concepts of “adequacy” and “home” in section 26 of the Constitution. Developing such an understanding is important for purposes of contextualising the law of evictions in post-apartheid South African law, with its firm move away from the common law and apartheid ways of construing the entitlement and power to evict squatters without any regard to their personal circumstances or what will become of them after the eviction. This chapter is divided into two parts. The first part develops an organising framework for giving substantive content to the right of access to adequate housing with reference to the International Covenant on Economic, Social and Cultural Rights.¹¹ The second part of the chapter shows that South African courts can receive interpretive guidance from the jurisprudence of regional human rights systems to give content to what it means to have access to adequate housing. The second part provides an overview of the case law generated in terms of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹² articles 16, 30 and 31 of the Revised European Social Charter,¹³ the implied right to housing in the American Convention on Human Rights,¹⁴ and the implied right to housing in the African Charter on Human and Peoples’ Rights.¹⁵

4 2 Developing an organising framework

4 2 1 The International Covenant on Economic, Social and Cultural Rights

4 2 1 1 Introduction

After World War II, the international community committed itself to the protection of human rights and fundamental freedoms. The United Nations adopted the International Bill of Rights, which consists of the Universal Declaration of Human Rights¹⁶ (‘UDHR’), the International Covenant on Civil and Political Rights¹⁷ (‘ICCPR’) and the International

¹¹ 993 UNTS 3.

¹² 213 UNTS 221.

¹³ CETS No 35.

¹⁴ OASTS No 36.

¹⁵ 1520 UNTS 217.

¹⁶ UN General Assembly Resolution 217 A (III).

¹⁷ 999 UNTS 171. The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976. As on 15 July 2011 the Covenant has 69

Covenant on Economic, Social and Cultural Rights¹⁸ ('ICESCR'). The UDHR remains an important standard of reference even though the ICCPR and the ICESCR have transcended the UDHR in terms of their specific provisions and the establishment of legal obligations to which States Parties bind themselves. In this regard the ICESCR is significant because it is one of the earliest and foremost international law treaties dealing specifically with economic, social and cultural rights.¹⁹

The guiding international norm in the context of housing and evictions is contained in article 11(1) of the ICESCR, which provides everyone with the right to an adequate standard of living. Article 11(1) of the ICESCR reads:

"The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

The United Nations Committee on Economic, Social and Cultural Rights²⁰ ('CESCR') is responsible for developing authoritative interpretations of what the obligations of States Parties are in terms of the ICESCR through its concluding observations²¹ and general

signatories and 160 parties. South Africa signed the Covenant on 3 October 1994. See the United Nations Treaty Collection database for the status of the Covenant. Available online at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed on 15 July 2011).

¹⁸ 993 UNTS 3. See Craven MCR *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (1995) 16-22 for the drafting history of the ICESCR ('Craven *The ICESCR*').

¹⁹ Craven *The ICESCR* 24. The rights included in the ICESCR are the right to work (article 6); the right to fair conditions of employment (article 7); the right to join and form trade unions (article 8); the right to social security (article 9); the right to protection of the family (article 10); the right to an adequate standard of living (article 11); the right to health (article 12); the right to education (article 13) and the right to culture (article 15).

²⁰ The Committee consists of 18 experts with internationally recognised competence in the field of human rights who serve in their personal capacity for a renewable four year term. The primary task of the Committee is to assist the Economic and Social Council with its consideration of the reports that States Parties submit to the Secretary-General of the United Nations (article 16(2) of the ICSECR).

²¹ See Langford M and King JA "Committee on Economic, Social and Cultural Rights - Past, present and future" in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 477-516 479 ('Langford and King "CESCR"') for a discussion of how the CESCR makes its concluding observations.

comments.²² The CESCR has adopted two general comments that explain the obligations of States Parties in the context of the right to housing and forced evictions.

4 2 1 2 General Comments No 4 and No 7

In General Comment 4²³ the CESCR stated that the article 11(1) of the ICESCR is the most comprehensive provision on the right to adequate housing and posited that it was the most important provision on the right contained in international human rights instruments.²⁴ The CESCR noted that the need for a general comment on the right to housing arose from the fact that it was receiving insufficient information from States Parties on the standards of living that prevailed in the respective countries and therefore set out to identify some of the principal issues that are important in relation to the right to housing.²⁵

The CESCR stated that the right applied to everyone and that it should not be construed in any way to exclude anyone from enjoying its protection.²⁶ The right to housing must be interpreted as having “the right to live somewhere in security, peace and dignity.”²⁷ Any interpretation that purports to reduce it to the mere fact of having a roof over your head should be avoided because such an interpretation would fail to appreciate the interconnected nature of all human rights²⁸ and would specifically preclude any substantive evaluation of the adequacy of housing for human habitation.²⁹

²² General comments are considered to be soft international law because they have not crystallised into treaty provisions or norms of customary international law. See Liebenberg *Socio-Economic Rights* 102 where she explains that soft international law can include: firstly, resolutions that have been adopted at international conferences that were organised under the auspices of the United Nations or any of the regional human rights bodies in the European, Inter-American and African systems; secondly, guidelines adopted by international organisations; or thirdly, reports and guidelines issued by special rapporteurs, working groups and other non-treaty based international mechanisms. While these sources of international law are not binding on South Africa, they serve as interpretive tools for South African courts to have regard to for purposes of section 39(1)(b) of the Constitution. Langford and King “CESCR” 480 notes that general comments are not comparable to ordinary judgments because it is based on the experience of the CESCR in reviewing State Party reports.

²³ General Comment No 4 *The right to adequate housing*, UN Doc E/1992/23 (‘General Comment No 4’).

²⁴ General Comment No 4 par 3.

²⁵ General Comment No 4 par 5.

²⁶ General Comment No 4 par 6.

²⁷ General Comment No 4 par 7.

²⁸ General Comment No 4 par 9.

²⁹ General Comment No 4 par 7.

In this regard the CESCR found that housing will be considered adequate if it provides security of tenure and certain services; is affordable, habitable and accessible; is located in close proximity to social facilities; and is culturally adequate.³⁰ To this end all States Parties must take steps,³¹ on their own and through international cooperation,³² to ensure the full realisation of the right to housing for every individual in the shortest possible time in accordance with the maximum of available resources.³³

These steps must include the provision of domestic remedies for violations of the right to housing and can include, but are not limited to, procedures for lodging appeals against evictions that stand to be carried out without a court order; seeking compensation for an illegal eviction; to lodge complaints about illegal actions that are taken or supported by landlords; to lodge complaints about any form of discrimination in the allocation of housing; and to lodge complaints against landlords about unhealthy and unsafe living conditions.³⁴ In conclusion, the CESCR stated that it considered all instances of forced eviction to be *prima facie* incompatible with the provisions of the ICESCR. The CESCR further stated that forced evictions could only be justified in exceptional circumstances and that even then the evictions should only be carried out in accordance with the relevant principles of international law.³⁵

Six years later, the CESCR adopted General Comment 7³⁶ to clarify the implications of forced evictions on the obligations of States Parties in terms of the ICESCR. It defined forced evictions as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy,

³⁰ General Comment No 4 par 8. See section 2 1 2 in chapter 3 for a discussion of the intangible aspects of the right to housing for purposes of developing a substantive interpretation of the right of access to adequate housing in section 26(1) of the Constitution.

³¹ General Comment No 4 paras 10-13.

³² Article 23 of the ICESCR reads:

“The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.”

³³ General Comment No 4 par 14.

³⁴ General Comment No 4 par 17.

³⁵ General Comment No 4 par 18.

³⁶ General Comment No 7 *The right to adequate housing: forced evictions*, UN Doc E/1998/22 (‘General Comment No 7’).

without the provision of, and access to, appropriate forms of legal or other protection.”³⁷ The CESCR emphasised that forced evictions were not limited to overpopulated urban areas because such practices also took place when people were internally displaced; during armed conflict and mass exoduses; as a response to refugee movements; and often in the name of development.³⁸ The CESCR stated that children, ethnic minorities and other minorities, indigenous people, the elderly, women and other vulnerable groups suffered disproportionately in all these instances of forced evictions because they are subjected to some form of discrimination in violation of article 2(2) of the ICESCR.³⁹

The CESCR stated that the obligations of States Parties in terms of article 11(1) had to be read in conjunction with article 2(1) of the ICESCR. On the one hand, this provision places an obligation on States Parties and its agents to refrain from conducting forced evictions and to ensure that third parties who bring about forced evictions are prosecuted to the full extent of the law.⁴⁰ Conversely, the CESCR found that the most effective foundation upon which to build a system of effective protection against forced evictions was to enact legislation that provides strong security of tenure rights to occupiers of houses and land; requires conformity with the ICESCR; and controls the circumstances under which evictions can be carried out.⁴¹

In this regard States Parties must ensure that they explore all possible alternatives to eviction in consultation with those persons that stand to be affected by the eviction in an effort to avoid or minimise the need for the use of force.⁴² States Parties must further ensure that evictions are carried out in compliance with the provisions of international law and the general principles of reasonableness and proportionality.⁴³

³⁷ General Comment No 7 par 3.

³⁸ General Comment No 7 paras 5 and 7.

³⁹ General Comment No 7 par 10. Article 2(2) of the ICESCR reads:

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁴⁰ General Comment No 7 par 8.

⁴¹ General Comment No 7 par 9.

⁴² General Comment No 7 par 13.

⁴³ General Comment No 7 par 14.

The CESCR stated that States Parties must ensure that appropriate procedural protection was available to those that stood to be affected because the observance of due process was pertinent in instances of forced evictions. States Parties are under an obligation to engage in genuine consultation with those that stand to be affected and must give them notice of and information on the proposed eviction before the eviction is conducted. States Parties must ensure that evictions are not carried out in inclement weather, at night or without the presence of government officials. States Parties must then ensure that legal assistance is available to persons who seek redress from the courts and that the remedies granted by the courts are respected.⁴⁴ In conclusion, the CESCR stated that States Parties must ensure that evictions do not result in individuals being rendered homeless or vulnerable to the violation of other human rights.⁴⁵

In 2007 the then Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari,⁴⁶ presented the Human Rights Council of the United Nations with a document containing certain principles and guidelines for development-based evictions. The United Nations subsequently adopted the *Basic Principles and Guidelines on Development-Based Evictions and Displacement*⁴⁷ ('*Basic Principles*'). The *Basic Principles* represent a further development of the *Comprehensive Human Rights Guidelines on Development-Based Displacements*⁴⁸ and is consistent with General Comment 4 and General Comment 7.⁴⁹ The *Basic Principles* aims to assist States Parties in developing policies and legislation to prevent forced evictions⁵⁰ that are pursued in the name of development.⁵¹ In addition

⁴⁴ General Comment No 7 par 15.

⁴⁵ General Comment No 7 par 16.

⁴⁶ Mr Kothari was the first person to be appointed in this capacity in 2000 and served as such until 2008 when his mandate ended. For more information on Mr Kothari see <http://www.ohchr.org/EN/Issues/Housing/Pages/MiloonKothari.aspx> (accessed on 18 March 2011). Mr Kothari was succeeded by Ms Raquel Rolnik who is currently the Special Rapporteur. For more information on Ms Rolnik see <http://www.ohchr.org/EN/Issues/Housing/Pages/RaquelRolnik.aspx> (accessed on 18 March 2011).

⁴⁷ UN doc A/HRC/4/18.

⁴⁸ UN doc E/CN.4/Sub.2/1997/7, annex.

⁴⁹ *Basic Principles* par 3.

⁵⁰ *Basic Principles* par 4 defines "forced evictions" as

"acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection."

⁵¹ *Basic Principles* par 8.

to identifying certain general obligations,⁵² the *Basic Principles* also included detailed obligations on what should happen prior to,⁵³ during⁵⁴ and immediately after⁵⁵ development-based evictions.

4 2 1 3 Conclusion

Article 11(1) of the ICESCR, together with General Comment 4 and General Comment 7, provide the normative framework within which the right to housing must be understood and interpreted. Together they emphasise that there is a fundamental link between the right to housing and all other human rights and that a violation of the former will inevitably involve violations of the latter. It is therefore inappropriate to limit the meaning of the right to housing because it affects so many areas of human existence. The scope of the right to housing should therefore be comprehensive enough for certain elements of its adequacy to be identified and to serve as a benchmark for evaluating the measures States Parties have adopted in fulfilment of their obligations. The *Basic Principles* constitute soft international law and could develop into binding customary international law obligations for South Africa. It is clear that States Parties must adopt a national housing policy which caters specifically for vulnerable members and groups in society. Such a policy must be concretised in legislation that gives effect to the right to housing and provides adequate procedural and substantive safeguards against abuses of power and forced evictions. In this regard the reasons for forced evictions must satisfy a high level of justification and should only be carried out in strict compliance with the abovementioned safeguards and under close supervision of government functionaries.

4 2 2 The organising framework

The Constitutional Court has an obligation to develop the normative and substantive content of the right of access to adequate housing. This obligation flows firstly, from the fact that the Constitutional Court may only hear constitutional matters and issues that

⁵² *Basic Principles* paras 11-36.

⁵³ *Basic Principles* paras 37-44.

⁵⁴ *Basic Principles* paras 45-51.

⁵⁵ *Basic Principles* paras 52-58.

are connected with those constitutional matters.⁵⁶ Whether people have access to adequate housing and whether they will suffer hardship as a result of an eviction are manifestly constitutional issues. Secondly, all courts are instructed to interpret the rights in the Bill of Rights in a manner that will promote the values of human dignity, equality and freedom.⁵⁷ To my mind any eviction order in terms of which people are evicted from their homes and relocated to a distant place that is granted without engagement with what it means to those people to have a place that they can call home will be less likely be just and equitable. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*⁵⁸ ('*Jaftha*'), Mokgoro J held that the ability to call a place home had the potential to be "the most empowering and dignifying human experience" even under the most basic circumstances.⁵⁹

It is instructive to consider that the interpretive approach for section 26 of the Constitution requires courts to interpret the right in its textual setting.⁶⁰ This requires courts to acknowledge the interrelated nature of all the rights in the Bill of Rights, but also to consider the relationship of section 26 with other provisions in the remainder of the Constitution. The discussion below will show that all the constitutional, legislative, policy and jurisprudential foundations for giving substantive content to the right of access to adequate housing are in place. All that is required to actually give substantive content to the right is to identify and appropriately describe an organising framework for bringing all these pieces together under section 26(1) of the Constitution.

The *White Paper on Housing*⁶¹ ('*White Paper*') confirmed that such an organising framework could form the basis from which substantive content can be given to the right of access to adequate housing. The *White Paper* describes the national housing vision as follows:

⁵⁶ Section 167(3)(b) of the Constitution.

⁵⁷ Section 39(1)(a) of the Constitution.

⁵⁸ 2005 (2) SA 140 (CC).

⁵⁹ *Jaftha* par 39. See also Chaskalson A "Human dignity as a foundational value of our constitutional order" (2000) 16 *SAJHR* 193-205 and Liebenberg S "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1-31.

⁶⁰ *Grootboom* par 23.

⁶¹ GG 354 GN 1376 of 23 December 1994.

“Housing is defined as a variety of processes through which habitable, stable and sustainable public and private residential environments are created for viable households and communities. This recognises that the environment within which a house is situated is as important as the house itself in satisfying the needs and requirements of the occupants. Government strives for the establishment of viable, socially and economically integrated communities, situated in areas allowing convenient access to economic opportunities as well as health, educational and social amenities, within which all South Africa’s people will have access on a progressive basis to: A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; and potable water, adequate sanitary facilities including waste disposal and domestic electricity supply.”⁶²

The best way to give substantive content to the right of access to adequate housing would be to use abovementioned characteristics that the CESCR identifies in General Comment 4 as an interpretive guide. Housing would then be “adequate” if it provides security of tenure and certain services; is affordable, habitable and accessible; is located in close proximity to social facilities; and is culturally adequate.⁶³ The following paragraphs will show that it is possible to give substantive content to the right in this manner by simply adopting the characteristics that the Committee identified as an organising framework.

Security of tenure, the first characteristic of adequate housing, is underpinned by section 25(6) of the Constitution.⁶⁴ This characteristic is flexible because it provides for various types of security of tenure⁶⁵ that range from community care and emergency housing⁶⁶ on the weaker side to social housing⁶⁷ and ownership on the stronger side. In between these options there is shelter care, transitional housing and communal housing. Giving content to the right by identifying security of tenure as a characteristic

⁶² *White Paper 21*.

⁶³ General Comment No 4 par 8.

⁶⁴ Section 25(6) of the Constitution states that “[a] person or community whose tenure of land is legally insecure as a result of past discriminatory laws of practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

⁶⁵ Development Action Group “Housing ladder for vulnerable people” (2010) 7(1) *Urban Land Matters* 8 provides a graphic illustration of the range of tenure option that is available.

⁶⁶ See section 2 2 2 in chapter 3 for a discussion of Chapter 12 of the National Housing Code.

⁶⁷ The legislature recently enacted the Social Housing Act 16 of 2008. The preamble of this Act acknowledges that “there is a dire need for affordable rental housing for low to medium income households which cannot access rental housing in the open market.” The preamble further states that the roles and responsibilities of all three spheres of government are to “promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions” which will ensure, interestingly, “the elimination and prevention of slums and slum conditions.”

would not be a rigid or inflexible approach as it provides a court with a wide range of tenure options to have regard to when considering the current living conditions of the unlawful occupiers compared to what they may be subjected to in the event of an eviction.

Access to basic municipal services, the second characteristic of adequate housing, is underpinned by sections 27(1)(b)⁶⁸ and 152(1)(b),⁶⁹ read with schedule 4B⁷⁰ and 5B,⁷¹ of the Constitution. This characteristic too is flexible because it merely identifies a number of basic municipal services that local government must provide without specifying the precise quantity or quality of the service to be provided. Giving content to the right by identifying the basic municipal services that local government must provide as a characteristic would provide a court with a wide menu of service options from which to choose when considering the current living conditions of the unlawful occupiers compared to what they may be subjected to in the event of an eviction.

Accessibility, the third characteristic of adequate housing, is underpinned by section 152(1)(d) of the Constitution.⁷² It can be argued that this characteristic requires that housing should be financially accessible. This creates a link with affordability, the fourth characteristic of adequate housing, which is underpinned by section 26(2) of the Constitution. It can be argued further that accessibility also incorporates the requirement that housing be physically accessible. This creates a link with habitability, the fifth characteristic of adequate housing, which is also underpinned by section 152(1)(d) of the Constitution. Habitability as a characteristic of adequate housing is supported by

⁶⁸ Section 27(1)(b) of the Constitution affords everyone the right to have access to “sufficient food and *water*” (emphasis added).

⁶⁹ Section 152(1)(b) of the Constitution states that it is one of the objects of local government “to ensure the provision of services to communities in a sustainable manner”.

⁷⁰ The range of basic municipal services that a municipality should provide includes, in terms of schedule 4B of the Constitution, electricity and gas reticulation; municipal health services; municipal public transport; municipal public works; stormwater management systems in built-up areas; and water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.

⁷¹ Schedule 5B of the Constitution adds cleansing; local amenities; municipal parks and recreation; municipal roads; refuse removal, refuse dumps and solid waste disposal; and street lighting.

⁷² Section 152(1)(d) of the Constitution states that it is an object of local government “to promote a safe and healthy environment”.

section 20(1) of the Health Act 63 of 1977⁷³ and sections 12⁷⁴ and 17(1)⁷⁵ of the National Building Regulations and Building Standards Act 103 of 1977.

Location, the sixth characteristic of adequate housing, has no direct constitutional or statutory provision counterpart. However, it can be argued that section 26 itself incorporates this characteristic because the history of forced evictions in South Africa requires courts to redress the spatial apartheid that the plethora of discriminatory legislation created.⁷⁶ Location as a characteristic of adequate housing has featured in a number of recent eviction cases.⁷⁷ While it appears clear that this characteristic will not allow unlawful occupiers to dictate where they want to live, it affords courts the possibility to engage with the proximity of housing to employment opportunities, educational facilities, recreational facilities and other social amenities. Culturally appropriate housing, the seventh characteristic of adequate housing, is underpinned by sections 30⁷⁸ and 31⁷⁹ of the Constitution. This characteristic of adequate housing

⁷³ Section 20(1) of the Health Act 63 of 1977 reads:

“Every local authority shall take all lawful, necessary and reasonably practicable measures - (a) to maintain its district at all times in a hygienic and clean conditions; (b) to prevent the occurrence within its district of - (i) any nuisance; (ii) any unhygienic conditions; (iii) any offensive condition; or (iv) any other condition which will or could be harmful or dangerous to the health of any person within its district or the district of any other local authority, or, where a nuisance or condition referred to in subparagraphs (i) to (iv), inclusive has so occurred, to abate, or cause to be abated, such nuisance, or remedy, or cause to be remedied, such condition, as the case may be;”

⁷⁴ Section 12 of the National Building Regulations and Building Standards Act 103 of 1977 empowers a local authority to issue a notice to the owner of a building, land or earthwork to demolish or alter it in a manner that it will no longer be dilapidated or in a state of disrepair; or to secure the building, land or earthwork in a manner that it will no longer show signs of being dangerous or of becoming dangerous.

⁷⁵ Section 17(1) of the National Building Regulations and Building Standards Act 103 of 1977 empowers the Minister to make regulations that provide detailed guidelines about the minimum requirements that a building or structure must meet during its construction.

⁷⁶ See section 2.2 in chapter 2 for a discussion of the rural land tenure measures that systematically deprived black people from acquiring land and forced them into oppressive labour relationships on white farms. See section 2.3 in chapter 3 for a discussion of the urban land measures that regulated the access of black people to white urban areas.

⁷⁷ See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W) par 20; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) par 254; and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) par 77, Order 5(4).

⁷⁸ Section 30 of the Constitution states that “[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

⁷⁹ Section 31 of the Constitution reads:

“(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community - (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic

affords courts the possibility to engage with the intangible aspects of the right of access to adequate housing and the affective value a house has as a home.

All the South African courts will be able to have an initial principled engagement with the purpose and underlying values of the right of access to adequate housing if the Constitutional Court adopted abovementioned organising framework to give substantive content to section 26(1) of the Constitution. This will enable courts to follow the classic model of constitutional adjudication where they first delineate the scope of the right concerned and establish whether the right has been infringed before they consider whether the limitation of the right can be justified. This will ensure that the adjudication of the right of access to adequate housing does not occur in a normative vacuum.⁸⁰ All courts in South Africa will furthermore be in a position to satisfy their obligation to consider international law when interpreting the right of access to adequate housing because they will be able to draw on the international human rights dialogue on the adequacy of housing.

In practice the organising framework for giving substantive content to section 26(1) of the Constitution will afford people who seek the protection of the right of access to adequate housing an opportunity to articulate their housing needs in terms of the specific characteristics that are indicative of adequacy. Courts will be able to use this organising framework to evaluate the reasonableness of legislative and other measures in terms of the model of reasonableness review. Put differently, courts will be better placed to evaluate whether the government is succeeding in its goal of facilitating the progressive realisation of the right of access to adequate housing because they will have a clear indication of what it means to have access to adequate housing.

Unlawful occupiers will furthermore be able to use this organising framework to argue that an eviction will be unjust and inequitable. The unlawful occupiers would be able to argue that the emergency or temporary alternative accommodation that the government proposes to make available will provide them with less security of tenure, access to fewer services, is relatively more inappropriate for human habitation, inaccessible, unaffordable and far removed from their livelihood strategies. This is a

associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

⁸⁰ Liebenberg *Socio-Economic Rights* 175.

dramatic change from the position under the common law of evictions where an owner could evict squatters in terms of the *rei vindicatio* without any regard for the personal circumstances of the squatters or the severe hardship that accompanied a forced eviction.

While the characteristics that underpin the organising framework for giving substantive content to the right of access to adequate housing originate in international law, the elements that sustain its transplantation into South African law flow from the Constitution and the statutory obligations of local government. The Constitution and the statutory obligations of local government stand at the centre of three further developments in the law of evictions that require further elaboration.

What remains is to see what interpretive guidance South African courts can get from the three regional human rights systems on the meaning and content of adequate housing.

4 3 Interpretive guidance on the adequacy of housing

4 3 1 The Convention for the Protection of Human Rights and Fundamental Freedoms

4 3 1 1 Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms⁸¹ ('ECHR') was adopted by the Council of Europe to respond to the atrocities committed in Europe during World War II; to instil common values through regional integration; and to ensure the unity of and bring the non-Communist countries of Europe together within a common ideological framework against the Communist threat.⁸²

Article 8 of the ECHR provides everyone with a right to respect for their private and family life, their home and correspondence and is the foundational provision to be considered in the context of the right to housing and evictions. Article 8 of the ECHR reads:

⁸¹ 213 UNTS 221. The Convention was adopted on 4 November 1950 and came into force on 3 September 1953. As on 15 July 2011 the Covenant had 47 ratifications. See <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> (accessed on 15 July 2011).

⁸² Steiner HJ, Alston P and Goodman R *International Human Rights in Context - Law, Politics, Morals* (2008) 933.

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The European Court of Human Rights⁸³ (‘ECtHR’) has had the opportunity to interpret the scope of this right in a number of cases where it was alleged that the United Kingdom⁸⁴ had unfairly discriminated against gypsies/travellers⁸⁵ by making it nearly impossible to obtain planning permission for the stationing of a caravan on land in terms of the regulatory framework for land use. In all these cases the ECtHR found that the home and/or the private and family life of the gypsies/travellers were at issue and that the current regulatory framework constituted an interference that was in accordance with the law. All the cases therefore turned on the ECtHR’s interpretation of whether this interference was necessary in a democratic society. In this regard the ECtHR recalled that

⁸³ The European Court of Human Rights, in its current guise, replaced and superceded the two former supervisory bodies, the European Court of Human Rights that was established in 1959 and the European Commission of Human Rights, of the ECHR. The European Court of Human Rights consists of 47 judges (article 20 of the ECHR) of high moral character who serve in their personal capacity (section 21 of the ECHR) for a six year term and may be re-elected (article 23 of the ECHR). Appeals can be lodged within the ECtHR from a Committee (court of three judges), to a Chamber (court of seven judges) and to the Grand Chamber (court of seventeen judges).

⁸⁴ The United Kingdom incorporated the ECHR into its legal system with the adoption of the Human Rights Act 1998 (royally assented to on 9 November 1998 and came into force on 2 October 2000). Where it is not possible for judges to interpret Acts of Parliament in conformity with the ECHR (section 3(1) of the Act), a declaration of incompatibility must be issued by the court which states the nature of the incompatibility (section 4 of the Act). However, this does not invalidate the Act of Parliament, but permits its amendment in terms of a fast-track procedure (section 10 of the Act).

⁸⁵ Section 16 of the Caravan Sites Act 1960 defines gypsies as “persons of nomadic habit of life, whatever their race or origin, but does not include members of an organised group of travelling showmen, or of persons in travelling circuses, travelling together as such.” Home R “Gypsies and travellers in the United Kingdom: Planning, housing and human rights in a changing legal regulatory framework” (2009) 20 *Stell LR* 533-550 537 (‘Home “Gypsies and travellers”’) explains that judicial interpretations of the definition has significantly reduced its scope with the effect that it has become very difficult to claim Gypsy status for the purpose of getting planning permission. He adds that these interpretations have resulted in complex judicial reasoning to differentiate between “new age” travellers, Irish travellers, travelling show people and “settled” gypsies/travellers. Currently Planning Circular 01/06 defines “gypsies and travellers” as “[p]ersons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family’s or dependant’s educational or health needs or old age have ceased to travel temporarily or permanently, but excluding members of an organised group of travelling show people or circus people travelling together as such.”

“[a]n interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention.”⁸⁶

The ECtHR conceded that a margin of appreciation must be afforded to the United Kingdom because principle dictates that it is better placed to evaluate the local needs and conditions.⁸⁷ However, the ECtHR noted that this margin of appreciation will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.⁸⁸ The ECtHR explained that it had to accord the United Kingdom a wide margin of appreciation in cases concerning the implementation of planning policies because it required the weighing of multitude local factors⁸⁹ which it was not well equipped to challenge. However, the ECtHR added that the availability of procedural protections to individuals would be determinative in evaluating whether a State Party remained within its margin of appreciation when it established the regulatory framework that is capable of interfering with the enjoyment of a right in the Convention.⁹⁰

The Town and Country Planning Act 1990 (‘Planning Act’) establishes the regulatory framework for the granting of planning permission in the United Kingdom. The Planning Act requires gypsies/travellers to apply for planning permission to station their caravans on land that they purchased.⁹¹ The local authority within whose area of jurisdiction the

⁸⁶ See *Lustig-Prean and Beckett v United Kingdom* (2000) 39 EHRR 548 paras 80-81; *Leander v Sweden* (1987) 9 EHRR 433 par 59; *Miailhe v France* (1993) 16 EHRR 332 par 36; *Buckley v United Kingdom* (1997) 23 EHRR 101 par 74 (‘*Buckley*’); *Chapman v United Kingdom* (2001) 33 EHRR 18 par 90 (‘*Chapman*’); and *Connors v United Kingdom* (2005) 40 EHRR 9 par 81 (‘*Connors*’).

⁸⁷ See *Dudgeon v United Kingdom* (1982) 4 EHRR 149 par 52; *Gillow v United Kingdom* (1989) 11 EHRR 335 par 55; *Chapman* par 91; and *Connors* par 82.

⁸⁸ See *Dudgeon v United Kingdom* (1982) 4 EHRR 149 par 52; *Gillow v United Kingdom* (1989) 11 EHRR 335 par 55; *Chapman* par 91; and *Connors* par 82.

⁸⁹ See *Buckley* par 75; *Chapman* par 92; and *Connors* par 82.

⁹⁰ See *McMichael v United Kingdom* (1995) 20 EHRR 205 par 87; *Buckley* par 76; *Chapman* par 92; and *Connors* par 83.

⁹¹ Section 57(1) of the Planning Act requires anyone to obtain planning permission if they want to carry out any development of land. Section 55(1) of the Planning Act defines “development” as “the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.” *Restormel Borough Council v Secretary of State for the Environment and Rabey* [1982] JPL 785 and *John Davies v Secretary of State for the*

land falls is empowered to grant or refuse planning permission⁹² with reference to the development plan of the area and “any other material considerations.”⁹³ The local authority regularly refuses to grant planning permission because the land is situated in a Green Belt area that is sensitive to development.

The Planning Act empowers the gypsies to take this decision on appeal to the Secretary of State for the Environment,⁹⁴ who is empowered to consider the application as if it had been made to him in the first instance.⁹⁵ The Secretary is empowered to appoint an Inspector to hear arguments from both the gypsies/travellers and the local authority on the merits of the application for planning permission.⁹⁶ The Inspector will also visit the site to determine whether, in general, the aesthetic impact of granting planning permission to station caravans on the land can be ameliorated by planting hedges or erecting screens and, specifically, whether it would be appropriate to grant the planning permission given the designation and sensitivity of an area for development. In this regard the inspector must consider the policy guidance⁹⁷ contained in Circular 28/77,⁹⁸ Circular 1/94⁹⁹ and Circular 18/94.¹⁰⁰

Environment and South Hertfordshire District Council [1989] JPL 601 confirmed that a change in the use of land for the stationing of a caravan can constitute a development.

⁹² Section 58(1) of the Planning Act envisages that planning permission may be granted (a) by a development order or (b) by the local authority (or, in the cases provided in this Part, by the Secretary of State) on application to the authority in accordance with a development order.

⁹³ Section 70(2) of the Planning Act. Home “Gypsies and travellers” 546 notes that gypsies/travellers have gradually been accorded special policy consideration for planning permission. He ascribes this to the fact that planning decisions are primarily being based on the policies in the development plan rather than other material considerations.

⁹⁴ Section 78(1) of the Planning Act.

⁹⁵ Section 79(1) of the Planning Act.

⁹⁶ Section 79(2) of the Planning Act.

⁹⁷ Home “Gypsies and travellers” 547 notes that these policy guidance documents encourages local authorities to employ criterion-based policies that take into consideration the proximity of facilities and services, whether the development will have a minimal impact on amenities, whether the site has acceptable access for vehicles, whether it is possible to erect screens or to landscape the development in a manner that ameliorates the aesthetic impact of the development, whether the site can be provided with municipal services, whether the site is located in a protected areas and what the impact of the development will be on the environment and countryside.

⁹⁸ Dated 25 March 1977.

⁹⁹ Dated 5 January 1994. This circular was issued to provide policy guidance on whether the special accommodation needs of gypsies needs to be taken into account as a material consideration of planning decisions after the repeal of Circular 57/78 (dated 15 August 1978) which provided policy guidance on Part II of the Caravan Sites Act 1968. Section 6(1) of this Act required local authorities “to exercise their powers under section 24 of the Caravan Sites and Control of Development Act 1960 (provision of caravan sites) so far as may be necessary to provide adequate accommodation for gypsies residing in or resorting to their area.”

The Inspector will make a recommendation to the Secretary on whether planning permission should be granted or refused. The Secretary often adopts the recommendation made by the Inspector and frequently refuses to grant planning permission for the stationing of caravans on the site. In that event the gypsies/travellers may make a final appeal to the High Court for review of the decision of the Secretary.¹⁰¹

In the cases discussed below the complainants alleged that the current regulatory framework unfairly discriminates against gypsies/travellers because it does not provide for appropriate consideration of their rights, given the shortage of caravan sites and the apparent lack of responsiveness by the United Kingdom to this need.¹⁰² The complainants accepted the need for the regulation of land use but asserted that this legitimate State action has had a disproportionate socio-economic impact upon them and that either the regulatory framework should be reconfigured to enable them to accommodate themselves or that the ECHR should oblige the United Kingdom to provide them with accommodation.¹⁰³

4 3 1 2 Case law

4 3 1 2 1 *Buckley*

During 1988 the applicant in *Buckley* moved with her two small children onto a site where her sister was granted temporary planning permission for two caravans.¹⁰⁴ The

¹⁰⁰ Dated 23 November 1994. This circular instructed local authorities to tolerate unauthorised gypsy encampments by taking steps to control unbearable levels of nuisance (par 6) and to prevent encampments becoming a health hazard (par 8).

¹⁰¹ Section 288(1) of the Planning Act.

¹⁰² Home "Gypsies and travellers" 544-545 notes that the need for additional residential caravan pitches and transit place were conservatively estimated during 2003 at 2000 and 2500 respectively. This would require the provisioning of approximately 900 additional plots per annum for five consecutive years. Between 2003 and 2005 the United Kingdom could only deliver an additional 140 plots per year. The Department of Communities and Local Government has therefore injected £ 56m for the financial years of 2006-2008 and a further £ 97m for the financial years of 2008-2011 to achieve this goal.

¹⁰³ Clements L and Simmons A "European Court of Human Rights - Sympathetic unease" in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 409-427 414 ('Clements and Simmons "European Court of Human Rights"'). Similar developments have occurred in the area of landlord and tenant law. See *Harrow London Borough Council v Qazi* [2003] UKHL 43; *Kay and Others v Lambeth London Borough Council*, *Leeds City Council v Price and Others* [2006] UKHL 10 (HL) and *McCann v United Kingdom* (2008) 46 EHRR 42. The cases are discussed in Bright S *Landlord and Tenant Law in Context* (2007) 272-284, 610-613 and 670-672; Fox L *Conceptualising Home - Theories, Laws and Policies* (2007) 481-517; and Gray K and Gray SF *Elements of Land Law* (2009) 125-131 ('Gray and Gray Elements').

¹⁰⁴ Section 91 of the Planning Act.

applicant decided to abandon the itinerant lifestyle¹⁰⁵ that she had maintained until then because she found it difficult being on the move constantly while she was expecting her third child. Later that year, the applicant acquired a small piece of land toward the back of her sister's land with a view to establishing a home so that the two eldest children could start attending school. The applicant then applied, retrospectively, for planning permission to station three caravans on the land. On two occasions, in 1989 and in 1994, the Secretary refused to grant the applicant planning permission¹⁰⁶ because the Inspector found that the applicant's site extended further into the open countryside than was permitted and therefore constituted a violation of the local development plan to protect the countryside from any avoidable development.¹⁰⁷ After each refusal the applicant was informed in writing, during 1992 and 1994, that caravan pitches were available at the County Council's official gypsy caravan park approximately 700 metres from her land in Meadow Drove.¹⁰⁸ The caravan park consisted of 15 pitches each with a brick building on it. The buildings contained a kitchen and sanitary facilities and could accommodate two caravans and two vehicles each.¹⁰⁹

The applicant argued that the planning measures had a disproportionate effect on her lifestyle as a gypsy because it prohibited her from providing a safe and stable environment for her children while they were attending school.¹¹⁰ The applicant argued further that she would much rather plant vegetation in front of her well-kept site to maintain the aesthetics of the countryside¹¹¹ than consider moving to the official caravan park where the safety of her family would be in danger on account of various

¹⁰⁵ In *Wrexham County Borough v National Assembly of Wales, Michael Berry and Florence Berry* [2004] JPL 65 the court held that a gypsy would lose her gypsy status if she no longer maintained a "nomadic habit of life" by retiring from travelling for reasons that include ill health, old age or a desire to abandon the itinerant way of life. The court further held that the test for regaining the gypsy status would be to have "an honest and realistically realisable intention" of taking up an itinerant way of life in the near future. Home "Gypsies and travellers" 540 notes that in the subsequent case of *O'Connor v SSTLG and Bath & North East Somerset Council* [2002] EWHC 2649 the court found that the specific history of travelling and the preference of living in a house would be determinative of whether the gypsy way of life had been surrendered in a particular case.

¹⁰⁶ *Buckley* paras 17 and 23.

¹⁰⁷ *Buckley* paras 16 and 22.

¹⁰⁸ *Buckley* par 25.

¹⁰⁹ *Buckley* par 24.

¹¹⁰ *Buckley* par 64.

¹¹¹ *Buckley* par 65.

instances of breaches of the peace, crime and violence.¹¹² The applicant added that she would not be able to afford a pitch at a private caravan site.¹¹³

The majority of the ECtHR found that the applicant was entitled to the protection afforded by article 8 because she had established a home¹¹⁴ for her children on the land that she acquired lawfully.¹¹⁵ According to the majority the enforcement measures taken in terms of the Planning Act¹¹⁶ were in accordance with the law¹¹⁷ and pursued the legitimate aims listed in article 8(2) of the ECHR.¹¹⁸ The case therefore turned on the question whether there were adequate procedural safeguards available to the applicant to challenge the decision not to grant her planning permission. In this regard the majority held that the regulatory framework for planning permission provided comprehensively for appeals to the Secretary and for judicial review by a High Court when local authorities refuse to grant planning permission.¹¹⁹ The majority also held that the reasonable concerns of the applicant about the suitability of the official caravan park could not force a construction of article 8 that would allow for an individual to express a preference about the location of her place of residence and for that preference to override the general interest of the public¹²⁰ in preserving the rural landscape. In conclusion, the majority held that the applicant's predicament was properly considered in terms of the regulatory framework.¹²¹

In a partially dissenting opinion Judge Repik found that the majority erred in holding that there was no violation of article 8. Judge Repik noted that the majority failed to appreciate that the government disputed whether the applicant legally established a home that could attract the protection of article 8.¹²² The fact that the government did not consider the applicant's home worthy of protection made it impossible for the Inspectors to consider her interests in any real terms when they considered the

¹¹² *Buckley* par 65.

¹¹³ *Buckley* par 66.

¹¹⁴ *Gillow v United Kingdom* (1989) 11 EHRR 335 paras 46 and 55.

¹¹⁵ *Buckley* par 54.

¹¹⁶ See section 172 of the Planning Act.

¹¹⁷ *Buckley* par 61.

¹¹⁸ *Buckley* par 62.

¹¹⁹ *Buckley* par 79.

¹²⁰ *Buckley* par 81.

¹²¹ *Buckley* par 84.

¹²² *Buckley* page 134.

guidelines for the application of planning policy to gypsies.¹²³ As such, the Inspectors could not have considered adequately the importance of article 8; the impact that the subsequent eviction would have on the applicant's family; or the fact that the applicant's land was not situated in unspoilt countryside or on land that was subject to special protection.¹²⁴ In another partially dissenting opinion Judge Lohmus also found that the majority erred in holding that there was no violation of article 8 because it failed to appreciate that there was a need to protect the cultural heritage and identity of gypsies/travellers¹²⁵ and that this need could warrant different treatment to preserve their heritage and identity.¹²⁶

In a further dissenting opinion Judge Pettiti found that the majority erred in holding that there was no violation of article 8 or article 14.¹²⁷ Judge Pettiti noted that the majority failed to appreciate the fact that the cumulative effect of the administrative rules that gypsies/travellers had to comply with before they could apply for planning permission to station a caravan on land made it impossible for an itinerant family to make arrangements for its accommodation and social integration.¹²⁸ As a result, any attempt to comply with the requirements of the local authority or circulars forced families to contravene other rules. Judge Pettiti accordingly found that the majority erroneously limited the scope of their analysis to places that could attract the protection of a home in terms of article 8 of the ECHR.¹²⁹ He further held that the majority erroneously accepted that the government pursued legitimate purposes through the strict application of its planning policy.¹³⁰ This acceptance extended the scope of the margin of appreciation

¹²³ *Buckley* page 135.

¹²⁴ *Buckley* page 136.

¹²⁵ Council of Europe Committee of Ministers Resolution (75) 13.

¹²⁶ *Buckley* page 136.

¹²⁷ Article 14 of the ECHR reads:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

¹²⁸ *Buckley* page 137.

¹²⁹ *Buckley* page 139.

¹³⁰ *Buckley* page 139.

too far in this case.¹³¹ Finally, he also found that the official caravan park was not a viable alternative for the applicant.¹³²

4 3 1 2 2 *Chapman*

On 18 January 2001 the Grand Chamber of the ECtHR handed down five judgments that concerned planning and enforcement measures that were taken against gypsies. In all five judgments the ECtHR held that there was no violation of articles 6,¹³³ 14 or 1 of Protocol 1;¹³⁴ with the majority¹³⁵ further holding that there was no violation of article 8. In all five cases the minority¹³⁶ held that there was a violation of article 8 because they found no reason why the interference with the respective applicants' homes was necessary in a democratic society. *Chapman* is considered to be the leading judgment in this series because in each of the other four judgments that were delivered on the same day the minority simply refers to their joint dissenting opinion in *Chapman*. The discussion below will therefore only engage with the *Chapman* judgment because the

¹³¹ *Buckley* page 141.

¹³² *Buckley* page 139.

¹³³ Article 6(1) of the ECHR provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

¹³⁴ Article 1 of Protocol 1 provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

¹³⁵ The majority comprised the following judges: Mr Wildhaber (president), Mr Costa, Mr Küris, Mr Türmen, Mr Butkevych, Mrs Greve, Mr Baka, Mrs Botoucharova, Mr Ugrekheidze and Lord Justice Schiemann.

¹³⁶ The minority comprised the following judges: Mr Pastor Rodruejo, Mr Bonello, Mrs Tulkens, Mrs Stráznická, Mr Lorenzen, Mr Fishbach and Mr Casadevall. In all five cases Judge Bonello wrote a separate concurring judgment in which he took issue with whether the interference with article 8, which he “grudgingly accepted”, was in accordance with the law. As such Judge Bonello found that the constitutional principle of “clean hands” precluded the United Kingdom from claiming the protection of the law.

facts in *Beard v United Kingdom*,¹³⁷ *Coster v United Kingdom*,¹³⁸ *Lee v United Kingdom*¹³⁹ and *Smith v United Kingdom*¹⁴⁰ are the same in all material terms.

In *Chapman* the applicant, a married gypsy woman with four children, purchased a piece of land with the intention of living on it in her caravans. In 1986 the Three Rivers District Council refused her application for retrospective planning permission to station her caravans on the land and served her with enforcement notices.¹⁴¹ On appeal to the Secretary an Inspector found that the national and local planning policies must override the applicant's interest because her land fell within a metropolitan Green Belt area that was particularly vulnerable to development pressure. However, the Inspector recommended that the applicant be afforded fifteen months to relocate to another site since there were no official or private caravan parks in the District.¹⁴² The applicant remained on her land upon the effluxion of this period because she had nowhere else to go and subsequently applied for planning permission for a bungalow.¹⁴³ This was again refused and the applicant received fines of £ 150 and £ 550 for failure to comply with the enforcement order.¹⁴⁴ This forced the applicant and her family to resume an itinerant lifestyle¹⁴⁵ while another application for planning permission for a bungalow was lodged and then refused.¹⁴⁶ On another appeal to the Secretary the Inspector concluded that the proposed developments did not fall within one of the categories of appropriate development in the Green Belt area and that there were no special circumstances in this case that could outweigh the strong presumption against unsuitable development in the Green Belt area.¹⁴⁷ The Inspector added that, even if special circumstances existed,

¹³⁷ (2001) 33 EHRR 19.

¹³⁸ (2001) 33 EHRR 20.

¹³⁹ (2001) 33 EHRR 29.

¹⁴⁰ (2001) 33 EHRR 33.

¹⁴¹ *Chapman* par 13.

¹⁴² *Chapman* par 14.

¹⁴³ *Chapman* par 15.

¹⁴⁴ Section 179(1) of the Planning Act makes it an offence to ignore the instructions contained in an enforcement order and section 179(2) makes any person that was convicted in terms of subsection (1) liable to pay a fine.

¹⁴⁵ *Chapman* par 15.

¹⁴⁶ *Chapman* par 16.

¹⁴⁷ It is for this reason that *PPG 2* creates, in addition to the general development policies, a general presumption against inappropriate development within green belt areas (par 3.1) that can only be rebutted when the applicant can show that other considerations outweigh the harm that the environment will suffer if planning permission is granted (par 3.2).

the granting of planning permission would create a precedent for similar schemes that would be difficult to refuse in future.¹⁴⁸

The ECtHR held that the planning and enforcement measures taken against the applicant in terms of the Planning Act 1990 constituted an interference¹⁴⁹ that was in accordance with the law¹⁵⁰ and pursued the legitimate aim of protecting the rights of others through preservation of the environment.¹⁵¹ However, the ECtHR acknowledged that the interference with her home had widespread implications for the applicants because the occupation of her caravan formed an integral part of her culture and identity as a gypsy/traveller. Many gypsies/travellers increasingly settle on a specific place for extended periods of time under the pressure of development or of their own volition despite retaining the desire to maintain an itinerant lifestyle. An interference with the home of a gypsy/traveller therefore has a wider impact on her ability to continue conducting her private and family life according to the traditions of an itinerant minority.¹⁵²

The majority therefore acknowledged that the Framework Convention for the Protection of National Minorities¹⁵³ was indicative of an emerging international consensus amongst the contracting States of the Council of Europe. This consensus required the recognition of the special needs of minorities so that their security, identity and lifestyle could be protected in a manner that would ensure the preservation of a diverse cultural heritage for the whole community.¹⁵⁴ However, the majority noted that the failure to reach agreement on the implementation of the Framework Convention showed that the consensus was not sufficiently concrete¹⁵⁵ for it to overturn the precedent set in *Buckley* in accordance with its duty to be responsive to the changing conditions in Contracting States.¹⁵⁶ The impact of the Framework Convention is

¹⁴⁸ *Chapman* par 17.

¹⁴⁹ *Chapman* par 78.

¹⁵⁰ *Chapman* par 79.

¹⁵¹ *Chapman* par 82.

¹⁵² *Chapman* par 73.

¹⁵³ CETS no. 157. The Framework Convention was adopted on 1 February 1996 and came into force on 1 February 1998.

¹⁵⁴ *Chapman* par 93.

¹⁵⁵ *Chapman* par 94.

¹⁵⁶ *Cossey v United Kingdom* (1991) 13 EHRR 622 par 35. However, the minority disputed the authority of this case because it was decided before the reforms brought about by Protocol 11 came into operation.

therefore limited by *Buckley* to giving special consideration to the needs and demands of an itinerant lifestyle in the regulatory planning framework.¹⁵⁷ The majority therefore found that it was limited to an analysis of whether the particular circumstances of the case, and not the general situation in the United Kingdom, constituted a violation of article 8.¹⁵⁸

Against this background the majority found that the applicant did not lead a traditional itinerant gypsy lifestyle because she became sedentary when she settled on her land without the requisite planning permission to station caravans.¹⁵⁹ They also found that the applicant had the opportunity to make representations to the Inspectors about her particular personal circumstances.¹⁶⁰ The Inspectors furthermore gave special consideration to whether, when weighed against the need to protect the countryside from unnecessary encroachment, the location of her land and the efforts she made to mitigate the visual intrusion of her caravans on the quiet rural character of the area could be regarded as an exceptional circumstance.¹⁶¹

The majority noted that the applicant could take these decisions on judicial review to the High Court if she believed that the Inspectors did not take all the relevant circumstances into consideration or if they founded their decisions on irrelevant considerations.¹⁶² Finally, the ECtHR found that the applicant failed to provide the court with information that would have enabled it to consider whether the alternative sites that periodically became available in neighbouring counties would be suitable for her family.¹⁶³ The majority found that the regulatory planning framework provided the applicant with sufficient procedural safeguards¹⁶⁴ and that there was no violation of article 8.¹⁶⁵

This case therefore was not authority for the impact of the Framework Convention on the current conditions in the United Kingdom. See *Chapman* par O-I1.

¹⁵⁷ *Chapman* par 96.

¹⁵⁸ *Chapman* par 100.

¹⁵⁹ *Chapman* par 105.

¹⁶⁰ *Chapman* par 106.

¹⁶¹ *Chapman* paras 108 and 109.

¹⁶² *Chapman* par 110.

¹⁶³ *Chapman* par 111 and 112.

¹⁶⁴ *Chapman* par 114.

¹⁶⁵ *Chapman* par 116.

The minority held that the majority's characterisation of the obligations imposed by article 8 failed to appreciate that States may, through inaction, still be in violation of fundamental rights because the interferences caused by merely respecting a right was just as severe as those caused by inadequate measures to protect, promote and fulfil the right.¹⁶⁶ When determining whether an interference is "necessary in a democratic society" it would then be more appropriate to afford States a margin of appreciation which is curbed, especially in cases where a balance has to be struck between the individual interest of a gypsy and the collective interests of the community, by the current circumstances in a specific State.¹⁶⁷ The margin of appreciation of the United Kingdom should be restricted according to the emerging consensus contained in the Framework Convention to the extent that, in addition to refraining from discrimination, it may be necessary to require positive steps to be taken that will improve the lives of gypsies.¹⁶⁸

The minority also held that it was misguided to question, as the majority did, the applicant's commitment to a traditional itinerant gypsy lifestyle. The applicant, in accordance with established planning policy,¹⁶⁹ acquired a piece of land to station her caravans because, due to the legislatively reduced gypsy sites, it was impossible for her to obtain lawful accommodation on an official gypsy site.¹⁷⁰ The applicant's position was exacerbated by the fact that she faced the overwhelming task of persuading the local authority that her personal circumstances warranted special consideration in order to rebut the presumption against inappropriate development of the countryside. The result is that the regulatory framework is unable to afford any substantial weight to the housing interests of the applicant or her vested interest in preserving her cultural heritage and identity.¹⁷¹ It was therefore imprudent to hold that a narrow margin of appreciation in the discretionary enforcement of planning permission for environmental concerns would exclude gypsies from the planning framework. In the United Kingdom the systemic failure in the provision of authorised gypsy sites has already been patched up with

¹⁶⁶ *Chapman* par O-12.

¹⁶⁷ *Chapman* par O-14.

¹⁶⁸ *Chapman* par O-14.

¹⁶⁹ *Chapman* par O-17.

¹⁷⁰ *Chapman* par O-16.

¹⁷¹ *Chapman* par O-110.

official policy that required sympathetic application of planning policy with regard to gypsies.¹⁷² This claim loses further credence when compared to the reality that gypsies are often precluded, either through outright refusal or indirectly through exorbitant admission costs, from entering private residential sites - even on a seasonal or temporary basis.¹⁷³ It is furthermore inappropriate to misrepresent the housing interests of gypsies/travellers as a specific preference to stay at a location of their choosing without any regard to the resources at their disposal.¹⁷⁴ It is equally incongruous to hold that affording protection to a gypsy for establishing a home in the face of arduous planning bureaucracy would be discriminatory towards non-gypsies who are barred from building houses on their land in the same area.¹⁷⁵ The minority accordingly held that there was a violation of article 8 in this case because the local authority failed to ensure that gypsies/travellers had a practical and effective way of asserting their article 8 rights in accordance with their traditional lifestyle.¹⁷⁶

4 2 1 2 3 *Connors*

In *Connors* the applicant, a married gypsy man, occupied a plot in Cottingley Springs with his family in terms of a contractual licence¹⁷⁷ with the Leeds City Council. At the beginning of 2000 the applicant and his daughter, who also had a contractual licence to occupy a plot adjacent to that of the applicant with her husband, received notice to quit¹⁷⁸ as a result of various instances of anti-social behaviour in breach of their licence conditions.¹⁷⁹ The County Court granted an order for summary possession of the plots on the basis that the applicant and his daughter were trespassing.¹⁸⁰ Approximately one

¹⁷² *Chapman* par O-111.

¹⁷³ *Chapman* par O-112.

¹⁷⁴ *Chapman* par O-112.

¹⁷⁵ *Chapman* par O-114.

¹⁷⁶ *Chapman* par O-115.

¹⁷⁷ Clause 18 of the licence stated:

“No nuisance is to be caused by the occupier, his guests, nor any member of his family to any other person, including employees of the Council, the occupiers of any other plots on the Site, or occupiers of any land or buildings in the vicinity of the Site.”

See Gray and Gay *Elements* 1304-1316 on contractual licences.

¹⁷⁸ See Gray and Gray *Elements* 406-413. A notice to quit is a method terminating a lease or tenancy.

¹⁷⁹ *Connors* paras 14-16.

¹⁸⁰ *Connors* paras 18, 22 and 25. See Gray and Gray *Elements* 1260-1287 on trespass and privacy.

month later the Council obtained a warrant for possession¹⁸¹ which it executed a fortnight thereafter, during the early hours of the morning, with the assistance of officers of the police and the sheriff's office.¹⁸² The applicant then obtained permission to occupy a piece of land at Cottingley Drive where he was evicted alongside a group of unidentified gypsies.¹⁸³ The Council also applied for an injunction¹⁸⁴ against the applicant to prevent further trespassing at Cottingley Springs¹⁸⁵ which eventually brought about the dissolution of his marriage due to the stress caused by their insecure existence.¹⁸⁶

The United Kingdom argued that local authority gypsy sites required exemption from the provisions which afforded security of tenure to occupiers of other accommodation. The government argued that it needed a measure of flexibility to manage local authority sites if local authorities were required to cater for the special housing needs of gypsies/travellers.¹⁸⁷ The government argued that the power of summary eviction was a vital management tool which facilitated the speedy removal of troublemakers from the site and enabled other occupiers to cope with anti-social behaviour.¹⁸⁸

At the outset the ECtHR distinguished *Chapman* from this case because here the applicant was in lawful occupation of the plot and simply sought the procedural protections afforded to the occupiers of privately owned land and official local authority gypsy sites.¹⁸⁹ The applicant, like many other gypsies who are becoming ever more sedentary,¹⁹⁰ enjoyed this protection for thirteen years before he received a contractual

¹⁸¹ *Connors* par 27. A warrant for possession is an eviction order that is based on the applicant's stronger right to possession.

¹⁸² *Connors* par 28.

¹⁸³ *Connors* paras 31 and 32.

¹⁸⁴ See Gray and Gray *Elements* 1283 for the circumstances under which it may be appropriate to obtain injunctive relief.

¹⁸⁵ *Connors* par 34.

¹⁸⁶ *Connors* par 35.

¹⁸⁷ *Connors* par 87.

¹⁸⁸ *Connors* par 87.

¹⁸⁹ *Connors* par 86.

¹⁹⁰ Later in the judgment the ECtHR acknowledged the challenges that the apparent change in lifestyle of gypsies presented to local authorities when it stated that it

"would not underestimate the difficulties of the task facing the authorities in finding workable accommodation solutions for the gypsy and traveller population and accepts that this is an area in which national authorities enjoy a margin of appreciation in adopting and pursuing their social and housing policies. The complexity of the situation has, if anything, been enhanced by the apparent shift in habit in the gypsy population which remains nomadic in spirit if not in actual or constant practice. The authorities are being required to give special

licence to occupy the plot at Cottingley Springs. Local authority sites are therefore increasingly accommodating gypsies who are, perhaps uncharacteristically, settling down due to various reasons.

The ECtHR was not persuaded that local authorities used eviction by summary procedure as a means of ensuring that sites often became vacant or of deterring families from becoming long term occupants.¹⁹¹ The ECtHR noted that summary eviction proceedings were rarely used to control anti-social behaviour on local authority sites and that local authorities relied on a different range of powers to regulate it at other forms of accommodation because, in fact, they could only proceed to evict subject to independent court review of the justification for the measure.¹⁹² The ECtHR was not convinced that it would make the management of local authority gypsy sites unworkable if local authorities were required to establish reasons for evicting long-standing applicants as they were required to do in other instances.¹⁹³ The ECtHR also noted that the courts in the United Kingdom had, when they considered the professed lack of security of tenure by gypsies at local authority sites, found no violation of articles 8 or 14 of the Convention. The ECtHR found that the domestic courts reached these findings, despite articulating serious concerns about the current regime of evicting gypsies, because they did not want to encroach upon the functions of the legislature in seeking to resolve the complex issues surrounding the housing interests of gypsies/travellers.¹⁹⁴ The domestic courts furthermore accepted that the procedural protections that were in place could mitigate the impact of summary eviction proceedings.¹⁹⁵

However, the ECtHR found that the domestic courts failed to appreciate that a factual dispute - whether the applicant caused and could subsequently be held responsible for the nuisance caused by others at Cottingley Springs - existed between the applicant and the local authority. The ECtHR found that the procedural protections were inadequate because the local authority was not required to provide any substantive reasons for evicting the applicant. In the absence of any reasons for

consideration to a sector of the population which is no longer easy to define in terms of the nomadism which is the *raison d'être* of that special treatment" (par 93).

¹⁹¹ *Connors* par 88.

¹⁹² *Connors* par 89.

¹⁹³ *Connors* par 89.

¹⁹⁴ *Connors* par 91.

¹⁹⁵ *Connors* par 91.

evicting the applicant, judicial review would serve no purpose because it would not provide any opportunity for the examination of the facts in dispute between the parties.¹⁹⁶

4 3 1 3 Conclusion

The structure of the rights in the ECHR follow a classic theoretical understanding of fundamental rights, namely that there is a distinction between, on the one hand, the definition or scope of the right and, on the other hand, the justification for limiting the right. Article 8 of the ECHR is no exception to this understanding and therefore clearly states the right in subparagraph 1, while the reasons that may serve as legitimate limitations to this right are listed in subparagraph 2. The ECtHR generally follows this theoretical distinction between scope and limitation in its reasoning. However, in certain cases the ECtHR either ignores the definitional stage completely and proceeds to the limitation analysis or merges the two stages.¹⁹⁷ This is similar to the position in South Africa, where the Constitutional Court has consistently held that sections 26(1) and (2) of the Constitution must be read together and then proceeded to focus exclusively on the reasonableness of the measures that government adopted to give effect to the right of access to adequate housing.

The case law of the ECtHR discussed above is an example of how the court initially failed to pay sufficient attention to the definitional stage by simply accepting that article 8 was engaged. To a large extent this explains why its approach to the adjudication of these cases has focussed on the formalities of a proportionality review and a consideration of the extent of the State's margin of appreciation.¹⁹⁸

Chapman marked the beginning of a gradual change in the approach of the ECtHR because it explicitly recognised the need to afford special consideration to the rights and needs of gypsies/travellers in the regulatory framework for land use. The ECtHR recognised that the right to respect the home of gypsies/travellers requires positive action from the United Kingdom in awarding planning permission to station a caravan on

¹⁹⁶ *Connors* par 92.

¹⁹⁷ Gerards J and Senden H "The structure of fundamental rights and the European Court of Human Rights" (2009) 7 *J Con* 619-653 621.

¹⁹⁸ Clements and Simmons "European Court of Human Rights" 414.

the land that they lawfully acquired. The margin of appreciation that is accorded to States Parties has subsequently narrowed to take into account the emerging consensus amongst contracting States Parties that the rights and needs of gypsies/travellers require special protection.

However, local authorities have been slow to accord this special consideration to gypsies/travellers due to a lack of explicit policy guidance. Gypsies/travellers remain caught in a vicious circle of administrative bureaucracy from which it is difficult to escape because any attempt to do so involves either enduring the physical and psychological trauma of living in a confined space or undertaking protracted legal proceedings against a local authority. Home explains that

“[t]he process involves tactical manoeuvring by both sides, with the occupiers trying to achieve security on their land and improve their living conditions, and the council usually seeking to prevent the creation of new residential use rights in the countryside, or at least to circumscribe such rights as tightly as possible.”¹⁹⁹

The only way that gypsies/travellers will be able to escape this circle is for the ECtHR to develop the scope of the right to a home in the context of gypsies/travellers and to add depth to that determination with reference to the non-discrimination provision in article 14 of the ECHR.²⁰⁰ A close reading of the case law discussed above suggests that this development has already started. The ECtHR has already recognised that the right to a home includes the fact that a home must provide security of tenure²⁰¹ and that the home must be affordable.²⁰² The ECtHR has further recognised that a home must be habitable,²⁰³ accessible²⁰⁴ and located in a safe and healthy environment.²⁰⁵ Article 14 has similarly been developed in the context of the rights of gypsies/travellers to a home that accords with their social and cultural heritage.²⁰⁶

¹⁹⁹ Home “Gypsies and Travellers” 546.

²⁰⁰ See Sandland R “Developing a jurisprudence of difference: The protection of the human rights of travelling peoples by the European Court of Human Rights” (2008) 8 *HRLR* 475-516.

²⁰¹ See *Buckley* page 135 and *Connors* par 91. See also *Somerset CC v Frederick Isaacs* [2002] EWHC 1014; *R (Smith) v Barking and Dagenheim LB* [2002] EWHC 2400; and *Sheffield City Council v Smart* [2002] EWCA Civ 4.

²⁰² See *Buckley* page 135 and *Chapman* par 112.

²⁰³ See *Moldovan and Others v Romania* (No 2) (2007) 44 EHRR 16, *Marzari v Italy* (1999) 28 EHRR 175, *O'Rourke v United Kingdom* Application No 39022/97, *Lee* par 21 and *Chapman* par 112.

²⁰⁴ See *Chapman* par 97.

²⁰⁵ See *Buckley* page 135 and *Chapman* par 112.

²⁰⁶ See *Buckley* pages 135-136.

However, the jurisprudence of the ECtHR would be that much richer if it developed these characteristics of the right to a home under article 8(1) by engaging with its normative and substantive content in a systematic way, instead of simply accepting that the right is engaged before it probes the legitimacy of the reasons advanced to limit the right. South African courts can learn a great deal about the interpretation of the right to housing from the ECtHR's gradual development of article 8 by infusing a greater contextual dimension into the case law affecting the housing rights and interests of gypsies/travellers.

4 3 2 The Revised European Social Charter

4 3 2 1 Introduction

The European Social Charter²⁰⁷ ('ESC') was intended to be the counterpart, in the area of economic and social rights, of the ECHR.²⁰⁸ However, the ESC was overshadowed by the ECHR and largely ignored until the mid-1990s.²⁰⁹ De Schutter attributes this to the fact that firstly, the conclusions that the Committee of Independent Experts²¹⁰ adopted after examining country reports for compliance with the ESC were relatively obscure and hardly publicised; secondly, the subordinate role of the Committee of Independent Experts to both the Governmental Committee and the Committee of Ministers of the Council of Europe resulted in an ambiguous mechanism for control which was neither fully judicial nor purely political; thirdly, the ESC did not provide for an individual or collective complaints mechanism; fourthly, its application was limited to

²⁰⁷ CETS no 35. The European Social Charter was concluded by thirteen Member States of the Council of Europe on 18 October 1961 in Turin and entered into force when it attained its fifth ratification on 26 February 1965.

²⁰⁸ In *International Federation of Human Rights Leagues (FIDH) v France* Complaint No 14/2003 (Decision on the merits, 8 September 2004) the European Committee of Social Rights stated that the ESC was a living human rights instrument that drew inspiration from the values of human dignity, autonomy, equality and solidarity. Viewed from this perspective the envisaged purpose of the ESC was to compliment the ECHR by adding a full set of economic, social and cultural rights to complete the rights enshrined the ECHR. See also Khaliq U and Churchill R "The European Committee of Social Rights - Putting flesh on the bare bones of the European Social Charter" in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 428-452 428 ('Khaliq and Churchill "Putting flesh on bare bones") and De Schutter O "The European Social Charter" in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) 425-442 425 ('De Schutter "The European Social Charter").

²⁰⁹ De Schutter "The European Social Charter" 425.

²¹⁰ During 1998 this body decided to rename itself the European Committee of Social Rights in order to mark its development into a quasi-judicial human rights body.

nationals of the States Parties to the ESC; fifthly, its *à la carte* approach allowed States Parties, within certain limitations, to select the provisions which it would be bound by upon accession to the ESC; and finally, certain guarantees in the ESC were considered to be satisfied if the majority of its intended beneficiaries were protected.²¹¹

The ensuing revitalisation²¹² of the ESC resulted in the clarification of the role of the Committee of Independent Experts;²¹³ the adoption of a collective complaints mechanism²¹⁴ and the revision of the ESC.²¹⁵ The Revised ESC is comprised of the nineteen rights contained in the original ESC,²¹⁶ the four rights contained in the Additional Protocol,²¹⁷ and seven new rights.²¹⁸

²¹¹ De Schutter “The European Social Charter” 425.

²¹² De Schutter “The European Social Charter” 426 notes that the Committee of Ministers launched this revitalisation process at the Ministerial Conference on Human Rights which were held in Rome during November 1990. The objectives of the revitalisation process were to breathe new life into the ESC and to re-establish the Council of Europe as a preeminent authority in setting human rights standards for the European continent. For a more detailed account of this process, see Harris D “A fresh impetus for the European Social Charter” (1992) 41 *International and Comparative Law Quarterly* 659-676 and Harris D and D’Arcy J *The European Social Charter* (2001) 12-14.

²¹³ De Schutter “The European Social Charter” 426 notes that the Protocol Amending the European Social Charter CETS no 142, although it never came into force, brought about an understanding between the Committee of Independent Experts and the Governmental Committee that the Committee of Independent Experts would have the exclusive competence to interpret and apply the ESC.

²¹⁴ The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints CETS no 158 was adopted on 9 November 1995 and entered into force on 1 July 1998. The collective complaints mechanism allowed non-governmental organisations to challenge legislation and policies of States Parties for violating the commitments it made under the ESC without first exhausting the local remedies that may be available to the victims of these alleged violations. See Brillat R “A new protocol to the European Social Charter providing for collective complaints” (1996) 1 *EHRLR* 53-62 and Churchill R and Khaliq U “The collective complaints system of the European Social Charter: An effective mechanism for ensuring compliance with economic and social rights?” (2004) 15 *EJIL* 417-456.

²¹⁵ CETS no 163. The Revised ESC was adopted on 3 May 1996 in Strasbourg and entered into force when it attained its third ratification on 1 July 1999.

²¹⁶ These rights, in their reformulated guise, are: the right to work (article 1); the right to just conditions of work (article 2); the right to safe and healthy working conditions (article 3); the right to fair remuneration (article 4); the right to organise (article 5); the right to bargain collectively (article 6); the right of children and young persons to protection (article 7); the right of employed women to protection of maternity (article 8); the right to vocational guidance (article 9); the right to vocational training (article 10); the right to protection of health (article 11); the right to social security (article 12); the right to social and medical assistance (article 13); the right to benefit from social welfare services (article 14); the right of persons with disabilities to independence, social integration and participation in the life of the community (article 15); the right of the family to social, legal and economic protection (article 16); the right of children and young persons to social, legal and economic protection (article 17); the right to engage in a gainful occupation in the territory of other Parties (article 18); and the right of migrant workers and their families to protection and assistance (article 19).

²¹⁷ CETS no 128. The Additional Protocol was adopted on 5 May 1988 and entered into force on 4 September 1992. These rights are: the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (article 20); the right to information and consultation (article 21); the right to take part in the determination and improvement of

The European Committee of Social Rights²¹⁹ ('ECSR') is subordinate to the Committee of Ministers ('CoM'), the political organ of the Council of Europe, which is the only body that may make recommendations to States Parties. However, in theory, the ECSR is the only body that is competent to give an authoritative interpretation of the broadly phrased provisions of the Revised ESC. As such, the ECSR's interpretation of provisions in the Revised ESC, along with its views on how that Revised ESC is to be applied in the context of a national report²²⁰ or a collective complaint,²²¹ constitutes its "jurisprudence". The ECSR considers the Revised ESC to be a living instrument that must be interpreted according to the realities that prevail in the jurisdictions of member states of the Council of Europe as well as relevant international instruments.²²² Any limitations of these social rights must therefore be read restrictively so as to preserve the essence of the right and to achieve the overall purpose of the Revised ESC.²²³ This approach to the interpretation of the Revised ESC has empowered the ECSR to develop a dynamic understanding of the essence of each right, which has subsequently enabled it to clarify the obligations of States Parties.²²⁴

Some of the most influential decisions of the ECSR have been in the context of housing.²²⁵ These decisions grappled with discrimination against, social exclusion of

the working conditions and working environment (article 22); and the right of elderly persons to social protection (article 23).

²¹⁸ These rights are: the right to protection in cases of termination of employment (article 24); the right of workers to the protection of their claims in the event of the insolvency of their employer (article 25); the right to dignity at work (article 26); the right of workers with family responsibilities to equal opportunities and equal treatment (article 27); the right of workers' representatives to protection in the undertaking and facilities to be accorded to them (article 28); the right to information and consultation in collective redundancy procedures (article 29); the right to protection against poverty and social exclusion (article 30); and the right to housing (article 31).

²¹⁹ The ECSR consists of 15 members who serve in their personal capacity as experts in social policy and law for a period of 6 years with may be renewed once.

²²⁰ See Khaliq and Churchill "Putting flesh on the bare bones" 430-432 and De Schutter "The European Social Charter" 430-433.

²²¹ Khaliq and Churchill "Putting flesh on bare bones" 432 and De Schutter "The European Social Charter" 433-436.

²²² *World Organisation against Torture v Ireland* Complaint No 18/2003 (Decision on the merits, 26 January 2005) par 63.

²²³ *International Federation of Human Rights Leagues (FIDH) v France* Complaint No 14/2003 (Decision on the merits, 8 September 2004) paras 26-29.

²²⁴ Khaliq and Churchill "Putting flesh on the bare bones" 434.

²²⁵ Article 31 of the Revised ESC reads:

"With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: (1) to promote access to housing of an adequate standard; (2)

and apathy expressed by many States Parties towards the rights and needs of the Roma²²⁶ and their families.

4 3 2 2 Case law

4 3 2 2 1 Greece

In *European Roma Rights Center v Greece*²²⁷ ('*ERRC v Greece*') the complainant argued that the Greek government was denying the Roma an effective right to housing in violation of article 16²²⁸ of the Revised ESC because the *Sanitary Provision for the Organized Relocation of Itinerant Persons (Nomadic Travellers)*²²⁹ ('1983 Ministerial Decision') discriminated against them in housing matters.²³⁰ The 1983 Ministerial Decision prohibited the unchecked encampment of wandering nomads, commonly referred to as *Athinganoi*, in all areas,²³¹ particularly near archaeological sites, beaches, landscapes of natural beauty or in areas which could affect the public health.²³² The 1983 Ministerial Decision further required any organised encampment of *Athinganoi* to remain outside inhabited areas and, significantly, to be "a good distance from the

to prevent and reduce homelessness with a view to its gradual elimination; (3) to make the price of housing accessible to those without adequate resources."

²²⁶ Roma, a group of people common in Eastern Europe and Central Italy, is a subgroup of an ethnic minority called Romani, who trace their origins to the Indian subcontinent, more specifically the province of Rajasthan, during the 11th century. Romani people commonly adopt the dominant religion of their country of residence, which ranges from Christianity to Islam, and their social behaviour is regulated and enforced through patriarchal lineage. Romani people have suffered enduring discrimination since their arrival in the Romanian state of Moldavia during the 14th century. Contemporary forms of discrimination include criminal profiling, inadequate housing in ghettos on the periphery of urban centres, police brutality, lack of access to schools and employment opportunities. Other subgroups include Iberian Kale (found in Spain, Portugal and Southern France); Finnish Kale (found in Finland and Sweden); Welsh Kale; Romanichal (found in the United Kingdom); Sinti (found in German-speaking areas of Central Europe and their neighbouring countries); Manush (found in French-speaking areas of Central Europe) and Romanisæl (found in Sweden and Norway). See Weyrauch *WO Gypsy Law: Romani Legal Traditions and Culture* (2001).

²²⁷ Complaint No 15/2003 (Decision on the merits, 8 December 2004).

²²⁸ Article 16 of the Revised ESC reads:

"With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."

²²⁹ Ministerial Decision No A5/696/25.4.83.

²³⁰ *ERRC v Greece* par 11.

²³¹ Article 1 of the 1983 Ministerial Decision.

²³² Article 3(3) of the 1983 Ministerial Decision.

approved urban plan or the last contiguous houses.”²³³ The complainant submitted that the 1983 Ministerial Decision discriminated against the Roma by referring to them as *Athinganoi* and that it intensified the practice of discrimination against the Roma by enacting their residential segregation.²³⁴ The Greek government stated that the complaint was unfounded because the 1983 Ministerial Decision was amended²³⁵ (‘2003 Ministerial Decision’) so as to provide for the establishment of temporary settlement areas for itinerant persons pending the establishment of permanent settlement areas.²³⁶ Appropriate public, municipal or private locations would be selected for the establishment of these temporary settlement areas after extensive consultations with various bureaucratic institutions were conducted.²³⁷ Once established, these temporary settlement areas would only be tolerated²³⁸ if they maintained the infrastructure that would provide safe drinking water, electricity, sanitation facilities and refuse removal services.²³⁹ This, the complainant argued,²⁴⁰ only exacerbated the already vulnerable position of Roma by subjecting them to the threat of continuous forced evictions and other penalties.²⁴¹

The ECSR stated that member States had a duty to respect difference and to ensure social arrangements did not lead to or reinforce social exclusion. This duty flowed from the underlying purposes of the Revised ESC to express solidarity and promote social inclusion.²⁴² In this regard the right to housing - as the key to exercising civil, political and other social rights - must be viewed as being of central importance to the family.²⁴³ Article 16 therefore requires States Parties to ensure that there is an adequate supply of housing that catered for the housing needs of families. Article 16 further requires States Parties to ensure that the housing is of an adequate standard and that it includes the

²³³ Article 3(1) of the 1983 Ministerial Decision.

²³⁴ *ERRC v Greece* par 11. See European Roma Rights Center Greek Helsinki Monitor *Cleaning Operations - Excluding Roma in Greece* Country Report Series No 12 (2003) 44-49 available online at www.greekhelsinki.gr/bhr/english/organizations/ghm/greeceE_2003.rtf (accessed on 26 August 2010) (‘*ERRC Cleaning Operations*’).

²³⁵ Joint Ministerial Decision No 23641/3.7.2003.

²³⁶ Article 1(2) of the 2003 Ministerial Decision.

²³⁷ Article 2(1) of the 2003 Ministerial Decision.

²³⁸ Article 5 of the 2003 Ministerial Decision.

²³⁹ Article 3(3) of the 2003 Ministerial Decision.

²⁴⁰ *ERRC v Greece* par 11.

²⁴¹ Article 6(2) of the 2003 Ministerial Decision.

²⁴² *ERRC v Greece* par 19.

²⁴³ *ERRC v Greece* par 24.

provision of essential services.²⁴⁴ The ECSR recalled that it previously held that adequate housing would constitute a dwelling of suitable size considering the composition of the family.²⁴⁵ The ECSR therefore found that, when these characteristics of adequate housing were applied to the traditional lifestyle of itinerant Roma, article 16 required the provision of adequate stopping places.²⁴⁶

In this regard the complainant submitted that at least 100 000 Roma were living in settlements that posed serious risks to their health and safety²⁴⁷ because the sites had scant infrastructure²⁴⁸ and were located at isolated places²⁴⁹ far from urban areas.²⁵⁰ The Greek government highlighted that it had adopted the *Integrated Action Plan for the Social Integration of the Roma People*,²⁵¹ which sought to address the housing concerns of Roma by developing new settlements; improving existing residences and settlements; and arranging housing for the nomadic populations in Greece;²⁵² and to introduce a programme that would enable Roma families to obtain loans for housing.²⁵³ However, the ECSR found that the Greek government had failed to take sufficient measures that could achieve any material improvement in the living conditions of the

²⁴⁴ *ERRC v Greece* par 24.

²⁴⁵ Conclusions XIII-2 43-44.

²⁴⁶ *ERRC v Greece* par 25.

²⁴⁷ See *ERRC Cleaning Operations* 94-99 for an account of the disastrous health implications that the winter of 2001 had on the Roma living in inadequate housing.

²⁴⁸ The Public Enterprise for Town Planning conducted a study during 1999 on the availability of infrastructure in “genuine” settlements (where the living quarters are makeshift), “mixed” settlements (that included makeshift and permanent dwellings) and “neighbourhoods” (constellations of houses that essentially formed part of a city or village). The study found that 50% of the “genuine” settlements were uninhabitable because 15% were more than 1 kilometre away from an urban area; 84% had inadequate water supply; 80% had no connection to a sewage system; more than 50% did not receive garbage removal services and there was no connection to electricity in any of these settlements. See DEPOS *Meleti Sxediou Programmatos gia tin antimetopisi ton ameson oikistikon provlimaton ton Ellinon Tsinganon* (1999) 6-9.

²⁴⁹ See *ERRC Cleaning Operations* 82-94 for an account of the tactics employed by municipalities to isolate and segregate Roma from other groups in a community.

²⁵⁰ *ERRC v Greece* par 31.

²⁵¹ See Appendix 3 of case document 4 of this complaint which is available online at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC15CaseDoc4_en.pdf (accessed on 18 March 2011)

²⁵² The Third EU Structural Fund and the Ministry of the Interior, Public Administration and Decentralisation granted € 180 million for this purpose. The Greek government estimated that this would enable it to purchase 1500 acres of land for the building of 100 new settlements, 4000 new homes and the establishment of 60 organised camping sites for itinerant Roma. See *ERRC v Greece* par 36.

²⁵³ The Third EU Structural Fund and the Ministry of the Interior, Public Administration and Decentralisation granted € 120 million for this purpose. When the ECSR delivered its decision on the merits 4797 loans of € 60 000 each had been awarded to the 14151 applicants that applied for loans. See *ERRC Cleaning Operations* 199-202.

Roma. This, the ECSR found, could be attributed principally to the fact that there were inadequate means which could be used to compel local authorities to improve the living conditions of the Roma when they routinely adopted an obstinate attitude towards the rights and needs of Roma by only effecting rudimentary improvements to existing housing stock and stalling new building projects.²⁵⁴

The ECSR found that the Greek government failed to appreciate its obligations in fulfilment of the overarching aim of social inclusion.²⁵⁵ The resolute reluctance of local authorities to identify appropriate sites, over and above their unwillingness to provide the appropriate infrastructure, exacerbated the strict circumstances under which the 2003 Ministerial Decision condoned temporary encampment.²⁵⁶ The Greek government failed to provide information that contradicted the submissions made by the complainant about how Roma are evicted and prosecuted for living in structures that do not comply with building regulations.²⁵⁷ The ECSR therefore held that Greece violated article 16 because it did not provide sufficient permanent dwellings or temporary camping sites for Roma and did not provide adequate protection to Roma against forced evictions and the imposition of further penalties for the unlawful occupation of land.

The ECSR transmitted its report on the merits of the complaint to the CoM on 7 February 2005. The CoM adopted a resolution²⁵⁸ where it noted that: firstly, the implementation of the *Integrated Action Plan for the Social Integration of the Roma People* was in progress and that this plan was continuously evaluated and reformed to ensure more effective coordination between all the interested parties; secondly, the housing loans programme for Roma in Greece were being revised and extended to reach more beneficiaries; and finally, a Commission for the social integration of Roma in Greece had been established.

In *International Centre for the Legal Protection of Human Rights v Greece*²⁵⁹ (*'Interights v Greece'*) the complainant submitted that the Greek government was still violating article 16 of the Revised ESC. According to the complainant, approximately

²⁵⁴ *ERRC v Greece* paras 37 and 42. Mr Nikitas Aliprantis highlighted this point in his concurring opinion. See *ERRC v Greece* appendix.

²⁵⁵ *ERRC v Greece* par 43.

²⁵⁶ *ERRC v Greece* par 46.

²⁵⁷ *ERRC v Greece* par 50. See *ERRC Cleaning Operations* 50-73.

²⁵⁸ ResChS(2005)11 of 8 June 2005.

²⁵⁹ Complaint No 49/2008 (Decision on the merits, 11 December 2009).

300 000 individuals of Roma origin were living in 52 encampments throughout Greece without access to basic amenities or infrastructure.²⁶⁰ In the 40 months between the ECSR's decision on the merits in December 2004 and the registration of the complaint with the secretariat of the ECSR in March 2008 the Greek government only succeeded in building 185 houses on four newly established permanent settlements.²⁶¹ This, the complainant argued, could be attributed to an overreliance on and a flawed interpretation of the housing loans scheme under the IAP which resulted in the awarding of loans only to those Roma who already owned a piece of land and were in possession of a certificate of permanent residence.²⁶² Consequently, only 2685 additional loans had been approved over this period - which constituted a modest expenditure of 17% of the total loans budget.²⁶³

The ECSR acknowledged that the Greek government had made some progress in ameliorating the living conditions of Roma through the upgrading of infrastructure in vulnerable areas and awarding of loans to Roma.²⁶⁴ However, the ECSR noted that various independent sources attested to the existence of serious infrastructure deficiencies in the large settlements of Spata and Aspropygros near Athens.²⁶⁵ This proved that the specific housing needs of the Roma were not sufficiently catered for by the Greek government and that the Roma were still being discriminated against for purposes of article 16 of the Revised ESC.²⁶⁶ The complainant noted that this discrimination manifested in the execution of twenty forced evictions without prior notice, adequate consultation or the provision of alternative accommodation since the beginning of 2005.²⁶⁷ The complainant submitted that this formed part of a deliberate policy of the Greek government to remove Roma from certain areas by demolishing their homes.²⁶⁸

²⁶⁰ *Interights v Greece* par 16.

²⁶¹ *Interights v Greece* par 17.

²⁶² *Interights v Greece* par 19.

²⁶³ *Interights v Greece* paras 23 and 28.

²⁶⁴ *Interights v Greece* par 38.

²⁶⁵ *Interights v Greece* par 39.

²⁶⁶ *Interights v Greece* par 40.

²⁶⁷ *Interights v Greece* paras 42 and 43.

²⁶⁸ *Interights v Greece* paras 44 and 46.

The ECSR emphasised that much of the information that the complainant submitted was not structured and that it was either incomplete or did not sufficiently justify some of the allegations made in relation to forced evictions.²⁶⁹ The Greek government did not provide any information which disputed the allegations that the regulatory framework was deficient in that it did not provide for notice and consultations prior to evictions or that adequate alternative accommodation should be provided for those that are subjected to forced evictions.²⁷⁰ Despite the lack of information on the practice of forced evictions, the ECSR still found that it could take note of the information available from other sources that do substantiate the allegations of the complainant.²⁷¹

The ESCR noted that the poor regulatory framework was aggravated by the fact that many of the remedies available to those subjected to forced evictions from their own land were complex and ineffectual.²⁷² While there were many remedies available to the Roma in public and civil law, the accessibility of these remedies seemed to elude the Roma because they have not been educated about their rights or do not know how to enforce it without legal aid.²⁷³ The ECSR therefore held that the Greek government was violating article 16 of the Revised ESC because countless Roma families continued to live in intolerable conditions that did not meet the minimum standards for habitation; and forced evictions were still being executed without appropriate legal remedies available and accessible to those affected by this practice. The ECSR transmitted its report on the merits of the complaint to the CoM on 25 January 2010, but the CoM has not yet adopted a resolution on this report as of 5 August 2011.

4 3 2 2 2 *Italy*

In *European Roma Rights Center v Italy*²⁷⁴ ('*ERRC v Italy*') the complainant argued that the Italian government was denying the Roma an effective right to housing in violation of article 31,²⁷⁵ read with article E,²⁷⁶ of the Revised ESC because the *Consolidated Law*

²⁶⁹ *Interights v Greece* par 61.

²⁷⁰ *Interights v Greece* paras 62 and 63.

²⁷¹ *Interights v Greece* par 68.

²⁷² *Interights v Greece* par 49.

²⁷³ *Interights v Greece* par 65.

²⁷⁴ Complaint No 27/2004 (Decision on the merits, 7 December 2005).

²⁷⁵ Article 31 of the Revised ESC reads:

on *Immigration*²⁷⁷ (Legislative Decree) discriminated against them in a manner which manifested in forced evictions and banishment to camping sites of substandard quality on the periphery of society.²⁷⁸ The Legislative Decree affords foreigners the right to live in Italy if they entered the country lawfully in terms of either a valid “stay permit” or a “residence permit”²⁷⁹ and have obtained employment. These foreigners may then obtain access to collective or private social housing²⁸⁰ or public residential housing.²⁸¹ The relevant authorities will then be under an obligation to remove all obstacles which may stand in the way of these foreigners and the full enjoyment of their housing rights.²⁸² The Italian government stated that the complaint was unfounded because it fell beyond the scope of application of the Revised ESC, seeing that the majority of the Roma in Italy do not lawfully reside or habitually work in the country.²⁸³ The Italian government further stated that it was impossible to distinguish between the Roma who are Italian citizens and those who were nationals of member States.²⁸⁴ The Italian government had therefore issued circulars that encouraged local authorities to include Roma on civil status registers that will make them eligible to receive social and medical assistance

“With a view of ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: (1) to promote access to housing of an adequate standard; (2) to prevent and reduce homelessness with a view to its gradual elimination; (3) to make the price of housing accessible to those without adequate resources.”

²⁷⁶ Article E of the Revised ESC reads:

“The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

²⁷⁷ Legislative Decree No 286 of 25 July 1998.

²⁷⁸ *ERRC v Italy* par 5. See European Roma Rights Center *Campland - Racial Segregation of Roma in Italy* Country Report Series No 9 (2000) 13-22 for a historical account of the arrival of Roma in Italy and their systematic segregation which is available online at <http://www.eric.ed.gov/PDFS/ED459274.pdf> (accessed on 26 August 2010) (*‘ERRC Campland’*).

²⁷⁹ Section 5(1) of the Legislative Decree.

²⁸⁰ Section 40(4) of the Legislative Decree.

²⁸¹ Section 40(6) of the Legislative Decree.

²⁸² Section 3(5) of the Legislative Decree.

²⁸³ *ERRC v Italy* par 6. Article 1 of the appendix to the Revised ESC reads:

“Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners *only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned*, subject to the understanding that these articles are to be interpreted in the light of the provisions of Article 18 and 19” (emphasis added).

²⁸⁴ *ERRC v Italy* par 6.

and to issue them with work permits. The Italian government furthermore placed a prohibition on the imposition of bans on Roma encampments.²⁸⁵

The complainant submitted that Roma camping sites in fact failed to meet minimum living standards because the majority of sites have limited or no access to basic amenities, are constantly plagued by insects and rodents, and do not have asphalt surfacing.²⁸⁶ The complainant further submitted that the Italian government actively pursued a policy of racial segregation that was premised on the assumption that the traditional lifestyle of Roma dictated that they live on the fringes of society.²⁸⁷ As a result the periphery of Italian towns and cities were replete with a network of ghettos that prevented the integration of Roma into mainstream Italian society.²⁸⁸ The Italian government disputed these allegations and declared that it had taken the appropriate legislative measures to ensure the sufficiency and adequacy of camping sites.²⁸⁹ The Italian government attributed all the inadequacies in the housing supply for Roma to the fact that they erected unauthorised camps or introduced new residents into authorised camps that could not cater for them.²⁹⁰

The ECSR found that the Italian government had not provided any information which refuted the complainants' allegations or showed that the number of camping sites were adequate and sufficient.²⁹¹ The ECSR found that article 31(1), read with article E, of the Revised ESC enshrined a prohibition against discrimination that established an obligation to ensure that all population groups enjoyed the rights contained in the Revised ESC. The ECSR accordingly held that Italy had violated article 31(1), read with article E, of the Revised ESC because it failed to take adequate steps to ensure that

²⁸⁵ *ERRC v Italy* par 10. Carlisle K "From bad to horrific in a gypsy ghetto" *Business Week* (2000-07-19) points out that Roma with resident permits do not have any guarantee that their "citizenship" will be honoured by the Italian government when it is dismantling sites in an effort to "fight crime and improve the conditions for the Roma". Roma often face certain deportation if they protest against policies that reinforce racial segregation. Roma are therefore forced to go quietly with the hope that they will be rewarded with placement in another camp instead of "a one-way ticket back to their countries of origin." As such, Carlisle argues that, "the solution of choice seems to lie between the less frightening of two nightmares." See *ERRC Campland 45* for examples of how the police destroy or threaten to destroy the identification documents of the Roma.

²⁸⁶ *ERRC v Italy* par 29.

²⁸⁷ *ERRC v Italy* par 28.

²⁸⁸ *ERRC v Italy* par 28.

²⁸⁹ *ERRC v Italy* par 32.

²⁹⁰ *ERRC v Italy* par 33.

²⁹¹ *ERRC v Italy* par 34.

Roma are offered housing of a sufficient quantity and quality to meet their particular needs, and to ensure that local authorities are fulfilling their responsibilities in this area.²⁹² The ECSR found that by blaming the inadequate conditions in camping sites on the Roma, Italy had failed to appreciate fully its responsibilities to ensure effective implementation of domestic law and policy by provincial and local authorities.²⁹³

The ECSR also held Italy to be in violation of article 31(2), read with article E, of the Revised ESC for failing to ensure that evictions were carried out through procedures and in conditions that respect the dignity of the people concerned.²⁹⁴ The Italian government furthermore failed to ensure that alternative accommodation was made available to those that were evicted and that no provision was made to those who sought redress through legal remedies.²⁹⁵ Finally, Italy also violated article 31(3), read with article E, of the Revised ESC for failing to appreciate that its regulatory framework that provided access to housing was based on criteria that Roma invariably could not satisfy.²⁹⁶

The ECSR transmitted its report on the merits of the complaint to the CoM on 21 December 2005. The CoM adopted a resolution²⁹⁷ where it noted that: firstly, the Italian authorities at local and national level have taken measures to improve the lives of Roma living in Italy; secondly, Italy undertook to bring the Roma housing crisis into conformity with the Revised ESC by adding to the measures that have already been taken; and lastly, it looked forward to receiving Italy's next country report so that it could ascertain whether the position has improved.

4 3 2 2 3 *Bulgaria*

In *European Roma Rights Centre v Bulgaria*²⁹⁸ ('*ERRC v Bulgaria*') the complainant argued that the Bulgarian government was discriminating against Roma in terms of

²⁹² *ERRC v Italy* par 37.

²⁹³ *ERRC v Italy* paras 25 and 26

²⁹⁴ See *ERRC Campland* 23-34 for an account of the abusive raids and arbitrary destruction of property by the police and other law enforcement officials.

²⁹⁵ *ERRC v Italy* par 42. See *ERRC Campland* 50-51 for an account of the prolonged detention of Roma before trails on "flight-prevention grounds" and the severe sentencing "for crimes which might, in other cases, merit non-custodial punishment."

²⁹⁶ *ERRC v Italy* paras 43-45.

²⁹⁷ Resolution ResChS(2006)4 on 3 May 2006.

²⁹⁸ Complaint No 31/2005 (Decision on the merits, 18 October 2006).

strict planning legislation in violation of article 16, read with article E, of the Revised ESC.²⁹⁹ Both the Law on Municipal Property (1996)³⁰⁰ and the Law on State Property (1996)³⁰¹ empowered a government official to seize the property if it was occupied unlawfully, used inappropriately, or ceased to be of any use. The Territorial Planning Law (2001) additionally authorised the demolition of all illegal construction that started during a specific period if the owner of the land did not declare it to the responsible authorities within six months of the commencement of the specific statute.³⁰² The cumulative effect of this legislation is that Roma are confined - often with physical barriers - to areas on the outskirts of cities, towns and villages where they live in substandard conditions without adequate infrastructure or security of tenure and are subjected to forced evictions.³⁰³ The Bulgarian government acknowledged the prevalence of intolerable living conditions but disputed the allegation that these conditions affected the Roma disproportionately in comparison to the rest of the population.³⁰⁴ The Bulgarian government highlighted the fact that it joined the Decade of Roma Inclusion 2005–2015 campaign³⁰⁵ and that it subsequently put in place various framework programmes and action plans aimed at improving *inter alia* the living conditions of Roma.³⁰⁶

The ECSR noted that the policy and legislative response of the Bulgarian government to the need for improved living conditions in Roma camps demonstrated

²⁹⁹ *ERRC v Bulgaria* par 7.

³⁰⁰ Article 65(1) of the Law on Municipal Property (1996) reads:

“A municipal property which is in possession or is being held on no legitimate grounds, is not being used as designed, or the need for which is no longer there, shall be seized on the basis of an order of the mayor of the municipality.”

³⁰¹ Article 80(1) of the Law on State Property (1996) reads:

“Any State property held in possession or tenure without any legal grounds, or such as shall be used inappropriately or such which the purpose shall have ceased to exist shall be repossessed by order of the competent Regional Governor.”

³⁰² Article 16(3) of the Territorial Planning Law (2001) reads:

“Any illegal construction works, commenced after the 30th day of June 1998 but not legalized prior to the promulgation of this Act, shall not be removed if the said works were tolerable under the effective detailed urban development plans and under the rules and standard specifications effective during the said period and according to this Act, and if declared by the owners thereof to the approving authorities within six months after the promulgation of this Act.”

³⁰³ *ERRC v Bulgaria* paras 22-24.

³⁰⁴ *ERRC v Bulgaria* paras 28 and 29.

³⁰⁵ Available online at <http://www.romadecade.org> (accessed on 26 August 2010).

³⁰⁶ *ERRC v Bulgaria* paras 31 and 32.

that legal and practical measures were necessary to redress such situation.³⁰⁷ The ECSR lauded the Bulgarian government for expressing its clear intention³⁰⁸ to improve the housing situation of Roma families in various national programmes and action plans, the most recent of which was the Framework Programme for Equal Integration of the Roma in the Bulgarian Society,³⁰⁹ and stated that its content mandated the observance of a margin of appreciation for the manner in which measures are being taken to comply with the obligations under the Revised ESC.³¹⁰

While the ECSR acknowledged that the implementation of the right to housing would require time, it expressed its concern that the programmes and plans to improve the lives of Roma were not being implemented effectively.³¹¹ The ECSR held that the six year period between 1999 and 2005 should have been enough to effect significant improvements in the living conditions of the Roma given the urgency of their housing situation.³¹² The ECSR reiterated that the mere guarantee of equal treatment before the law as a means of protecting Roma against discrimination would not suffice. The obligation flowing from article E requires the integration of ethnic minorities like the Roma into mainstream society by way of positive action.³¹³

The complainant noted that the Bulgarian government failed to communicate to Roma what they were required to do to comply with the Territorial Planning Law in order to obtain secure tenure of their land. As a result the Roma were disproportionately exposed to the realities of forced eviction because they had no procedural safeguards at their disposal and could not obtain affordable alternative accommodation.³¹⁴ The ECSR recalled that it had previously held that the “illegal occupation of a site or dwelling could justify the eviction of the illegal occupiers³¹⁵ if and when it is carried out in conditions that respect the dignity of the persons concerned and provision was made for

³⁰⁷ *ERRC v Bulgaria* par 36.

³⁰⁸ *ERRC v Bulgaria* par 38.

³⁰⁹ Available online at <http://www.ncedi.government.bg/en/RPRIRBGO-English.htm> (accessed on 26 August 2010).

³¹⁰ *ERRC v Bulgaria* par 35.

³¹¹ *ERRC v Bulgaria* par 38.

³¹² *ERRC v Bulgaria* par 39.

³¹³ *ERRC v Bulgaria* par 42.

³¹⁴ *ERRC v Bulgaria* paras 44-48.

³¹⁵ *ERRC v Greece* par 51.

the acquisition of alternative accommodation.³¹⁶ The ECSR therefore found that, given the fact that the current policy and legislative framework in Bulgaria could not ensure that evictions were conducted in this way, it was perfectly understandable for the Roma to partake in otherwise inexcusable behaviour in order to satisfy their housing needs.³¹⁷ The ECSR further held that Bulgaria had violated article 16 because it had failed to appreciate that Roma families are extremely vulnerable to evictions as a result of the precariousness of their tenancy.³¹⁸

The ECSR transmitted its report on the merits of the complaint to the CoM on 30 November 2006. The CoM adopted a resolution³¹⁹ where it noted that: firstly, Bulgaria had undertaken to bring the Roma housing crisis into conformity with the Revised ESC by implementing measures that had been adopted to improve the housing situation of Roma at local and national government level. Bulgaria had further undertaken to adopt an Act to amend and supplement the Territorial Planning Act and to enact a Housing Association Act. The CoM further noted that it looked forward to receiving Bulgaria's next country report so that it could ascertain whether the position has improved.

4 3 2 2 4 France

In *International Movement ATD Fourth World v France*³²⁰ ('*Fourth World v France*') the complainant alleged that the French government was violating articles 16, 30³²¹ and 31 alone or taken in conjunction with article E of the Revised ESC on various grounds. Firstly, the complainant argued that the French government did not give effect to various pieces of domestic legislation that would guarantee many poor and otherwise destitute

³¹⁶ *Conclusions 2003 225* (France), 345 (Italy), 557 (Slovenia) and 653 (Sweden) which is available online at www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/2003Vol1_en.pdf and www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/2003Vol2_en.pdf (accessed on 26 August 2010).

³¹⁷ *ERRC v Bulgaria* par 53.

³¹⁸ *ERRC v Bulgaria* par 56.

³¹⁹ Resolution ResChS(2007)2 of 5 September 2007.

³²⁰ Complaint No 33/2006 (Decision on the merits, 5 December 2007).

³²¹ Article 30 of the Revised ESC reads:

"With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake: (a) to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; (b) to review these measures with a view to their adaption if necessary."

people access to decent housing.³²² The complainant alleged that the French government was reluctant to build social housing, despite numerous official reports attesting to the malfunctioning of the housing market.³²³ The complainant cited a 2008 report on social protection and social inclusion strategies which indicated that a mere 9% of all social housing built during 2005 (compared to 12% and 30% during 2000 and 1998 respectively) was targeted at people living in extreme poverty.³²⁴ The government informed the ECSR that construction work had started on 410 000 houses during 2005, that the rate of completion was at its highest in 25 years and that 81 000 houses were being financed during the first year of the re-launched social cohesion plan.³²⁵

The ECSR recalled that there must be an adequate supply of affordable housing and that it will be affordable if the household can afford to pay the deposit, the rent and maintenance costs on a long term basis and still be in a position to maintain a good standard of living compared to the other households of the society in which it is located.³²⁶ The ECSR further recalled that it had previously concluded that the stock of social housing in France was manifestly inadequate because only 80 000 social housing units were scheduled for construction in 2004 to cater for the 1 640 000 outstanding applications for social housing at the end of May 2002.³²⁷ The ECSR acknowledged that there were significant changes in practice and the law since the beginning of 2005,³²⁸ but noted that there was still a considerable shortage of housing.³²⁹ The ECSR therefore held that the implementation of the social cohesion policy itself did not constitute a sufficient step for ensuring that priority is given to the provision of social housing for those living in abject poverty.³³⁰

The complainant further argued that the information which the government provided did not indicate how the social housing units were allocated or if any were in fact

³²² Section 6 of the Tenancy Act, No 89-462 of 6 July 1989 states that a “landlord shall provide the tenant with decent housing with no manifest risks to the latter’s physical safety and health, fitted out in such a way as to make it habitable.” See also section 187 of the Urban Solidarity and Renewal Act, No 2000-1208 of 13 December 2000 and Decree No 2002-120 of 30 January 2002.

³²³ *Fourth World v France* par 85.

³²⁴ *Fourth World v France* paras 87-90.

³²⁵ *Fourth World v France* par 92.

³²⁶ *Conclusions* 2003 232 (France) and 655 (Sweden).

³²⁷ *Fourth World v France* par 96.

³²⁸ *Fourth World v France* par 97.

³²⁹ *Fourth World v France* par 98.

³³⁰ *Fourth World v France* par 100.

allocated to those in desperate need of social housing.³³¹ In this regard the complainant alleged that the eligibility criteria for social housing were suspect;³³² the *département's* housing action plans for disadvantaged persons did not function;³³³ there were considerable risks for the least well off in the management of the prefectural housing quota;³³⁴ the procedure for allocating social housing were not transparent;³³⁵ and inadequate appeal procedures were available in the event of excessive waiting periods to be allocated social housing.³³⁶

The ECSR noted that the French government did not submit any information that addressed the key arguments presented by the complainant.³³⁷ There was clear evidence that the system for allocating social housing was still dysfunctional because a large part of the demand for social housing remained unsatisfied and the average waiting period for allocation was still in excess of two years.³³⁸ The ECSR also found that the procedure for allocating social housing did not ensure sufficient fairness and transparency³³⁹ because it did not provide guidance in determining who qualified as being in a priority situation of need.³⁴⁰ The ECSR further found that mediation commissions were only established in a few local authorities and that those did not address the problem of protracted waiting periods for allocation of social housing.³⁴¹

Secondly, the complainant argued that the government discriminated against the Roma and Travellers because the government refused to provide family plots for them to station their caravans. The complainant alleged that there were discrepancies between the provisions of the *département's* plans and the number of camp sites constructed.³⁴² In this regard the complainant submitted that the government was misguided in arguing that the integration of travellers depended on the funding provided

³³¹ See section 4 of the Right to Housing Act No 90-449 of 31 May 1990.

³³² *Fourth World v France* par 102.

³³³ *Fourth World v France* paras 103-106.

³³⁴ *Fourth World v France* paras 107-108.

³³⁵ *Fourth World v France* par 109.

³³⁶ *Fourth World v France* paras 110-113.

³³⁷ *Fourth World v France* par 128. The submissions of the French government are available at paras 114-127.

³³⁸ *Fourth World v France* par 129.

³³⁹ *Fourth World v France* par 130.

³⁴⁰ *Fourth World v France* par 132. See article L 441-1 of the Building and Housing Code.

³⁴¹ *Fourth World v France* par 131.

³⁴² *Fourth World v France* par 135. See sections 1 and 2 of the Reception and Accommodation of Travellers Act No 2000-614 of 5 July 2000.

to local authorities for setting up family plots that could be leased in terms of the Reception and Accommodation of Travellers Act No 2000-614 of 5 July 2000.³⁴³

The ECSR found that there was a delay in implementing the plans for receiving Roma and that an estimated 41 800 plots needed to be constructed.³⁴⁴ This delay forced many Roma to occupy sites illegally, which exposed them to the risk of forcible eviction. This is exacerbated by the fact that local authorities and the French government had failed to take into account the specific needs of the Roma community over extended periods in the past.³⁴⁵ The ECSR accordingly held that the French government was in violation of its obligations in terms of article 31 alone and taken together with article E of the Revised ESC.³⁴⁶ The ECSR's findings on whether the French government was in violation of articles 16 and 30 alone or taken together with article E of the Revised ESC followed its conclusion on article 31.³⁴⁷

On the same day the ECSR delivered another decision on the merits of alleged violations of article 31 alone or in conjunction with article E of the Revised ESC by the French government. In *European Federation of National Organisations working with the Homeless v France*³⁴⁸ ('*FEANTSA v France*') the complainant lodged a complaint that was slightly narrower in scope than the complaint in *Fourth World v France*. The tailored scope of the *FEANTSA v France* complaint can be attributed to the fact that the complainant organisation had nearly ten months (from 26 January 2006 to 2 November 2006) to study the *Fourth World v France* complaint and to gather more recent statistics and progress reports before it filed its complaint with the ECSR. At its 221st session (19 to 23 March 2007) the ECSR decided to hear arguments in *Fourth World v France* and *FEANTSA v France* on the same day and set the date for the hearing for 25 June 2007. The reasoning of the ECSR in terms of this narrower complaint is the same in all material aspects as the reasoning adopted in *Fourth World v France* and is therefore not discussed separately. In *FEANTSA v France* the ECSR also unanimously held that

³⁴³ *Fourth World v France* par 137.

³⁴⁴ *Fourth World v France* par 151.

³⁴⁵ *Fourth World v France* par 154.

³⁴⁶ *Fourth World v France* paras 83, 100, 133 and 155.

³⁴⁷ *Fourth World v France* paras 158, 170 and 174.

³⁴⁸ Complaint No 39/2006 (Decision on the merits, 5 December 2007).

France was in violation of its obligations in terms of article 31, alone or in conjunction with article E, of the Revised ESC.

The ECSR transmitted its reports on the merits of the complaints in *Fourth World v France* and *FEANTSA v France* to the CoM on 4 February 2008. The CoM adopted two resolutions³⁴⁹ where it noted that France had adopted measures to address the housing crisis in France so as to bring the rights of vulnerable people into conformity with the Revised ESC by enacting the Enforceable Right to Housing Act No 2007-290 of 5 March 2007. The so-called DALO Act established an enforceable right to housing and came into effect on 1 January 2008. The DALO Act also established an effective appeal process in cases where the application for social housing had been refused to those considered to be in a priority situation. The DALO Act further created a programme whereby appropriate budgetary resources would be directed to the protection of those in a priority situation against social exclusion.

In *European Roma Rights Center v France*³⁵⁰ (*ERRC v France*) the complainant argued that the Travellers in France suffered social exclusion because they were denied access to adequate housing³⁵¹ on racial grounds³⁵² and that their insecure position was exacerbated by the fact that there was a shortage of halting sites and permanent housing that would enable them to sustain an adequate standard of living. The complainant submitted that the housing situation in France amounted to a violation of

³⁴⁹ ResChS(2008)7 and ResChS(2008)8 of 2 July 2008.

³⁵⁰ Complaint No 51/2008 (Decision on the merits, 19 October 2009).

³⁵¹ Section 1 of the Enforceable Right to Housing Act, No 2007-290 of 5 March 2007 reads:

“The State shall secure the right to decent and independent housing, as referred to in Section 1 of the Right to Housing Act, No. 90-449 of 31 May 1990, for all persons residing in French territory lawfully and on a permanent basis, as defined in an order of the *Conseil d'Etat*, who have insufficient resources to obtain or retain such housing themselves. This right shall be exercised through a conciliation procedure followed, if necessary, by a judicial appeal as specified in this Section and in Articles L. 441-2-3 and L. 441-2-3-1.”

³⁵² Section 1 of the Tenancy Act, No 89-462 of 6 July 1989 reads:

“No one may be refused a tenancy on grounds of origin, family name, physical appearance, sex, family situation, state of health, disability, morals, sexual orientation, political opinions, trade union activities or real or supposed membership of a specified ethnic group, nation, race or religion. In the event of a dispute concerning the application of the preceding paragraph, the person who has been refused the tenancy shall present evidence to support the presumption of direct or indirect discrimination. In the light of this information, the respondent must establish that the decision was justified. The court shall reach a decision after ordering any investigations it may deem necessary.”

articles 16, 30 and 31, taken alone or in conjunction with article E, of the Revised ESC.³⁵³

The complainant submitted that a quarter of the demand for halting sites was satisfied at the end of 2006 and that in some cases the government was only contributing 50% of what it was actually supposed to subsidise the construction of these sites.³⁵⁴ The complainant further noted that the intransigent attitude of the residents and officials in some *départements* reduced the delivery of halting sites even further as an increasing number of *départements* were applying to be exempted from the provisions requiring it to receive Travellers in their jurisdiction.³⁵⁵

The ECSR noted that it had not seen any appreciable change in the provision of halting sites since it assessed the position in *Fourth World v France* and *FEANTSA v France*.³⁵⁶ This was clearly in conflict with the French government's undertaking to ensure the effective implementation of legislation that would create an adequate supply of halting sites for Roma in accordance with article 31(1) of the Revised ESC.³⁵⁷

The complainant also submitted that many of the halting sites were located on the outskirts of large urban centres and that only 58% of these halting sites could be regarded as fit for human habitation. The complainant further noted that many of the sites that could be regarded as fit for human habitation did not comply with technical specifications for the provision of facilities,³⁵⁸ services³⁵⁹ or management³⁶⁰ at those halting sites.³⁶¹

³⁵³ *ERRC v France* par 7.

³⁵⁴ *ERRC v France* par 31.

³⁵⁵ *ERRC v France* paras 32-33. Section 15 of the Orientation and Planning of Municipalities and Urban Renovation Act No 2003-710 of 1 August 2003 reads:

“Municipalities with fewer than 20,000 inhabitants, half of whom or more live in ‘sensitive’ urban areas as defined by Section 42.3 of the Orientation for Spatial Planning and Development Act, No. 95-115 of 4 February 1995, shall, at their request, be exempted from the Reception and Accommodation of Travellers Act, No. 2000-614 of 5 July 2000, and in particular from the obligation provided for in Section 2 of the said [A]ct.”

³⁵⁶ *ERRC v France* paras 37-38.

³⁵⁷ *ERRC v France* par 41.

³⁵⁸ Circular NOR/INT/D/06/00074/C of 3 August 2006 on the “Implementation of the prescriptions of the *département* plan for receiving Travellers” states that:

“The site shall be equipped with sanitary facilities including a sanitary block, comprising at least one shower and two lavatories, for every five caravan spaces. While the creation of sites should help to ensure that Travellers are accommodated on a temporary basis in a dignified and decent manner, and facilitate their integration into the urban community, it should not render authorities liable to grossly excessive expenditure, such as has already

The ESCR held that the French government did comply with the technical standards for the provision of facilities, services and management at halting sites,³⁶² but noted that many of these sites were created outside urban areas or near to facilities which were major sources of nuisance.³⁶³ However, the government violated the legislative requirements pertaining to sanitation and access to water and electricity to the extent that the location of these halting sites was dangerous for families with young children.³⁶⁴ To this extent the French government violated article 31(1) of the Revised ESC.³⁶⁵

The complainant, relying on a report commissioned by the Directorate General of Town Planning, Housing and Construction, noted that 70 *départements* conducted a needs assessment of family plots within its jurisdiction and that only 30 of those *départements* could provide specific statistical data on demand for family plots.³⁶⁶ The complainant submitted that the shortage of nearly 5100 family plots throughout France could be attributed to the fact that, on the one hand, the establishment of these sites was not compulsory, and on the other hand, many *départements* could not understand the apparently conflicting desires of Travellers to maintain an itinerant lifestyle when possible and to be sedentary for purposes of education and employment.³⁶⁷ The complainant submitted that the Travellers' lack of access to adequate housing was further exacerbated because they are precluded from receiving various social benefits

incurred in some cases. The use of technical design offices, which can significantly increase these costs, should be envisaged only with the utmost caution.”

³⁵⁹ Article 3 of Decree No 2001-569 of 29 June 2001 reads:

“The stopping place shall have at least one sanitary block comprising at least one shower and two lavatories for every five caravan spaces, within the meaning of the foregoing article. Each caravan space shall have ready access to sanitary facilities as well as to drinking water and electricity supply.”

³⁶⁰ Circular UHC/IUH1/12 No 2001-49 of 5 July 2001 implementing the Reception and Accommodation of Travellers Act, No. 2000-614 of 5 July 2000 states that:

“A single system for several sites located in the same geographical area is possible. The site, however, must be staffed for a sufficient time every day, thereby making it possible to receive Travellers and deal with arrivals and departures, and ensure that the user charge is paid and that the regulations are properly complied with.”

³⁶¹ *ERRC v France* paras 42-43.

³⁶² *ERRC v France* par 48.

³⁶³ *ERRC v France* par 49.

³⁶⁴ *ERRC v France* par 49.

³⁶⁵ *ERRC v France* par 50.

³⁶⁶ *ERRC v France* par 51.

³⁶⁷ *ERRC v France* par 52.

that they could be eligible for if caravans were recognised as a form of social housing.³⁶⁸

The ECSR found that a caravan could not qualify as a form of social housing because owning a caravan did not require a building permit which, in turn, rendered the owner of a caravan ineligible for housing allowances or a loan.³⁶⁹ The ECSR further found that the government was misguided in arguing that Travellers could only claim a right of access to housing if they were willing to purchase an ordinary dwelling.³⁷⁰ The ECSR accordingly held that the government was in violation of article 31(1) of the Revised ESC to the extent that it failed to appreciate that the needs of Travellers required special attention.³⁷¹ This conclusion led the ECSR to hold that the government was also in violation of articles 16 and 31 taken in conjunction with article E of the Revised ESC.³⁷²

The complainant finally submitted that the absence of an overall national policy on housing for families which have adopted a sedentary lifestyle contributed to their social exclusion, prosecution and eviction for trespassing. The ECSR found that it would be inimical to the human dignity of people if they were forced to live in a state of social exclusion. The ECSR recalled that the right to protection against such social exclusion required

“States Parties to adopt an overall and co-ordinated approach, which should consist of an analytical framework, a set of priorities and measures to prevent and remove obstacles to access to fundamental rights. There should also be monitoring mechanisms involving all relevant actors, including civil society and persons affected by exclusion. This approach must link and integrate policies in a consistent way.”³⁷³

The ECSR noted that it had already found the housing policy for Travellers inadequate for purposes of its assessment of article 31 and that this policy also falls short of constituting a co-ordinated approach in protecting those susceptible to social exclusion for purposes of article 30.³⁷⁴

³⁶⁸ *ERRC v France* par 53.

³⁶⁹ *ERRC v France* par 54.

³⁷⁰ *ERRC v France* par 55.

³⁷¹ *ERRC v France* par 56.

³⁷² *ERRC v France* paras 85 and 89.

³⁷³ *Conclusions* 2003 214 (France).

³⁷⁴ *ERRC v France* par 95.

The ECSR transmitted its report on the merits of the complaint to the CoM on 26 October 2009. The CoM adopted a resolution³⁷⁵ where it noted that: firstly, the French government undertook to maintain its efforts to bring the housing situation in France into conformity with the Revised ESC; and secondly, that it looked forward to receiving the next country report from France so as to ascertain whether the measures that France had taken are being effectively implemented.

4 3 2 3 Conclusion

The ECSR, unlike the ECtHR, has adopted an approach whereby it clearly defines the scope of the right to family protection, the right to protection against poverty and social exclusion, and the right to housing. Against this background the ECSR has developed a substantive understanding of the purpose and scope of these rights. In *ERRC v Greece* the ECSR confirmed that article 16 required the provision of an adequate supply of housing that is of a suitable size considering the composition of the family.³⁷⁶ The right further required a dwelling to be equipped with or have access to essential amenities.³⁷⁷ Finally, the right requires that a certain measure of security from unlawful eviction must be provided for the families.³⁷⁸

In relation to article 30 the ECSR found that access to fundamental social rights should be assessed by taking into account the effectiveness of policies, measures and actions undertaken³⁷⁹ to prevent the occurrence of poverty and social exclusion. The ECSR added that appropriate budgetary appropriations formed an integral part of the overall strategy to fight social exclusion and poverty.³⁸⁰

Concerning article 31 the ECSR found that the criteria of illegal occupation should not be too wide and that evictions should take place in accordance with the principle of due process which must be sufficiently protective of the rights of the persons concerned.³⁸¹ In *FEANTSA v France* the ECSR added that States Parties must ensure that evictions are carried out in conditions that respect the human dignity of those that

³⁷⁵ Resolution ResChS(2010)5 of 30 June 2010.

³⁷⁶ *ERRC v Greece* par 24.

³⁷⁷ *ERRC v Greece* par 24.

³⁷⁸ *ERRC v Greece* par 24.

³⁷⁹ *Conclusions* 2005 580 (Norway).

³⁸⁰ *Conclusions* 2005 674 (Slovenia).

³⁸¹ *ERRC v Greece* par 51. See also *ERRC v Italy* par 41.

stand to be affected and that alternative accommodation must be made available.³⁸² In the event that alternative accommodation is not available, the special circumstances of those who stand to be evicted must ensure that “special support should be available including targeted advice on availability of legal aid and on appeals.”³⁸³ In *Fourth World v France* the ECSR added that article 31 required States Parties to

“a. adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter; b. maintain meaningful statistics on needs, resources and results; c. undertake regular reviews of the impact of the strategies adopted; d. establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage; e. pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.”³⁸⁴

The more explicit right to housing in the Revised ESC has enabled the ECSR to scrutinise the arguments advanced as justification for the limitation of housing and family interests with greater rigour and jurisprudential discipline than the ECtHR. The ECSR has identified numerous systemic barriers in housing policy and practice that prevent Roma from accessing affordable housing and impede their social integration into mainstream society. Again unlike the ECtHR, the ECSR has been prepared to incorporate the right to non-discrimination in Article E of the Revised ESC to its interpretation of abovementioned rights. This has made it far easier to accept the emerging consensus amongst Contracting States of the Council of Europe that the rights and needs of Roma require special consideration in domestic law and policy.

However, it must be noted that the ECSR has been afforded the freedom to be adventurous in its interpretations of articles 16, 30, 31 and E because its decisions are subordinate to the COM and thus subject to political control. On the other hand, the ECtHR’s decisions are directly binding on the States Parties without the interference of a political mediating body. This contributes - along with a far less direct right to housing provision in the ECHR - to a more cautious approach by the ECtHR with greater deference to national sovereignty.

³⁸² *FEANTSA v France* par 163.

³⁸³ *Interights v Greece* par 69.

³⁸⁴ *Fourth World v France* par 60.

4 3 3 The American Convention on Human Rights

4 3 3 1 Introduction

The second regional human rights system was created when the Organization of American States ('OAS') adopted the American Convention on Human Rights³⁸⁵ ('Pact of San José'). The purpose of the Pact of San José is to "consolidate ... a system of personal liberty and social justice based on respect for the essential rights of man".³⁸⁶ While the Pact of San José provides for a range of civil and political rights,³⁸⁷ it only provides for socio-economic rights in a single provision. Article 26 of the Pact of San José reads:

"The States parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

In an effort to complement this provision, the OAS has adopted the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights³⁸⁸ ('Protocol of San Salvador') which includes a range of socio-economic

³⁸⁵ OASTS No 36. The Convention was adopted on 22 November 1969 and came into force on 18 July 1978. As at 15 July 2011 24 of the 35 Organisation of American States countries have ratified the Convention.

³⁸⁶ Preamble of the Pact of San José.

³⁸⁷ These rights includes the right to legal personality (article 3); the right to life (article 4); the right to humane treatment (article 5); the right to be free from slavery (article 6); the right to personal liberty (article 7); the right to a fair trial (article 8); the right to be free from prosecution under *ex post facto* laws (article 9); the right to compensation for miscarriages of justice (article 10); the right to privacy (article 11); the right to freedom of conscience and religion (article 12); the right to freedom of thought and expression (article 13); the right to reply (article 14); the right of assembly (article 15); the right to associate freely (article 16); family rights (article 17); the right to a name (article 18); the rights of children (article 19); the right to nationality (article 20); the right to property (article 21); the right of free movement and residence (article 22); the right to participate in government (article 23); the right to equal protection before the law (article 24) and the right of access to courts (article 25).

³⁸⁸ OASTS No 69. The Protocol was adopted on 17 November 1988 and came into force on 16 November 1999. Melish TJ "The Inter-American Commission on Human Rights - Defending social rights through case-based petitions" in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 339-371 344 ('Melish "The Inter-American Commission"') explains that while the Inter-American Commission on Human Rights can apply all of abovementioned socio-economic rights to States Parties of the OAS under its promotional mandate, it is only competent to apply the right to unionise and the right to education under its contentious mandate. The result is that the other rights contained in the Protocol may only be used by the Commission to the extent that they are invoked to aid the interpretation of the scope and content of the "congruent but less precisely defined" right to

rights.³⁸⁹ However, the Protocol of San Salvador does not provide for the right to housing. The Inter-American Commission on Human Rights³⁹⁰ ('IACHR') and the Inter-American Court of Human Rights³⁹¹ ('IACtHR') therefore has had to adjudicate housing rights cases with reference to the right to life in article 4³⁹² and the right to humane treatment in article 5³⁹³ of the Pact of San José.³⁹⁴

4 3 3 2 Case law

In *Corumbiara v Brazil*,³⁹⁵ 500 families occupied a small part of a privately-owned farm that was not being used productively. The land owner hired private security guards to assist the military police to execute the eviction order which the owner obtained the previous day. In the process nine squatters were shot from behind and killed and more than 100 squatters were wounded as a result of the violent and brutal confrontation. Afterwards the entire settlement was destroyed and all the belongings of the squatters were burned.

development in the Pact of San José. See also Melish TJ "The Inter-American Court of Human Rights - Beyond progressivity" in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 372-408 376-377 ("Melish "The Inter-American Court of Human Rights").

³⁸⁹ The Protocol provides for the rights to work (article 6); just, equitable and satisfactory conditions of work (article 7); trade unionization (article 8); social security (article 9); health (article 10); a healthy environment (article 11); food (article 12); education (article 13); the benefits of culture (article 14); formation and protection of the family (article 15); children (article 16); protection of the elderly (article 17) and the handicapped (article 18).

³⁹⁰ The Commission was established in 1959 and reports to the General Assembly of the OAS. The IACHR consist of 7 commissioners "with high moral character and recognized competence in the field of human rights" (article 34 of the Pact of San José). The commissioners serve in their personal capacity (article 36) and are appointed for a four year term with the possibility of one re-election (article 37 of the Pact of San José). The IACHR convenes several times per year in Washington DC to "promote the observance and defence of human rights" through *inter alia* human rights awareness campaigns, conducting studies and hearing petitions and other communications (article 41 of the Pact of San José).

³⁹¹ The IACtHR was established in 1979 and reports to the General Assembly of the OAS. The IACtHR consist of 7 judges who possess "the qualifications required for the exercise of the highest judicial functions" (article 52 of the Pact of San José). The judges serve in their personal capacity and are appointed for a six year term with the possibility of one re-election (article 54 of the Pact of San José). The IACtHR convenes in San José, Costa Rica where it hears cases from OAS members (article 58 of the Pact of San José).

³⁹² Article 4 of the Pact of San José states *inter alia* that "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be deprived of his life."

³⁹³ Article 5 of the Pact of San José states that "(1) Every person has the right to have his physical, mental, and moral integrity respected. (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

³⁹⁴ Melish TJ "The Inter-American Commission" 356.

³⁹⁵ Case 11.556, Report No 77/98, Inter-Am CHR, OEA/Serv.L/V/II.95 doc 7 rev 2 (1998).

The petitioners framed their claim within the narrow bounds of the rights to life and humane treatment by focussing on the death and physical injury that was caused as a result of the excessive force that was used to evict them. The IACHR ordered adequate reparation for them in terms of the violations of articles 4, 5, 8 (right to a fair trial) and 25 (right to judicial protection) of the Pact of San José and recommended, as a result of the failure to properly investigate the individual killings, that the formal competence of eviction-related investigations be transferred to the civilian police forces.

This case was decided on very narrow grounds because it focussed on the rights of those that were injured and killed during the execution of the eviction. This limited focus shifted the international housing rights violations committed against those that did not bear wounds to the background.³⁹⁶ A broader claim in terms of articles 11 (right to privacy) and 26 would have placed the IACHR in a position to address the other ways in which the eviction could be evaluated. These included the lack of notice; the execution of the eviction order at dawn; the destruction of the settlement and burning of the families' possessions; the failure to provide alternative accommodation; and the lack of a programme that can address the immediate needs of poor and otherwise destitute people.³⁹⁷

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*³⁹⁸ the Awas Tingni Community, under the leadership of Jaime Castillo Felipe, lodged a complaint with the IACHR on the grounds that the Nicaraguan government failed to demarcate their communal land and therefore violated their property rights over their ancestral land. The cause of the complaint was a concession of 62 000 hectares of tropical forest to the Korean company of Sol del Caribe for purposes of felling trees and to pursue commercial development.

The IACHR found the Nicaraguan government in violation of articles 1, 2, 21 and 25. The IACHR referred the case to the IACtHR along with its report on the violations. The IACtHR concluded that the Nicaraguan government violated articles 21 and 25. The IACtHR found that the violation of the property rights of the Awas Tingni Community

³⁹⁶ Melish TJ "Rethinking the 'less is more' thesis: Supranational litigation of economic, social and cultural rights in the Americas" (2006) 39 *New York University Journal of International Law and Politics* 171-343 317.

³⁹⁷ Melish TJ "The Inter-American Commission" 356.

³⁹⁸ Judgment of 31 August 2011 by the IACtHR, (Ser.C) No. 79 (2011).

was significant because their property rights flowed directly from their indigenous tradition which made it impossible for the government to award any concession over that land.

The IACtHR ordered the Nicaraguan government to adopt the measures that are necessary to properly demarcate the communal land of the Awas Tingni Community and to ensure that the title of the land is registered in their name. The IACtHR further ordered the government to refrain from any acts that affected the existence, value, use or enjoyment of the property located on the communal land where the community lives and carries out its activities. The IACtHR also awarded the Awas Tingni Community \$ 50 000 compensation for the violation of their rights by the Nicaraguan government.

4 3 3 3 Conclusion

Melish argues that both the IACHR³⁹⁹ and the IACtHR⁴⁰⁰ are well positioned to play a leading role in the development of socio-economic rights in the Inter-American human rights system. However, both bodies are currently reluctant to consider the existence of an independent socio-economic right to housing in terms of article 26. Instead, both bodies prefer to consider housing issues in terms of classic civil and political rights. Melish argues that this does not raise serious concerns in practice because the indivisibility and interdependence of all human rights ensures that housing issues can be adjudicated and vindicated in terms of civil and political rights.⁴⁰¹ She notes that this can occur in terms of certain neutral procedural norms like access to courts, due process or the principle of non-discrimination. This purpose can also be achieved in terms of the broad rights to life, dignity, political participation and privacy.⁴⁰² However, the latter approach presents a unique problem because the very broad nature of these rights make it extremely difficult to litigate issues that relate to the specifics of the adequacy, availability, accessibility and quality of housing. Melish accordingly argues that both the IACHR and the IACtHR must consider housing claims as claims for the

³⁹⁹ Melish "Inter-American Commission" 372.

⁴⁰⁰ Melish "Inter-American Court" 405.

⁴⁰¹ Melish "Inter-American Court" 406.

⁴⁰² Melish "Inter-American Court" 406.

protection against arbitrary or unreasonable conduct that harms the enjoyment of an individually-held right to housing.⁴⁰³

4 3 4 The African Charter on Human and Peoples' Rights

4 3 4 1 Introduction

The third regional human rights system was created when the Organisation of African Unity, now known as the African Union,⁴⁰⁴ adopted the African Charter on Human and People's Rights⁴⁰⁵ ('Banjul Charter') at the 18th Conference of Heads of State and Government. The Banjul Charter was adopted as a result of the external pressure that was placed on African governments to establish a regional human rights regime for Africa and as a response to the gross human rights violations committed by some African leaders.⁴⁰⁶ The Banjul Charter affirms the interdependence and indivisibility⁴⁰⁷ of all human rights within the African context and sets the stage for the African Commission on Human and Peoples' Rights⁴⁰⁸ (ACHPR) to consider the facts of the communications before it in light of all the applicable rights.⁴⁰⁹

Although the Banjul Charter contains a number of socio-economic rights,⁴¹⁰ it has been criticised for not expressly recognising *inter alia* the right to adequate housing and

⁴⁰³ Melish "Inter-American Court" 407.

⁴⁰⁴ Viljoen F "The African regional human rights system" in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) 503-527 505 ('Viljoen "The African regional human rights system"') notes that it is the role of the African Union to ensure compliance by member states of the commitment to respect human rights and the principles underpinning democracy, the rule of law and good governance.

⁴⁰⁵ 1520 UNTS 217. The Charter was adopted on 27 June 1981 and came into force on 21 October 1986. South African ratified the Charter on 9 July 1996.

⁴⁰⁶ Chirwa DM "African regional human rights system" in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 323-338 323 (Chirwa "African regional human rights system").

⁴⁰⁷ Preamble of the Banjul Charter.

⁴⁰⁸ The ACHPR was established in 1981 and reports to the Assembly of Heads of State and Government of the African Union. The ACHPR consists of 11 members from the African continent who are known "for their high morality, integrity, impartiality and competence in matters of human and peoples' rights" for a renewable six-year term (article 31). The ACHPR convenes bi-annually (during March/April and October/November) to interpret the Banjul Charter and conduct tasks that are related to the promotion and protection of human and peoples' rights (article 45).

⁴⁰⁹ Chirwa "African regional human rights system" 324.

⁴¹⁰ These rights include: the right to work (article 15); the right to health (article 16); the right to education (article 17); the right to freely dispose of wealth and natural resources (article 21); the right to economic, social and cultural development (article 22) and the right to a general satisfactory environment (article 24).

the right to an adequate standard of living.⁴¹¹ This apparent absence of key socio-economic rights in the Banjul Charter is remedied by the fact that the ACHPR is empowered to draw inspiration from international human rights law.⁴¹² This is exactly what the ACHPR did in *The Social and Economic Rights Action Group & the Centre for Economic and Social Rights v Nigeria*⁴¹³ (*SERAC v Nigeria*) when it found that a right to housing was implicitly entrenched in articles 14,⁴¹⁴ 16⁴¹⁵ and 18(1)⁴¹⁶ of the Banjul Charter.

4 3 4 2 *SERAC v Nigeria*

In *SERAC v Nigeria* it was alleged that the Nigerian government condoned and facilitated the oil production operations of the Nigerian National Petroleum Company (NNPC), a majority shareholder in a consortium with the Shell Petroleum Development Company, without due regard for the environmental degradation and resultant health problems it caused for the people in Ogoniland. It was further alleged that the combined effect of substandard maintenance, no operation oversight and questionable safety mechanisms resulted in the pollution of waterways near villages that were used by the Ogoni people for fishing and irrigation of their farmland. The Nigerian security forces

⁴¹¹ Oloka-Onyango J “Beyond the rhetoric: Reinvigorating the struggle for economic, social and cultural rights in Africa” (1995) 26 *California Western International Law Journal* 1-71 51. Article 10 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49 (concluded on 11 July 1990 and entered into force on 29 November 1999) states that

“[n]o child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.”

Article 16 of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa OAU doc CAB/LEG/66.6 (concluded on 11 July 2003 and entered into force on 25 November 2005) provides that “[w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant women whatever their marital status, access to adequate housing.”

⁴¹² Article 60 of the Banjul Charter.

⁴¹³ Communication 155/96, Ref. ACHPR/COMM/A044/1 (27 May 2002).

⁴¹⁴ Article 14 of the Banjul Charter reads: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

⁴¹⁵ Article 16 of the Banjul Charter reads: “(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

⁴¹⁶ Article 18(1) of the Banjul Charter reads: “The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.”

(army, air force, police and navy) responded to the protests of the Ogoni leaders by attacking villages, destroying homes and then setting everything alight. The complainants therefore argued that the Nigerian government was in violation of articles 2,⁴¹⁷ 4,⁴¹⁸ 14, 16, 18(1), 21⁴¹⁹ and 24⁴²⁰ of the Banjul Charter.

The complainants alleged that the Nigerian government contaminated the air, water and soil and thereby harmed the health of the Ogoni people; failed to protect the Ogoni people from the harm caused by the NNPC and Shell; and failed to conduct or permit studies of potential or actual environmental and health risks caused by the oil operations.⁴²¹ In this regard the ACHPR noted that the rights contained in articles 16 and 24 were closely linked to economic and social rights “in so far as the environment affects the quality of life and safety of the individual.”⁴²² The ACHPR found that these rights imposed clear obligations on the Nigerian government to “prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources” and to “desist from directly threatening the health and environment of their citizens.”⁴²³ These obligations would also include permitting or ordering independent scientific monitoring of threatened environments; providing information and the right to be heard to those communities

⁴¹⁷ Article 2 of the Banjul Charter states that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without discrimination of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

⁴¹⁸ Article 4 of the Banjul Charter provides that “[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. Non one may be arbitrarily deprived of this right.”

⁴¹⁹ Article 21 of the Banjul Charter reads:

“(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall people be deprived of it. (2) In case of spoliation the disposed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. (3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. (4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. (5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their people to fully benefit from the advantages derived from their natural resources.”

⁴²⁰ Article 24 of the Banjul Charter states that “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.”

⁴²¹ *SERAC v Nigeria* par 50.

⁴²² *SERAC v Nigeria* par 51.

⁴²³ *SERAC v Nigeria* par 52.

affected by these activities.⁴²⁴ The ACHPR therefore held that the Nigerian government did not show the Ogoni people the care and concern that they were entitled to under the Banjul Charter.⁴²⁵

The complainants also alleged that the Nigerian government failed to monitor or regulate the operations of the NNPC and Shell which enabled it to exploit the oil reserves in Ogoniland and that it failed to involve the Ogoni Communities in the decisions that affected the development of the land that they occupied and cultivated.⁴²⁶ In this regard the ACHPR noted that article 21 served “to remind African governments of the continent’s painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.”⁴²⁷ The ACHPR found that this provision imposed an obligation on governments to protect citizens not only by enacting legislation and providing appropriate enforcement mechanisms, but also by protecting them from harmful acts that are committed by private parties.⁴²⁸ The ACHPR held that the conduct of the Nigerian government facilitated the destruction of the Ogoniland with devastating effects to the general well-being of the Ogonis.⁴²⁹

The complainants further alleged that the Nigerian government systematically violated the right to adequate housing of the Ogoni community on a large scale.⁴³⁰ While the ACHPR acknowledged that the Banjul Charter does not contain an explicit right to housing, it reasoned that the combined effect of articles 14, 16 and 18(1) encapsulated the essence of a right to shelter or housing in the African context.⁴³¹

The ACHPR explained that the right to housing placed an obligation on governments to desist from destroying the homes of its citizens and to afford individuals and communities the opportunity to rebuild homes that were damaged or destroyed. Governments must further ensure that no government agency or third parties violated the housing rights of individuals and communities. In the event that such a violation occurred, governments should act decisively against those parties by prosecuting them

⁴²⁴ *SERAC v Nigeria* par 53.

⁴²⁵ *SERAC v Nigeria* par 54.

⁴²⁶ *SERAC v Nigeria* par 55.

⁴²⁷ *SERAC v Nigeria* par 56.

⁴²⁸ *SERAC v Nigeria* par 57.

⁴²⁹ *SERAC v Nigeria* par 58.

⁴³⁰ *SERAC v Nigeria* par 59.

⁴³¹ *SERAC v Nigeria* par 60.

to the full extent of the law. Finally, the right to housing encompasses more than the right to have a roof overhead. The right to housing also embodies the right of every individual to be left alone to live in peace - "whether under a roof or not."⁴³²

The ACHPR held that the demolition of Ogoni homes and the subsequent obstruction, harassment, violent attacks and murder of those that attempted to rebuild the homes constituted a serious violation of the right to shelter.⁴³³ The ACHPR echoed the CDESCR in holding that the right to housing entailed more than a right to shelter because it also encompassed the right to protection against forced eviction given that evictions cause distress (physical, psychological and emotional), increased impoverishment and the loss of means of economic sustenance.⁴³⁴

The ACHR accordingly held that the Nigerian government was in violation of all the articles cited. It recommended⁴³⁵ that it ensure the protection of the environment, health and livelihood of the people of Ogoniland by ceasing all attacks on their communities. The Nigerian government should conduct investigations into the human rights violations committed against the Ogoni people and award compensation to the victims of these violations. It should initiate comprehensive cleaning operations of the farms and rivers affected by pollution and ensure that appropriate environmental and social impact assessments were prepared. It should further provide information on the health and environmental risks of possible oil pollution and ensure that the Ogoni people obtain access to regulatory and decision-making bodies.⁴³⁶

4 3 4 3 Conclusion

The value of *SERAC v Nigeria* is that the ACHPR found that the right to housing was implicitly recognised in the Banjul Charter by relying on a combined interpretation of the rights to property, the best attainable state of physical and mental health, and to the protection of the family. As such the ACHPR affirmed the fact that all human rights are

⁴³² *SERAC v Nigeria* par 61.

⁴³³ *SERAC v Nigeria* par 62.

⁴³⁴ *SERAC v Nigeria* par 63.

⁴³⁵ Viljoen "The African regional human rights system" 505 notes that the recommendations of the ACHPR is not formally binding. This, together with the fact that it does not have a clear competence to order remedial action and the lack of visibility for its protective work, is cited as some of the deficiencies that is currently crippling the ACHPR's mandate.

⁴³⁶ *SERAC v Nigeria* 15.

indivisible and that they are mutually supporting. This enabled the ACHPR to craft a comprehensive response to the systemic violation of the implied right to housing. The ACHPR furthermore provided the Nigerian government with detailed guidance on what its obligations were in order to respect, protect, promote and fulfil the implied right to housing. Liebenberg notes that the coming into force of the Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights⁴³⁷ will hopefully provide more impetus towards developing a binding jurisprudence on all the rights in the Banjul Charter,⁴³⁸ in general, and the implied right to housing, specifically.

4 4 Conclusion

This chapter has shown that South African courts can consider a range of international and regional human rights instruments to develop a substantive understanding of the concepts of "adequacy" for purposes of section 26 of the Constitution. General Comment 4's description of the right to housing as living "somewhere in security, peace and dignity" accords with the Constitutional Court's assessment that section 26 amounts to "more than bricks and mortar". General Comment 4 further states that the right to housing is more complex than simply having a roof over one's head. This is in accordance with how the Constitutional Court has described the right of access to adequate housing. The similarities between General Comment 4 and the jurisprudence of the Constitutional Court is indicative of the fact that South Africa is on the correct path to giving substantive content to the right of access to adequate housing. South Africa simply requires an organising framework within which to consider the right of access to adequate housing. This organising framework can be found in General Comment 4 where the CESCR stated that the characteristics of adequate housing include having some sort of security of tenure, receiving services, living in a home that is accessible both financially and physically, living in a home that is fit for human habitation, having your home in close proximity to employment opportunities and social amenities, and

⁴³⁷ OAU doc CM/2051 (LXVIII). As at 15 July 2011 there were 25 ratifications of and 50 signatories to this Protocol. South African ratified the Protocol on 3 July 2002. See Mubangizi JC and O'Shea A "An African Court of Human and Peoples' Rights" (1999) 24 *SAYIL* 256-269.

⁴³⁸ Liebenberg *Socio-Economic Rights* 110.

living in a home that embraces your culture. The question is just how to reach this point of development.

The ECtHR's contentment with the fact that adequate procedural protections existed in the English land use system to vindicate the housing rights of gypsies/travellers has dwindled from *Buckley* to *Connors*. The ECtHR has now limited the margin of appreciation or amount of deference that it shows to States Parties and replaced it with a firm requirement that States Parties must take positive steps to embrace the emerging consensus amongst the Council of Europe member states to improve the living conditions and lives of gypsies/travellers. This requires States Parties to accept the fact that there is a dimension to the awarding of planning permission that goes beyond the environmental and other concerns listed in article 8(2) of the ECHR. This is the dimension that encompasses the personal circumstances of the gypsies/travellers. South Africa has already achieved this with section 26(3) of the Constitution and the subsequent jurisprudence of the Constitutional Court which states that the legally relevant circumstances in post-apartheid South Africa include both the personal circumstance of the unlawful occupiers and the history and duration of their unlawful occupation. The only way to embrace this dimension in the European context is to escape the vicious circle that the English land use system creates by giving substantive content to the right to a home. The ECtHR has reached this point of development in its jurisprudence on the right to respect the home and family life without adhering to the two-stage constitutional analysis that it applies in other instances. Despite this failure to engage first with the content of a right before moving on to a limitation analysis, the ECtHR has started to engage with the content of article 8(1) by framing its reservations about justifications advanced by the United Kingdom to reflect some of the characteristics that are contained in General Comment 4. South African courts, especially the Constitutional Court, have similarly not adhered to a strict two-stage constitutional analysis in adjudicating section 26 of the Constitution. The result is that the South African understanding of the right of access to adequate housing is that it amounts to "more than bricks and mortar." The ECtHR has shown that it is possible to engage to some extent with the substantive content of the right to housing in the second stage of constitutional analysis if the first stage is avoided.

The South African courts can also learn a great deal from the jurisprudence that the ECSR has generated in terms of articles 16, 30, 31 and E of the Revised ESC by giving substantive interpretations to these rights. The resulting independent content that has been afforded to these rights has enabled the ECSR to scrutinise the justifications advanced by Greece, Italy, Bulgaria and France with greater rigour and jurisprudential discipline than the ECtHR has done under the ECHR. This is in accordance with the approach that the CESCR prescribes in General Comment 7 when it requires States Parties to establish adequate procedural and substantive safeguards against forced evictions. Establishing these safeguards forces States Parties to establish better justifications for proceeding with planned forced evictions. South Africa has already achieved this in the democratic dispensation by ensuring that unlawful occupiers receive notice of the pending eviction and have an opportunity to place their personal circumstances before the court for its consideration. Recently the joinder of organs of state, the obligation to engage meaningfully with unlawful occupiers and the provision of alternative land or accommodation has been added to this list of protections against forced evictions. This shows that the development of these safeguards are possible in an approach that first engages with the content of the right before it proceeds to an evaluation of the reasons advanced by States Parties for not respecting, protecting or fulfilling these rights.

Finally, the South African courts can learn from the jurisprudence that the IACHR, the IACtHR and the ACHPR have generated in terms of the Pact of San José and the Banjul Charter respectively. While neither of these regional human rights systems has an explicit right to housing, the supervisory bodies in both systems have relied on classic civil and political rights to vindicate violations of housing interests. This is in accordance with the internationally accepted fact that all human rights are interdependent and mutually supporting. However, this approach to the adjudication of housing interests is problematic, because it is difficult to give content to a right to housing from these broad norms. South African courts, most notably the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*,⁴³⁹ have regularly stated that the right of access to housing must be interpreted

⁴³⁹ 2001 (1) SA 46 (CC).

and understood in relation to the other rights in the Bill of Rights. However, the reliance on the broad norms of equality, human dignity and life has only allowed the Constitutional Court to interpret the right of access to adequate housing as amounting to “more than bricks and mortar”. This interpretation of the content of section 26(1) of the Constitution is by no means insignificant because it indicates that there is more to housing than a physical structure. The fact remains that it is still unclear what the landscape of the right of access to adequate housing looks like beyond the physical structure of a home.

The South African courts are ideally placed to develop the substantive content of the right of access to adequate housing by tapping into the human rights dialogue on the scope and content of the interrelated concepts of “adequacy” and “home” discussed above. The establishment of an organising framework within which to develop the content and scope of the right of access to adequate housing will, however, turn on how the South African courts can interpret the statutory obligations that flow from the Housing Act 107 of 1997 and the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 to achieve its full transformative potential.

Obligations of the State

5 1 Introduction

The state has an obligation to “respect, protect, promote and fulfil” the right of access to adequate housing.¹ This obligation binds the legislature to enact legislation that gives effect to section 26 of the Constitution;² the executive to implement that legislation;³ and

¹ Section 7(2) read with section 26 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’). Shue H *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1980) developed this typology of duties as a response to the argument which erroneously assumes that a distinction can be drawn between negative or security rights and positive or subsistence rights. Shue explains that this argument fails to appreciate that neither security nor subsistence rights fit neatly into the assigned sides of a simplistic positive/negative dichotomy (at 37) because while it may be possible to avoid violating the physical security of another (for example, by refraining to murder, rape or assault another), it is only possible to protect that security by taking positive action (for example, by developing a criminal justice system to apprehend, prosecute and detain individuals that commit crime). Shue similarly explains that while subsistence rights sometimes require the provision of commodities to those that cannot do so for themselves (for example, providing shelter, water, food, social security or health care), it may also require negative action (for example, by not interfering with the access people have to shelter, water, food, social security or health care). Shue rejects the idea that the distinctions should be drawn between the types of rights (at 52) and argues that distinctions should rather be drawn between the types of duties that those rights impose on society. Shue therefore proposes the following “tripartite of duties”: firstly, duties to avoid depriving; secondly, duties to protect from deprivation; and finally, duties to aid the deprived. Liebenberg S *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) (‘Liebenberg Socio-Economic Rights’) 87 explains that section 7(2) of the Constitution embraces this holistic framework of duties which forms a firm basis from which to develop a substantive and contextual approach to the adjudication of human rights. See Liebenberg *Socio-Economic Rights* 54-49 for a discussion of the positive/negative rights dichotomy. See further Liebenberg S “Violations of socio-economic rights: The role of the South African Human Rights Commission” in Andrews P and Ellman S (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 405-443 and De Vos P “Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution” (1997) 13 *SAJHR* 67-101 for a discussion of the application of this typology of duties in the context of socio-economic rights in South Africa.

² Section 8(1) read with sections 43, 55(1), 68(1), 76(3), 104(1)(b)(i), 156(1) and schedule 4A of the Constitution. The following national legislation has been enacted to give effect to section 26 of the Constitution: the Housing Act 107 of 1997 (‘the Housing Act’); the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’); the Rental Housing Act 50 of 1999 and the Social Housing Act 16 of 2008.

³ Section 8(1) of the Constitution. The following offices are responsible for the implementation of legislation: at national government level, the President, as head of the national executive, and the Minister for Human Settlements (section 85(2)(a) of the Constitution read with the definition of “Minister” in section 1 of the Housing Act); at provincial government level, the Premier, as head of the provincial executive, and the MEC responsible for housing (section 125(2)(b) of the Constitution read with the definition of “MEC” in section 1 of the Housing Act); at local government level, the Municipal Council (section 156(1) of the Constitution read with the definition of “municipality” in section 1 of the Housing Act).

the judiciary to adjudicate whether the legislation as implemented can lead to the progressive realisation of the right of access to adequate housing.⁴ The executive authority is perhaps the most accessible and visible sphere of government, because it is at the coalface of the housing needs of the poor. In *Grootboom CC*, Yacoob J explained the obligations of the executive as follows:

“All levels of government must ensure that the housing program is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step and every level of government must be consistent with the constitutional obligations to take reasonable measures to provide access to adequate housing.”⁵

The executive - at national,⁶ provincial⁷ and local⁸ government level - therefore fulfils an instrumental role in the implementation of housing development projects⁹ that have been incorporated into a national housing programme.¹⁰ As such the executive must

⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) ('*Grootboom CC*'); *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('*PE Municipality*'); *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) ('*Modderklip CC*'); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) ('*Occupiers of 51 Olivia Road*'); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) ('*Residents of Joe Slovo*'); *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) ('*Joseph*'); *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) ('*Abahlali baseMjondolo*'); and *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) ('*Nokotyana*').

⁵ *Grootboom* par 82.

⁶ Section 3 of the Housing Act describes the functions of the Minister of Human Settlements.

⁷ Section 7 of the Housing Act describes the functions of the MEC responsible for housing in each of the nine provinces of South Africa.

⁸ Section 9 of the Housing Act describes the functions of the municipal council of each municipality.

⁹ Section 1 of the Housing Act defines “housing development project” as “any plan to undertake housing development as contemplated in any national housing programme.” Section 1 defines “housing development” as

“the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to - (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply.”

¹⁰ Section 1 of the Housing Act defines a “national housing programme” as

respect, protect, promote and fulfil¹¹ the right of access to adequate housing; observe and adhere to the principles of co-operative government and intergovernmental relations;¹² and comply with all other applicable provisions of the Constitution.¹³ The executive must ensure that housing development provides a range of housing and tenure options¹⁴ that are affordable and sustainable.¹⁵ These housing development projects must form part of an integrated development plan¹⁶ and must be administered in a transparent, accountable and equitable manner.¹⁷

The primary obligation of the executive in implementing housing development projects is to ensure that priority is given to the needs of the poor.¹⁸ The executive is therefore obliged to ascertain the needs of the poor by fostering a dialogic relationship between itself and, on the one hand, the individuals and communities affected by housing development and, on the other hand, all other stakeholders in housing development.¹⁹ The corollary of this dialogic relationship is that the executive will transfer the requisite skills and empower individuals and communities to fulfil their own housing needs²⁰ and spend its budget on housing development in a manner which stimulates private investment.²¹

In terms of the Housing Act, the executive is obliged to promote *inter alia* the establishment, development and maintenance of viable communities and to ensure that slums and slum conditions are prevented by fostering safe and healthy living

“any national policy framework to facilitate housing development, including, but not limited to, any housing assistance measures referred to in section 3(5) or any other measure or arrangement to - (a) assist persons who cannot independently provide for their own housing needs; (b) facilitate housing delivery; or (c) rehabilitate and upgrade existing housing stock, including municipal services and infrastructure.”

¹¹ Section 2(1)(h)(i) of the Housing Act.

¹² Section 2(1)(h)(ii) of the Housing Act. See also the principles of co-operative government and intergovernmental relations contained in section 41 of the Constitution.

¹³ Section 2(1)(h)(iii) of the Housing Act. The obligation in section 2(1)(f) to “take due cognisance of the impact of housing development on the environment” creates a direct link to section 24 of the Constitution.

¹⁴ Section 2(1)(c)(i) of the Housing Act.

¹⁵ Section 2(1)(c)(ii) of the Housing Act.

¹⁶ Section 2(1)(c)(iii) of the Housing Act.

¹⁷ Section 2(1)(c)(iv) of the Housing Act.

¹⁸ Section 2(1)(a) of the Housing Act. In *Residents of Joe Slovo* par 350, Sachs J explained that section 26 of the Constitution laid down “in great detail the approach the state must adopt when dealing with the claims of the homeless.”

¹⁹ Section 2(1)(l) of the Housing Act.

²⁰ Section 2(1)(d) of the Housing Act.

²¹ Section 2(1)(k) of the Housing Act.

conditions.²² The executive must also spearhead the process of integration in urban and rural areas²³ by ensuring that measures are put in place to prohibit discrimination on any of the listed grounds in the Constitution in the housing development process.²⁴

In practice, municipalities incur the primary obligation to provide access to adequate housing because “in some instances, the full realisation - or at least the ultimate administration – of programmes designed to make good the promise of th[is] right ... rests on municipalities.”²⁵ The Constitution foresees that the realisation of section 26 can intersect with the functions of municipalities in a direct way through the assignment of specific powers in terms of legislation.²⁶ Section 9(1)(a)(i) of the Housing Act assigns municipalities the power to ensure that the inhabitants of its area of jurisdiction have access to adequate housing, which is a competence listed in schedule 4A of the Constitution. Sections 3(2)(e) and 7(2)(c) of the Housing Act places an obligation on national and provincial government to provide any assistance that local governments may need to support and strengthen its capacity to fulfill its duties in terms of the Housing Act. The Constitution also foresees that the realisation of section 26 can intersect with the functions of municipalities in an indirect way through the contributory and supportive role they fulfil in rendering basic services²⁷ to their communities.²⁸

²² Section 2(1)(e)(iii) of the Housing Act.

²³ Section 2(1)(e)(iv) of the Housing Act.

²⁴ Section 2(1)(e)(vi) of the Housing Act.

²⁵ Steytler N and De Visser J “Local Government” in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa 2nd edition* (Original Service, June 2008) 22-67 (“Steytler and De Visser “Local Government”).

²⁶ Section 156(1) of the Constitution provides that

“[a] municipality has executive authority in respect of, and has the right to administer – (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and (b) *any other matter assigned to it by national or provincial legislation*” (emphasis added).

Section 156(4) of the Constitution further provides that

“[t]he national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, *the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if - (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it*” (emphasis added).

See also sections 155(6) and (7) of the Constitution.

²⁷ The range of basic municipal services that a municipality should provide includes, in terms of schedule 4B of the Constitution, electricity and gas reticulation; municipal health services; municipal public transport; municipal public works; stormwater management systems in built-up areas; and water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems. Schedule 5B of the Constitution adds cleansing; local amenities; municipal parks and recreation; municipal roads; refuse removal, refuse dumps and solid waste disposal; and street lighting.

The aim of this chapter is to trace the recent jurisprudential developments in the law of evictions that have provided greater clarity on the nature of the obligations of the state imposed by section 26 of the Constitution. The first part of this chapter analyses the case law on the necessary joinder of local authorities to eviction proceedings and the development of the concept of meaningful engagement. The second part of the chapter proposes an organising framework for the consideration of the availability of alternative accommodation in terms of the rights and needs of vulnerable people.

5 2 Current developments

5 2 1 Joinder

5 2 1 1 Introduction

Joinder refers to the situation where more than one party or more than one cause is joined in a single action. Joinder of convenience is usually pursued in cases where a multiplicity of actions will be avoided or time, costs and effort will be saved.²⁹ However, joinder can also occur where the circumstances dictate that it is essential for a party to be joined due to the interest of that party in the case. This joinder of necessity will be required where “a party has, or may have, a direct and substantial interest in any order

See *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) on water and sanitation, *Joseph* on electricity and *Nokotyana* on street lighting.

²⁸ Section 152(1)(b) of the Constitution. Steytler and De Visser “Local Government” 22-66 argue that section 152(b) of the Constitution does not provide a strong basis for claiming the provision of services other than those which the municipality provides to the community on a daily basis - water, sanitation and refuse removal - because these services are located within the broad objects of a municipality in terms of section 153 of the Constitution. They argue that a much stronger basis for claiming a broader range of services from a municipality can be found in section 227(1)(a) read with section 139(5) of the Constitution. Section 227(1)(a) of the Constitution provides that municipalities are “entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it.” The Minister of Human Settlements is therefore empowered to “negotiate for the national apportionment of the state budget for housing development” in terms of section 3(4)(b) of the Housing Act. Section 139(5)(a) of the Constitution enables the relevant provincial executive to “impose a recovery plan” when “a municipality, as a result of a crisis in its financial affairs, *is in serious or persistent material breach of its obligations to provide basic services* or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments” (emphasis added).

²⁹ Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (2009) 208 (‘Cilliers *et al Civil Practice*'). These instances of joinder of convenience are regulated exclusively by Rule 10(1) of the Uniform Rules of the High Court. In *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) par 71 it was stated that the questions of law and fact must “in the main” or in their “principal essentials” be essentially the same. See the conflicting judgments of the Witwatersrand Local Division of the High Court (now the South Gauteng High Court, Johannesburg) in *Vitorakis v Wolf* 1973 (3) SA 928 (W) at 930 and *Rabinowitz NNO v Ned-Equity Insurance Co Ltd* 1980 (3) SA 415 (W) at 419E on the question of whether Rule 10(1) has replaced the common law rules on joinder.

the court might make³⁰ or if the order “cannot be sustained or carried into effect” without prejudicial effect to that party.³¹

The numerous examples of joinder of necessity in case law³² indicate that a party will have a direct and substantial interest in a case when that party has an interest in the right which is the subject-matter of the litigation and not merely a financial interest.³³ The classic example in this regard is where the constitutional validity of an administrative action or piece of legislation is challenged.³⁴ In *Mabaso v Law Society, Northern Provinces and Another*, O’Regan J explained the rationale for joining the relevant organ of state in these circumstances as follows:

“In a constitutional democracy, a Court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the Court as it considers fit. There are at least two reasons for this. First, the Minister responsible for administering the legislation may well be able to place pertinent facts and submissions before the Court necessary for the proper determination of the constitutional issue. Secondly, a constitutional democracy such as ours requires that the different arms of government respect and acknowledge their different constitutional functions.”³⁵

Where such an interest of a party becomes apparent a court must postpone the proceedings until that party has either received judicial notice of the proceedings, been

³⁰ *Haroun v Garlick* [2007] 2 All SA 627 (C) par 14.

³¹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Van der Walt v Saffy* 1950 (2) SA 578 (O) at 581; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 165; *Harding v Basson* 1995 (4) SA 499 (C) and *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W).

³² These cases are discussed in Cilliers *et al Civil Practice* 219-223.

³³ *Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997 (4) SA 635 (O) at 644A-B. This test is not very strict because a court only has to satisfy itself that the possibility of such an interest exists and not that this interest in fact exists. See *Abrahamse v Cape Town City Council* 1953 (3) SA 855 (C) at 859.

³⁴ See Rule 10A of the Uniform Rules of the High Court and Rule 5 of the Constitutional Court Rules, 2003. Both Rules were inserted in the respective rules as a result of the reasoning of Ackerman J in *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC) par 5.

³⁵ 2005 (2) SA 117 (CC) par 13. See also *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) par 52; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) paras 7-9; *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC) par 27 and Hofmeyr K “Rules and procedure in constitutional matters” in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2nd edition (Original service, June 2008) 5-3.

joined or unequivocally waived the right to be joined and undertook to abide by any decision the court may make.³⁶

The discussion of case law that follows below provides an overview of the reasoning adopted in the High Courts for postponing eviction proceedings instituted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 ('PIE') and ordering the necessary joinder of organs of state to those proceedings.

5 2 1 2 Joinder of organs of State to evictions from private land

5 2 1 2 1 *Murray*

In *ABSA Bank Ltd v Murray and Another*³⁷ ('*Murray*') the applicant approached the Western Cape High Court, Cape Town for an eviction order against the respondents in terms of sections 4(7) and (8) of PIE. The first respondent was sequestered after he defaulted on the repayments of a mortgage bond that was registered over the property in favour of the applicant. The applicant subsequently purchased the property at a sale by public auction that was held in terms of section 83(8)(d) of the Insolvency Act 24 of 1936. The respondent's refusal to vacate the property made it impossible for the applicant to provide vacant possession to the persons to whom it subsequently sold the property.

Binns-Ward AJ found that it would be inappropriate to assign an ultimate onus³⁸ to place relevant information before the court on either the unlawful occupier(s) or owner in a purely adversarial sense because that would imply that evidence of certain facts will give rise to specific and predictable legal consequences.³⁹ This would be the antithesis of affording the courts a broad discretion in considering the justice and equity of an eviction after considering all the relevant circumstances.⁴⁰ Instead, Binns-Ward AJ focussed on the procedural duty that section 4(2) of PIE places on an owner to serve

³⁶ Cilliers *et al Civil Practice* 208 note that it is a principle in South African law that an interested party should be afforded an opportunity to be heard in matters in which it has a direct and substantial interest. See also *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659; *Toekies Butchery (Edms) Bpk v Stassen* 1974 (4) SA 771 (T) at 774H; *Smith v Conelect* 1987 (3) SA 689 (W) at 694; *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W) at 49F-I; *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) at 939C-F and *Ex parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA) par 9.

³⁷ 2004 (2) SA 15 (C).

³⁸ *Ndlovu v Ngobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) par 19.

³⁹ *Murray* par 39.

⁴⁰ *Murray* par 39.

notice of the eviction proceedings on the municipality within which the property is located. In this regard he reiterated that municipalities must obtain the required financial and other support from provincial and national government to fulfil one of their primary constitutional obligations of progressively realising the right of access to adequate housing.⁴¹ The notice served upon municipalities fulfilled a much broader purpose than merely informing them of pending eviction proceedings. Municipalities are in a position to provide a court with valuable information in eviction proceedings regarding the availability of land, alternative accommodation, amenities and health care facilities that will enable a court to consider the justice and equity of the eviction.⁴² Viewed in this way the notice requirement in section 4(2) of PIE entrusts municipalities with a duty to place information before a court which would enable it to properly consider the justice and equity of the eviction.

Binns-Ward AJ furthermore found it alarming that municipalities have adopted an attitude of not filing reports about the circumstances which prevail in their jurisdiction. This failure to compile reports not only rendered the service of such notices superfluous and an unnecessarily costly exercise, but also frustrated the attempts of a court to determine the justice and equity of the eviction after considering all the relevant information.⁴³ However, in the specific circumstances of the case⁴⁴ he could not justify the further delay which would result if the municipality was directed to provide a report on the availability of land and alternative accommodation within its jurisdiction. An eviction order was thus granted against the respondents.⁴⁵

5 2 1 2 2 *Cashbuild*

In *Cashbuild (South Africa) (Pty) Ltd v Scott and Others*⁴⁶ ('*Cashbuild*') the applicant approached the South Gauteng High Court, Johannesburg for an eviction order against the respondents in terms of section 4(6) of PIE. The applicant cancelled the contract of sale in terms of which the respondents purchased a piece of land in the Lebowakgomo

⁴¹ *Murray* par 40.

⁴² *Murray* par 40.

⁴³ *Murray* par 41.

⁴⁴ *Murray* paras 45-47.

⁴⁵ *Murray* par 50, Order 2 and 3.

⁴⁶ 2007 (1) SA 332 (T).

informal settlement from the applicant after the respondents failed to respond to requests to rectify a breach of the deed of alienation. The applicant subsequently served a notice on the respondents that informed them of their unlawful occupation of the property and instructed them to vacate the property.

During the hearing Poswa J asked counsel for the applicant whether the Lepelle-Nkumpi Municipality was under a statutory obligation to respond to a notice that it received in terms of section 4(2) of PIE and, if so, why the municipality was not joined in the proceedings.⁴⁷ Counsel for the applicant argued that the application was launched within six months of the date on which the occupation of the property became unlawful and that the municipality was therefore not required to ensure that land was made available for the relocation of the respondents as it would be if the application was launched in terms of section 4(7) of PIE.

The applicant also argued that the municipality was under no statutory or constitutional obligation to intervene in the eviction proceedings because it had no obligation analogous to that of the Master of the High Court in sequestration proceedings. Finally, it was argued that the applicant was the only party that stood to be prejudiced in an unopposed application for eviction where the respondents failed to place relevant information, which is within their exclusive knowledge, before the court.⁴⁸

Poswa J was not convinced that it could have been the intention of the legislature that the notice in terms of section 4(2) was merely to inform the municipality of the pending eviction proceedings within its jurisdiction, without an obligation to do something with the information. However, he agreed that it was trite that there was no obligation on a municipality to ensure the provision of alternative accommodation for the relocation of unlawful occupiers in terms of section 4(6) of PIE.⁴⁹ On the other hand, he held that section 7(1) of PIE created an obligation for a municipality to respond to a

⁴⁷ *Cashbuild* par 10.

⁴⁸ *Cashbuild* par 11.

⁴⁹ *Cashbuild* par 20. In *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) par 13 (*'Occupiers of Shulana Court'*), Theron AJA stated:

"There is nothing to suggest that in an enquiry in terms of s 4(6), a court is restricted to the circumstances listed in that section. The court must have regard to *all* relevant circumstances. The circumstances identified are peremptory but not exhaustive. The court may, in appropriate cases, have regard to the availability of alternative land. However, where the availability of alternative land is relevant, then it is obligatory for the court to have regard to it" (emphasis in original text and footnote omitted).

section 4(2) notice which has no bearing on whether or not the application falls under sections 4(6) or s 4(7) of PIE.⁵⁰

Section 7(1) provides that a municipality “may ... appoint one or more persons with expertise in dispute resolution” in an “attempt to mediate and settle any dispute” between interested parties which arises in terms of PIE. The application of this provision is not constrained by any time limitations and clearly instructs a municipality to apply its mind in taking a decision on appointing people to mediate a dispute that is the result of the provisions in PIE.⁵¹ Poswa J stated that the proceedings in court would be greatly facilitated if a municipality could mediate an agreement between the parties as to whether the occupation is unlawful and whether the date when the property must be vacated is just and equitable.⁵² A court would then be in a position to simply make this mediated agreement an order of court in the event that it finds the eviction to be just and equitable.⁵³ He further reasoned that, although the wording of section 7(1) of PIE may indicate the contrary,⁵⁴ it could not have been the intention of the legislature to afford a municipality an option whether to resolve a dispute between an owner and unlawful occupiers because it would first have to decide whether there was a dispute at all.⁵⁵ Any municipality would thus have a legal interest in proceedings to evict unlawful occupiers from land within its jurisdiction as a result of its statutory obligation in section 7(1) of PIE.⁵⁶

Poswa J accordingly found that a municipality should take it upon itself to intervene, even in cases where the section 4(2) notice is defective, by ensuring that it is joined to any eviction proceedings where it is clear that there is a dispute between an owner and unlawful occupiers.⁵⁷ Any other interpretation would lose sight of the underlying purpose of PIE and would render the provisions of the Constitution superfluous.⁵⁸ He

⁵⁰ *Cashbuild* par 21.

⁵¹ *Cashbuild* par 21.

⁵² *Cashbuild* par 22.

⁵³ *Cashbuild* par 23.

⁵⁴ *Cashbuild* par 24.

⁵⁵ *Cashbuild* par 25.

⁵⁶ *Cashbuild* par 25.

⁵⁷ *Cashbuild* par 27.

⁵⁸ *Cashbuild* paras 28 and 32. In *PE Municipality* paras 36-37, Sachs J formulated the underlying purpose of PIE as follows:

emphasised that the application could not be concluded without the proper citation of the Lepelle-Nkumpi municipality and it being afforded an opportunity to consider the facts of the case.⁵⁹ He also found it inappropriate to consider an unopposed application for eviction where the interests of children were not placed before court by the parent(s) or guardian(s) of those children.⁶⁰ As a result he ordered the joinder of the municipality⁶¹ and the postponement of the proceedings *sine die*.⁶²

5.2.1.2.3 *Lingwood*

In *Lingwood and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands*⁶³ (*'Lingwood'*) the applicant sought the eviction of the respondents in the South Gauteng High Court, Johannesburg in terms of section 4(7) of PIE. The proximity of the property to the inner city of Johannesburg provided the respondents with access to informal employment, which enabled them to lawfully occupy the nine bed-roomed building against payment of rent in the amount of R300 per month for a period that exceeded three years. The previous owner of the property notified the respondents that the property had been sold to the applicant during November 2005. However, the respondents did not receive any communication from the applicant about the lawfulness of their occupation or what the applicant planned to do with the property, until the water supply to the property was disconnected four months later. The respondents were served with a copy of the eviction application shortly thereafter. The respondents opposed the eviction application on the basis that their personal circumstances and lack of alternative accommodation in the City of Johannesburg Metropolitan Municipality would render their eviction unjust and inequitable.⁶⁴ The respondents therefore sought

"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" (paras 36–37).

⁵⁹ *Cashbuild* par 35.

⁶⁰ *Cashbuild* par 37.

⁶¹ *Cashbuild* par 42, Order 1.

⁶² *Cashbuild* par 42, Order 4.

⁶³ 2008 (3) BCLR 325 (W).

⁶⁴ *Lingwood* par 7.

an order to stay proceedings until the City of Johannesburg Metropolitan Municipality was properly joined.⁶⁵

The applicants opposed the joinder of the City on the grounds that it would have no legal effect on their right to evict the respondents.⁶⁶ The City also opposed its joinder with the filing of a notice which stated that it had no land or alternative accommodation available to accommodate the respondents if the court evicted them from the building.⁶⁷ Mogagabe AJ found this “terse and unsubstantiated statement” by the municipality lacking because it failed to properly appreciate its constitutional obligations.⁶⁸ He further noted that the allegation was not contained in an affidavit and therefore invited the court without more to accept its accuracy *ex facie* the notice.⁶⁹ He found that this was unacceptable because the City was in violation of its legislative obligations to *inter alia* identify and designate land for housing development⁷⁰ and to conduct appropriate housing development in its area of jurisdiction.⁷¹

Mogagabe AJ proceeded to consider whether it would be just and equitable to evict the respondents if the municipality was not joined to the proceedings. In this regard he observed that a private landowner had no obligation in terms of the common law, legislation or the Constitution to provide access to adequate housing, “let alone suitable alternative accommodation to homeless or unlawful occupiers in the position of the respondents”.⁷² The obligation to provide access to adequate housing and alternative accommodation is placed squarely on the government in terms of section 26(2) of the Constitution, *in casu* on the City, in terms of *inter alia* sections 9(1)(c) and (e) of the Housing Act. He found that it would be impossible to continue with the eviction

⁶⁵ *Lingwood* par 12.

⁶⁶ *Lingwood* par 16.

⁶⁷ *Lingwood* par 15.

⁶⁸ *Lingwood* par 15.

⁶⁹ *Lingwood* par 15.

⁷⁰ Section 9(1)(c) of the Housing Act.

⁷¹ Section 9(1)(f) of the Housing Act.

⁷² *Lingwood* par 19. See also *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) (*‘Modderklip W’*) at 394J-395B, *Groengras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T) par 23, *Modderklip CC* par 49 and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 404 (SCA) paras 36-39. However, in *Grootboom* Yacoob J stated that in certain circumstances the

“right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing” (par 35).

proceedings because the non-joinder of the City would make it difficult to sustain and implement an order, given that the order would only be enforceable *inter partes*.⁷³

It would be unjust and inequitable in the circumstances of the case to order the eviction of relatively settled⁷⁴ respondents if the municipality was not joined to the proceedings and requested to report on the availability of land and alternative accommodation within its jurisdiction.⁷⁵ He noted that a court may, if the parties did not do so, raise the issue of non-joinder of the municipality *mero motu*.⁷⁶ The eviction application was postponed *sine die*,⁷⁷ and the joinder of the City of Johannesburg Metropolitan Municipality was ordered.⁷⁸

5 2 1 2 4 *Sailing Queen Investments*

In *Sailing Queen Investments v The Occupants La Colleen Court*⁷⁹ (*'Sailing Queen Investments'*) the applicant instituted eviction proceedings against the respondents in terms of section 4(7) of PIE in the South Gauteng High Court, Johannesburg. The respondents lawfully occupied the property in terms of a lease agreement until May 2005, when they could no longer afford to pay the rent and keep themselves alive at the same time with an average monthly income of R 805 per person. The respondents continued to occupy the property unlawfully after that date, despite the lack of water and electricity, because they were waiting to obtain formal housing in terms of the housing programme that the City of Johannesburg Metropolitan Municipality devised. The respondents therefore submitted that it was necessary to join the City to the proceedings.

Jajbhay J found that the City had a direct and substantial interest in any order that a court may make in an eviction application because it would be impossible to sustain or

⁷³ *Lingwood* par 26.

⁷⁴ In *PE Municipality* the Constitutional Court stated that "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if as an interim measure pending ultimate access to housing in the formal housing programme" (par 28).

⁷⁵ *Lingwood* par 37.

⁷⁶ *Lingwood* par 32. See *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W); *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Occupiers of Erf 101, 102, 104 and 112 Short Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2010 (4) BCLR 354 (SCA) par 12 (*'Occupiers of Short Retreat'*) and Cilliers *et al Civil Practice* 208-209.

⁷⁷ *Lingwood* par 38, Order 1.

⁷⁸ *Lingwood* par 38, Order 2.

⁷⁹ 2008 (6) BCLR 666 (W).

carry out the order without triggering the constitutional obligations of the City.⁸⁰ These obligations assign responsibility to the municipality to accommodate the respondents and similarly placed people when they become homeless as a result of the eviction or succumb to the need to resort to further unlawful occupation upon eviction.⁸¹

He further stated that the justice and equity requirement for evictions warranted obtaining information from the City on the availability of alternative accommodation. In this regard he referred with approval to *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg*,⁸² where it was held that a municipality was best placed to provide the court with information regarding the availability of housing and land within its jurisdiction.⁸³ He observed that information regarding alternative accommodation and the implementation of housing programmes which flow from the constitutional and statutory obligations of local government is fundamental to a court which is seized with the question of whether it is just and equitable to grant an eviction order.⁸⁴ The municipality's claim that there was neither land nor alternative accommodation available does not pass constitutional muster and is a "far cry" from fulfilling its constitutional and statutory obligations.⁸⁵

The applicant based its opposition to the joinder of the municipality on the reasoning of Boruchowitz J in *Xantium Trading 387 (Pty) Ltd v Molefe and Others*.⁸⁶ Boruchowitz J held that *PE Municipality* did not justify the joinder of a municipality because it merely requires a court to consider all the circumstances that might be relevant where the duration of the occupation was longer than six months. Boruchowitz J further held that Rule 10 of the Uniform Rules of the High Court did not allow joinder at the instance of a party and that it was improper for a court to raise the issue of non-joinder *mero motu*.

Jajbhay J criticised Boruchowitz J for failing to appreciate the jurisprudence of the Constitutional Court, which identifies the central role of local authorities as mediators in

⁸⁰ *Sailing Queen Investments* par 6.

⁸¹ *Sailing Queen Investments* par 9.

⁸² [2007] JOL 18960 (T).

⁸³ At 13 it was stated that "[n]ormally the information regarding available housing for the homeless will be critical to determine whether an eviction order should be made at all, and if so, on what terms and conditions justice and equity would best be served." See also the reasoning in *Murray* par 42; *Cashbuild* par 21 and *Lingwood* par 26.

⁸⁴ *Sailing Queen Investments* par 9.

⁸⁵ *Sailing Queen Investments* par 10. See *Murray* par 41 and *Lingwood* par 15, where the attitude of municipalities with regard to the compilation of reports was also mentioned.

⁸⁶ Case No 23758/05, unreported judgment of Boruchowitz J in the South Gauteng High Court, Johannesburg dated 2 April 2007.

eviction proceedings and the duty local authorities have in providing alternative accommodation for the poor. Jajbhay J further stated that local authorities should apply their mind to the matter in an endeavour to resolve the dispute.⁸⁷ Viewed from this perspective it would be hard to think of a scenario where a local authority would be under no obligation to respond to a notice served on it in terms of section 4(2) of PIE.⁸⁸ He concluded that the interests of all the parties involved would be properly protected once the City was joined to the eviction proceedings⁸⁹ because justice and equity requires that the City be present during court proceedings to furnish the court with progress reports in cases where individuals in desperate need are defending themselves against eviction.⁹⁰ He accordingly ordered the City to be joined and postponed the eviction proceedings pending the determination of Part B of the application.⁹¹

5 2 1 2 5 *Chieftain Real Estate*

In *Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality and Others*⁹² ('*Chieftain Real Estate*') the applicant launched motion proceedings against the first respondent to fulfil its undertaking to remove the 20 000 unlawful occupiers that were in occupation of portions of two of the applicants' farms known as Hoekplaats 384 and Mooiplaats 355.⁹³ The proposed relocation of the unlawful occupiers was delayed because the first respondent had difficulty in obtaining funding from the MEC responsible for housing in Gauteng. The first applicant further stated that, even if it were to obtain funding, it lacked the capacity to carry out the relocation because the unlawful occupiers had damaged the vehicles of the first respondent and threatened the officials with violence when they attempted to access the properties on a previous occasion.⁹⁴

⁸⁷ *Sailing Queen Investments* par 14.

⁸⁸ *Sailing Queen Investments* par 14.

⁸⁹ *Sailing Queen Investments* par 18.

⁹⁰ *Sailing Queen Investments* par 19.

⁹¹ *Sailing Queen Investments* par 20, Orders 1 and 2.

⁹² 2008 (5) SA 387 (T).

⁹³ *Chieftain Real Estate* par 1.

⁹⁴ *Chieftain Real Estate* paras 6 and 7.

The applicant cited the Government of the Republic of South Africa and the MEC for Housing in Gauteng as the second and third respondents respectively. The second and third respondents opposed their joinder to the proceedings in terms of Rule 6(5)(d)(iii) of the Uniform Rules of the High Court.⁹⁵ The second respondent argued that the applicant did not reveal any cause of action against it, that the applicant did not make any factual allegations to which it could answer and that no issue arose between it and the applicant that depended on the determination of substantially the same question of law or fact to justify the joinder.⁹⁶ It was further argued that section 6 of PIE gave the second and third respondents a discretion to institute eviction proceedings and that the primary obligation to do so rested with the applicant in terms of section 4 of PIE.⁹⁷ In conclusion, it was argued that an order for the joinder of the second and third respondents would amount to misjoinder for its failure to meet the requirements of Rule 10(3) of the Uniform Rules of the High Court.⁹⁸

Makhafola AJ stated that the starting point in answering this question of joinder should be founding the values of the rule of law and the supremacy of the Constitution.⁹⁹ The state is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights. In this case the applicant is entitled to enforce its property rights contained in section 25 while the unlawful occupiers are equally entitled to the protection afforded by the right of access to adequate housing in section 26.¹⁰⁰

Makhafola AJ noted that the first respondent left the problem of eviction in the hands of the applicant when it failed to stand by its undertaking to relocate the unlawful occupiers at its expense.¹⁰¹ He also found the argument that the applicant should first

⁹⁵ *Chieftain Real Estate* paras 4 and 10.

⁹⁶ *Chieftain Real Estate* par 11.

⁹⁷ *Chieftain Real Estate* par 11.

⁹⁸ Rule 10(3) provides that

“[s]everal defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

See Cilliers *et al Civil Practice* 240-241 on raising the issue of misjoinder by way of exception.

⁹⁹ *Chieftain Real Estate* par 19.

¹⁰⁰ *Chieftain Real Estate* paras 20-22.

¹⁰¹ *Chieftain Real Estate* par 28.

obtain an eviction order as owner lacking because the *Modderklip* cases¹⁰² showed that it is difficult, if not impossible,¹⁰³ to evict a large number of unlawful occupiers without the assistance of the state.¹⁰⁴ He therefore argued that the other organs of state, the second and third respondents, should intervene as higher echelons of the organs of state in cases where the municipality does not have the capacity to fulfil its duties.¹⁰⁵ These organs of state have a direct and substantial interest in the promotion and fulfilment of the municipality's duties.¹⁰⁶ He accordingly granted the application for joinder¹⁰⁷ and postponed the proceedings pending the determination of the main application.¹⁰⁸ Makhafola AJ's reasoning is fortified by the fact that both national¹⁰⁹ and provincial¹¹⁰ government have an obligation to support and strengthen the capacity of municipalities to fulfil their housing development obligations. In this case the Tshwane Metropolitan Municipality required financial support to relocate the unlawful occupiers to another piece of land at its own cost¹¹¹ and additional (human and other) resources to execute the relocation of the hostile community.¹¹²

5 2 1 2 6 *Blue Moonlight Properties*

In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Others*¹¹³ (*'Blue Moonlight Properties'*) the applicant instituted eviction proceedings against the occupiers in terms of section 4(7) of PIE in the South Gauteng High Court,

¹⁰² *Modderklip W; Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T); *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae), President of the RSA and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) and *Modderklip CC*.

¹⁰³ *Chieftain Real Estate* par 29.

¹⁰⁴ *Chieftain Real Estate* par 29.

¹⁰⁵ *Chieftain Real Estate* par 31.

¹⁰⁶ *Chieftain Real Estate* par 30.

¹⁰⁷ *Chieftain Real Estate* par 32.

¹⁰⁸ *Chieftain Real Estate* par 33.

¹⁰⁹ See section 3(2)(e) of the Housing Act.

¹¹⁰ See section 7(2) of the Housing Act.

¹¹¹ *Chieftain Real Estate* par 6. See also section 3(4)(a) and 7(3) of the Housing Act.

¹¹² *Chieftain Real Estate* par 7.

¹¹³ 2009 (1) SA 470 (W). This judgment follows the order that Mophosho AJ made on 23 October 2007 in the following terms:

"(1) Directing that the City of Johannesburg Metropolitan Municipality ('the City') be joined in these proceedings by virtue of its interest in the relief sought in the main application and in Part B of this application. (2) Directing that the main application be stayed pending the determination of this application."

This order is reproduced in *Blue Moonlight Properties* par 2.

Johannesburg. Kernel Carpets, the previous owner and former employer of the majority of the occupiers, erected a double storey office building, two large garages and a small factory on the property. When Kernel Carpets stopped trading it allowed the occupiers to stay on the property against payment of rent to the caretaker. The occupiers continued paying rent to various individuals until the end of 2005, at which time the buildings had deteriorated to the point of being uninhabitable and without any water supply. Many of the occupiers relied on informal trading for their income, which made it impossible to find other lawful and affordable accommodation within the inner city of Johannesburg.

The applicant alleged that it had no knowledge of the events prior to 2004, when it purchased the property, and that it did not receive any rent from any of the respondents.¹¹⁴ The applicant also alleged that it would not be economically viable to restore the commercial property so that it complied with the provisions for residential use.¹¹⁵ In turn the City of Johannesburg Metropolitan Municipality contended that it only implements housing policy and that the obligation to progressively provide access to adequate housing did not rest on it alone.

Masipa J stated that it was unclear why the municipality refused to assist the occupiers in light of its constitutional and statutory obligations.¹¹⁶ She also noted that the municipality erred in adopting the attitude whereby it would only assist unlawful occupiers of public land because that indicated an aversion to assist those living in crisis situations on private land.¹¹⁷ Masipa J furthermore noted that, on the one hand, the applicant was suffering prejudice because it could not use its property. On the other hand, the municipality was neglecting to fulfil its obligations to these occupiers who would be rendered homeless despite their valiant efforts to stay employed so that they could pay rent and restore the deteriorating buildings.¹¹⁸ This tension between the property rights of the owner and the housing rights of the occupiers could only be resolved if the municipality provided the court with information on the alternatives that

¹¹⁴ *Blue Moonlight Properties* par 17.

¹¹⁵ *Blue Moonlight Properties* par 18.

¹¹⁶ *Blue Moonlight Properties* par 36.

¹¹⁷ *Blue Moonlight Properties* par 37.

¹¹⁸ *Blue Moonlight Properties* paras 39-40.

are available within its jurisdiction.¹¹⁹ Masipa J noted that this information had to be “comprehensive but must also be meaningful and specific to assist the court to come to a just decision in a particular case.”¹²⁰

The City filed a report with the court after its fruitless attempts to prove that it was not required to do so in *Lingwood* and *Sailing Queen Investments*. The fact that a report was filed in this case distinguishes it from the previous cases where the court did not have detailed information on the status of programmes aimed at housing provision within the jurisdiction of the relevant municipality. In this report the City stated that it received almost 300 notices in terms of section 4(2) of PIE per month and that it would be impossible for it to prepare a separate report in respect of each eviction application.¹²¹

Masipa J found the report entirely inadequate because it focused on those people that were evicted from buildings that pose health and safety risks in terms of the National Building Regulations and Building Standard Act 103 of 1977¹²² (‘NBRSA’). The report therefore did not provide the specifically tailored information that was required to determine whether the eviction would be just and equitable in the particular circumstances.¹²³ In fact it was an attempt to distance itself even further from the plight of the occupiers by showing them that they were not important enough to be included in the City’s plans.

She observed that the report was interesting and useful as a progress report because it provided an overview of the specific housing programme in the City.¹²⁴ However, she emphasised that each eviction was different and that the specific circumstances of each individual or group warranted a tailored response from government.¹²⁵ She accordingly instructed the municipality to investigate the circumstances of the case and to consult the interested parties so as to provide the

¹¹⁹ *Blue Moonlight Properties* paras 43 and 52.

¹²⁰ *Blue Moonlight Properties* par 52.

¹²¹ *Blue Moonlight Properties* par 57.

¹²² *Blue Moonlight Properties* paras 59-61.

¹²³ *Blue Moonlight Properties* par 58. Liebenberg *Socio-Economic Rights* 289 notes that this part of Masipa J’s judgment is important because it emphasises the fact that the justice and equity enquiry of each eviction requires an individualised assessment of the circumstances of the unlawful occupiers.

¹²⁴ *Blue Moonlight Properties* par 63.

¹²⁵ *Blue Moonlight Properties* par 64.

court with a full and meaningful report.¹²⁶ She postponed the proceedings *sine die* and ordered the City to report back to the court on the steps that it has taken and what can be done in future to provide the respondents with emergency shelter.¹²⁷

It took the City five months - and the additional motivation of contempt proceedings brought against it by the applicant - to file a report with the court.¹²⁸ This report indicated that there were more than 160 000 people on the official housing waiting list in the Gauteng Province and that the provincial government had denied the City's request for funding in terms of Chapter 12 of the National Housing Code.¹²⁹ The City argued that it only implemented national and provincial housing policy, which made it a passive role player in housing delivery and that its budget did not provide for the acquisition of housing for occupiers of private land elsewhere within its jurisdiction. Finally, the City noted that it provided shelter to occupiers of dangerous buildings who found themselves in a crisis situation without there being any obligation on it to do so from its own funding.¹³⁰

The applicant, in its replication, noted that the buildings on its land were declared dangerous by the City and that the respondents could be prosecuted if they continued to inhabit the buildings in contravention of the safety warning.¹³¹ The respondents, on the other hand, focussed on the fact that the City deliberately excluded unlawful occupiers of privately owned land from its relief programmes even though their plight was similar to or worse than those who occupied publicly owned land.¹³²

The respondents accordingly brought another application that sought relief in the following terms: firstly, a declaration that the City's housing policies were

¹²⁶ *Blue Moonlight Properties* par 75.

¹²⁷ *Blue Moonlight Properties* par 78. Liebenberg *Socio-Economic Rights* 290 notes that this part of Masipa J's judgment is important because it highlights the fact that the housing and local government officials of a local authority must make special efforts to secure alternative accommodation for those people who stand to be evicted by an eviction.

¹²⁸ *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) par 30 (*'Blue Moonlight Properties II'*).

¹²⁹ Chapter 12 of the National Housing Code, entitled Housing Assistance in Emergency Housing Situations, was adopted in 2004 to give effect to the *Grootboom CC* judgment where the government was ordered to "devise and implement within its available resources a comprehensive and coordinated programme progressively to realize the right of access to adequate housing" (par 99(2)(a)).

¹³⁰ *Blue Moonlight Properties II* par 31 (emphasis in the original text).

¹³¹ *Blue Moonlight Properties II* par 34. See City of Johannesburg Metropolitan Municipality Emergency Services By-Laws *Provincial Gazette* Extraordinary No 179 (21 May 2004) chapter 2, which deals with fire prevention and fire protection.

¹³² *Blue Moonlight Properties II* par 35.

unconstitutional because they excluded unlawful occupiers of privately owned land from its relief programmes in a discriminatory and arbitrary manner; secondly, an order directing the City to rectify this policy and to report back to the court; and thirdly, an interdict that prevented the applicant from evicting them until suitable alternative accommodation was procured by the City or became available to them.¹³³

In response to this application the City raised the objection of non-joinder because, so the argument went, the provincial government had to be joined to the proceedings in terms of Rule 10A and Rule 16A of the Uniform Rules of the High Court if the unlawful occupiers wished to pursue the relief sought in their first prayer.¹³⁴ The unlawful occupiers disputed the fact that they were challenging the constitutionality of a law, but nonetheless sought a further postponement of the main eviction application in order to join the MEC for Housing in Gauteng.¹³⁵

The MEC for Housing in Gauteng only became aware of this case, nearly three years after the eviction proceedings commenced, when she received a letter from the City which requested financial assistance in the amount of R 50,4 million to purchase, convert and administer the acquisition of warehouses in and around the inner city of Johannesburg for purposes of providing temporary housing.¹³⁶ The MEC rejected the request for financial assistance, but assured the City that the request would be reconsidered if the provincial government received additional funding during the financial year.¹³⁷ The City accordingly declared that it had fulfilled its obligations by requesting financial assistance from the provincial government and, since there was no funding available, that it could not be required to do anything more because it was simply a passive player in the provision of housing.¹³⁸

Spilg J, who heard the second application, took issue with the way in which the City characterised its role by summarising the case law of the Constitutional Court¹³⁹ which

¹³³ *Blue Moonlight Properties II* par 36.

¹³⁴ *Blue Moonlight Properties II* par 37.

¹³⁵ *Blue Moonlight Properties II* par 37.

¹³⁶ *Blue Moonlight Properties II* paras 50-54.

¹³⁷ *Blue Moonlight Properties II* par 55.

¹³⁸ *Blue Moonlight Properteis II* par 57.

¹³⁹ *Blue Moonlight Properties II* paras 59-66. In *Residents of Joe Slovo*, Ngcobo J (as he then was) stated:

“The effect of the failure by the City to evict the residents and its willingness to provide them with services must be understood in the context of the obligations imposed on the

rendered local government directly responsible for the implementation of the constitutional and statutory obligations to provide access to adequate housing for the most desperate in society.¹⁴⁰ He accordingly found that the City was incorrect in arguing that it had no obligation other than to seek financial assistance from the provincial government.

Spilg J noted that he could not order the joinder of the provincial government because the constitutional challenge of the unlawful occupiers did not pertain to any law, but instead referred to the discriminatory and arbitrary exclusion of unlawful occupiers of privately owned land from the City's housing relief policies.¹⁴¹ This finding made it easier to comprehend why the City was in actual fact so determined to get the provincial government joined to the proceedings - namely, to obtain an order that would direct the provincial government to provide the City with the funding it required to provide emergency housing to the unlawful occupiers in terms of chapter 12 of the Housing Code. Spilg J therefore had to consider whether it would be appropriate, considering the principles of co-operative government and intergovernmental relations, to join another organ of state in order to clarify or resolve issues between them.¹⁴² He was concerned that joinder in the circumstances of this case would amount to a court-directed allocation of funds which would help the provincial and local government to fulfil their respective obligations in terms of section 26 of the Constitution and sections 7 and 9 of the Housing Act.¹⁴³ He found that the City's reason for insisting on getting the provincial government joined to the proceedings concerned the application of budgeting priorities and the weighing of policy considerations.¹⁴⁴ Joining the provincial government on these grounds would not only be contrary to the doctrine of separation of powers, but

government in relation to access to adequate housing. In *Grootboom*, we held that the right of access to adequate housing, for some, requires the government to provide 'access to services such as water, sewage, electricity and roads.' This obligation is not limited to lawful residents. It is imposed in respect of all who are living in deplorable circumstances. The government has an obligation to act positively to ameliorate the conditions of those who have no access to basic services. As we pointed out in *Port Elizabeth Municipality*, while awaiting access to new housing development programmes, homeless people must be treated with dignity. When the City provided services to the residents it was doing no more than fulfilling its statutory and constitutional obligations" (par 209, footnotes omitted).

¹⁴⁰ *Blue Moonlight Properties II* par 58.

¹⁴¹ *Blue Moonlight Properties II* par 69.

¹⁴² *Blue Moonlight Properties II* par 70. See section 41(1) of the Constitution.

¹⁴³ *Blue Moonlight Properties II* par 71.

¹⁴⁴ *Blue Moonlight Properties II* par 79.

would also interfere with the constitutional and statutory framework for the resolution of intergovernmental disputes.¹⁴⁵

He reiterated that the primary obligation to provide access to adequate housing on a progressive basis and within available resources rested with the local government and that this fact militated against joining a provincial or the national government.¹⁴⁶ He accordingly refused to postpone the main eviction application further in order for the provincial government to be joined to the proceedings.¹⁴⁷

On appeal to the Supreme Court of Appeal in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*¹⁴⁸ (*'Blue Moonlight Properties SCA'*) the court considered the non-joinder of the provincial government to the eviction proceedings. Navsa JA and Plasket AJA conceded that provincial governments, in general, have an important role to play in the progressive realisation of section 26 of the Constitution as stipulated in section 7 of the Housing Act.¹⁴⁹ However, it was unclear to them why the facts of this case required the joinder of the Gauteng provincial government to the eviction proceedings. They noted that the City approached the provincial government with its request for funding to deal with the housing need of the unlawful occupiers long after it became aware of the problem. The provincial government's involvement with the case came to an end when it refused the City's request for funding on account of the fact that it did not have the budget for such support during the specific financial year.¹⁵⁰ It would further be inappropriate to join the provincial government to the eviction proceedings because neither the unlawful

¹⁴⁵ *Blue Moonlight Properties II* par 80. Section 41(2) of the Constitution states that legislation must be enacted to "(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes." The Intergovernmental Relations Framework Act 13 of 2005 was enacted to give effect to this provision. See also the Intergovernmental Dispute Prevention and Settlement: Practice Guide: Guidelines for Effective Conflict Management GG 29845 GN 491 of 26 April 2007 and Implementation Protocol Guidelines and Guidelines on Managing Joint Programmes GG 30140 GN 696 of 3 August 2007.

¹⁴⁶ *Blue Moonlight Properties II* par 81.

¹⁴⁷ See section 3 4 2 2 in chapter 3 for a discussion of the merits of the case and the ultimate order that required the government to pay rent to the applicant so that the respondents could stay on the property while the government acquired temporary emergency housing for the respondents.

¹⁴⁸ 2011 (4) SA 337 (SCA).

¹⁴⁹ *Blue Moonlight Properties SCA* par 68.

¹⁵⁰ *Blue Moonlight Properties SCA* par 68.

occupiers, nor the owner or the City sought any relief from the provincial government.¹⁵¹ The City sought the joinder of the provincial government purely because it was under the mistaken belief that it had no primary constitutional or statutory obligations to assist the unlawful occupiers in obtaining temporary emergency housing upon eviction.¹⁵² The court further held that it could not find anything in the financial records of the City which indicated that it would be unable to provide temporary emergency housing for the unlawful occupiers in terms of its own housing policy.¹⁵³ Navsa JA and Plasket AJA accordingly held that the provincial government had no direct or substantial interest in the outcome of the case that would warrant its joinder to the eviction proceedings.¹⁵⁴

5 2 1 2 7 Evaluation

The cases discussed above show that the courts have not adopted a uniform approach in their reasoning for the joinder of local authorities to eviction proceedings. The courts have consistently relied on a combination of arguments founded on the cumulative force of the notice requirement in section 4(2) of PIE; the requirement to attempt mediation in section 7(1) of PIE; and finally, the constitutional and statutory obligations of municipalities. The overall effect of this reasoning is convincing and powerful, but there are problems with the reasoning that attach to the first two grounds when they are considered on their own.

It is correct that it would be an expensive and pointless exercise if it was the intention of the legislature to require service of eviction notices on a local authority without it having some effect on the action of the local authority. However, it is not a convincing reason to join a local authority to eviction proceedings simply because the serving of the notice in terms of section 4(2) of PIE would otherwise be costly and pointless. It is only when the notice requirement is read with the obligations of the local authority to ensure that the inhabitants of its area of jurisdiction have access to adequate housing¹⁵⁵ and that harmful and dangerous conditions must be prevented or removed¹⁵⁶ that the

¹⁵¹ *Blue Moonlight Properties SCA* par 68.

¹⁵² *Blue Moonlight Properties SCA* par 68.

¹⁵³ *Blue Moonlight Properties SCA* par 68.

¹⁵⁴ *Blue Moonlight Properties SCA* par 68.

¹⁵⁵ Section 9(1)(a)(i) of the Housing Act.

¹⁵⁶ Section 9(1)(a)(ii) of the Housing Act.

underlying principle for the notice becomes apparent. The notice informs the local authority that it will be required, if the eviction order is granted, to fulfil its constitutional and statutory obligations with regard to those evicted from the property.

It is similarly problematic to situate the reason for joinder of a local authority exclusively in the fact that it may appoint a person with expertise in dispute resolution to attempt to mediate a dispute between a landowner and unlawful occupiers, because it is not clear why the local authority must then be joined to eviction proceedings that flow from a partially or wholly unsuccessful attempt at mediation. It is again only when this power to initiate a mediation attempt is read with the obligation of the local authority to promote the resolution of conflicts arising in the housing development process¹⁵⁷ that the underlying principle of the mediation becomes apparent. The mediation process will more often than not reveal that the unlawful occupiers do not wish to leave the property because it is in close proximity to (formal and informal) employment opportunities and, if they were evicted, they would have nowhere else to go. This is indicative of the fact that the local authority needs to reconceptualise and improve the housing development projects in its jurisdiction.

A more nuanced approach for the joinder of local authorities would therefore focus exclusively on the obligations of local authorities that flow from section 26(3), read with sections 26(1) and (2), of the Constitution and section 9 of the Housing Act. The Supreme Court of Appeal in *Occupiers of Shorts Retreat* confirmed this when it stated that

“[t]he municipality’s position in eviction proceedings under PIE differs from that of a third party in ordinary litigation because it has constitutional obligations it must discharge in favour of people facing eviction. It should therefore not be open to it to choose not to be involved.”¹⁵⁸

The necessary joinder of local authorities is buttressed by the fact that the principal parties to the eviction are often so embroiled in a debate about the unlawfulness of the occupation because, on the one hand, the owner is claiming his right to exclusive

¹⁵⁷ Section 9(1)(e) of the Housing Act.

¹⁵⁸ *Occupiers of Short Retreat* paras 13-14. See *Occupiers of Shulana Court* par 14 and *Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952, Johannesburg situated at 124 Kerk Street, Johannesburg; In re: Unidentified Occupants of Erf 952, Johannesburg situated at 124 Kerk Street, Johannesburg v The City of Johannesburg* [2011] ZAGPJHC 3 (17 February 2011).

possession in terms of section 25 of the Constitution while, on the other hand, the unlawful occupiers are claiming access to emergency or permanent housing in terms of section 26 of the Constitution. As a consequence, the court is frequently deprived of any information about the prevailing circumstances in the local authority's area of jurisdiction.

It is therefore incorrect to submit that joining the relevant local authority would have no force or effect, because the local authority is often the only party with information that will equip a court to properly satisfy itself of the justice and equity of the eviction. This could include, but is not limited to, information about the backlog and actual delivery of housing; the demographics of those in need of housing; land that has been earmarked for housing development or land that can be expropriated in its jurisdiction; the availability of emergency, temporary or permanent alternative accommodation, should the court evict the unlawful occupiers; and the amenities provided and infrastructure in place at the alternative accommodation sites.

This approach acknowledges that local authorities have a direct and substantial interest in eviction proceedings because a range of its constitutional and statutory obligations will be triggered when a court finds that it is just and equitable to evict unlawful occupiers.

5 2 1 3 Further development

It remains unclear from the jurisprudence what precisely the reports that local authorities must file with the court should include for it to satisfy the requirements of a full and meaningful report. Nevertheless, it is possible to give guidance to local authorities on what should be included in these reports with reference to the constitutional and statutory obligations that made it necessary for them to be joined to the eviction proceedings.

A report should, arguably, include information on firstly, the housing policies and programmes adopted by the specific local authority;¹⁵⁹ secondly, how these policies and

¹⁵⁹ In *Grootboom CC* par 42, Yacoob J stated that the adoption of legislative measures alone would not be enough to fulfill the constitutional obligations that flow from section 26(2) of the Constitution. He added that legislative measures would have to be supported by the implementation of appropriate, well-directed policies and programmes.

programmes address the housing needs of the unlawful occupiers in the particular case;¹⁶⁰ thirdly, what the housing needs are in the local authorities' area of jurisdiction; fourthly, the history¹⁶¹ and duration¹⁶² of the occupation; fifthly, demographic information on the unlawful occupiers or community of unlawful occupiers;¹⁶³ sixthly, whether and to what extent the local authority is in a position to address the housing needs of the unlawful occupiers;¹⁶⁴ seventhly, whether and to what extent the local authority has sought financial and other assistance from provincial and/or national government;¹⁶⁵ eighthly, whether and to what extent the local authority has engaged meaningfully with

¹⁶⁰ In *Blue Moonlight Properties* par 63, Masipa J found that the general report which the City of Johannesburg filed with the court was useful as a progress report. She added that the *pro forma* report on the housing policies and programmes that have been adopted was not designed to address the housing needs of the unlawful occupiers of that particular case. She held that a general report which included no particular information on how a housing policy or housing programmes affected the specific unlawful occupiers of a case would not serve its purpose of aiding a court in making a just and equitable decision.

¹⁶¹ In *PE Municipality* par 26, Sachs J stated that courts had to consider whether the unlawful occupiers were occupying privately or publicly owned land. Unlike private owners, the government will generally have other land that it could use to fulfill its obligations in terms of section 26 of the Constitution. He added that courts also had to consider the status of the land or buildings. He explained that private owners who have allowed its land or buildings to become derelict may have no real interest in how it is utilised, while the government may have earmarked a specific property for housing development and have a significant interest in fulfilling its constitutional obligations. He added that courts further had to have regard to the degree of the housing emergency of the unlawful occupiers and whether they invaded that land or buildings in a deliberate attempt to disrupt the comprehensive and co-ordinated efforts of the government to provide access to adequate housing.

¹⁶² In *PE Municipality* par 27, Sachs J explained that the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 created a link between the duration of the occupation and the fairness of the eviction. Section 4 of PIE expressly distinguishes between those unlawful occupiers that have occupied the land or buildings for less than six months and those that have occupied the land or buildings for more than six months. Section 6(3)(b) of PIE makes the duration of unlawful occupation a specific consideration that courts must have regard to in determining the justice and equity of the eviction from public land.

¹⁶³ I foresee the inclusion of general statistics about the number of men and women; the number of children between 0 and 6 (infants), between 7 and 13 (primary school) and between 14 and 18 (high school); the number of elderly people; the number of people with disabilities; the number of female-headed households; the type of structure that the unlawful occupiers currently occupy; whether and what types of basic services that unlawful occupiers have access to; the unemployment rate in the community; the type of economic activities that the unlawful occupiers engage in to sustain their livelihoods and the average distance travelled to employment opportunities on a daily basis.

¹⁶⁴ In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) the parties reached an agreement that committed the City of Johannesburg to provide two buildings in the inner city of Johannesburg for the occupiers as well as providing interim services to the buildings. See Tissington K "Challenging inner city evictions before the Constitutional Court of South Africa: The *Occupiers of 51 Olivia Road* case in Johannesburg, South Africa" (2008) 5(2) *Housing and ESC Rights Law Quarterly* 1-6.

¹⁶⁵ Section 3(2)(e) of the Housing Act 107 of 1997 places an obligation on the Minister of Human Settlements to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their duties in respect of housing development." Sections 7(2)(c) and (e) place similar obligations on the MEC for Housing and Local Government of each province.

the unlawful occupiers with the aim of ascertaining their housing need;¹⁶⁶ ninthly, the availability of alternative land or housing to serve as either emergency or temporary alternative accommodation for the unlawful occupiers if they are evicted;¹⁶⁷ and finally, how these prospective sites for emergency or temporary alternative accommodation will fulfil the housing needs of the unlawful occupiers in the particular case.

A report with all this information would be sufficiently tailored to the specific circumstances of a particular case. Such an individualised report would provide a court with a lot of information about both the social and historical context as well as the textual context of the proposed eviction. An individualised report of this nature would contribute to a substantive understanding of section 26 of the Constitution and the obligations for local authorities that flow from it. An individualised report will provide a court with information that will enable it to grapple with the justice and equity evaluation in a more principled manner.¹⁶⁸ The necessary joinder of local authorities and the filing of individualised reports will go a long way in finding the concrete and case-specific solutions that the Constitution and PIE requires.¹⁶⁹

The compilation of individualised reports will require local authorities to direct human and financial resources to the process of data collection. One way to obtain this information is to request the Director-General of Human Settlements to extract the relevant data from the national housing data bank and information system.¹⁷⁰ In the

¹⁶⁶ After hearing oral argument in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC), Langa CJ (as he then was) issued an interim order that directed the parties to engage with each other meaningfully on firstly, whether the values of the Constitution, the constitutional and statutory obligations of the municipality and the rights of the applicants could direct the parties to resolve the difficulties of the application amicably (interim order 1); and secondly, whether the plight of the applicants would be alleviated if the dangerous and ailing buildings that they occupied could be upgraded (interim order 2). The interim order was issued on 30 August 2007 and is available online at www.constitutionalcourt.org.za/Archimages/10731.PDF (accessed on 7 March 2010).

¹⁶⁷ In *Blue Moonlight Properties* par 66, Masipa J included the availability of alternative accommodation as a specific requirement for a full and meaningful report.

¹⁶⁸ *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T) page 13, Bertelsmann J stressed that meaningful information regarding the availability of alternative land or accommodation for the unlawful occupiers would be critical in order to determine whether an eviction order should be made at all and, if so, on what terms and conditions justice and equity would be served.

¹⁶⁹ See *PE Municipality* par 22.

¹⁷⁰ Section 6(1) of the Housing Act places an obligation on the Director-General to establish and maintain this data base and information system. Section 6(2) of the Housing Act 107 of 1997 stated that the objects of the data bank and information system are to firstly, record information for purposes of the development, implementation and monitoring of the national housing policy; secondly, provide reliable

event that this information is not available in the data bank and information system, the specific local authority can also rely on its constitutional obligation to engage meaningfully with the unlawful occupiers to obtain the requisite information from them directly.

5 2 1 4 Conclusion

It is disturbing that local authorities carelessly declare, without supporting evidence, that they do not have any alternative land or accommodation available in their jurisdiction. Private landowners sustain this attitude with their contention that the joinder of municipalities would have no legal consequence for their right to evict unlawful occupiers. This position undermines the impact of the Constitution and fails to appreciate the obligations of local authorities in providing access to adequate housing properly.

The cases discussed above draw a clear link between the obligations of the executive - at national, provincial and local government level – and the discretion courts exercise in determining the justice and equity of an eviction in terms of PIE.¹⁷¹ Joinder achieves this by creating an express link between, on the one hand, the constitutional and statutory obligations of government as stated by the Constitutional Court in *Grootboom* and, on the other hand, the power courts have in terms of section 26(3) of the Constitution and PIE to grant eviction orders if it is just and equitable to do so as stated by the Constitutional Court in *PE Municipality*. Liebenberg notes that the interrelatedness of all three subsections of section 26¹⁷² is upheld by this new approach to the determination of the justice and equity of an eviction order. Liebenberg emphasises the importance of joinder in eviction cases when she states that it would be impossible to promote a caring society that is founded on mutual interdependence and respect without meaningful and proactive involvement by the government. She adds

information that can be used during the planning of new housing developments; thirdly, to enable the Department of Human Settlements to monitor every aspect of the housing development process; fourthly, to generate information that can be used by the Department of Human Settlements to integrate the national housing policy with macro-economic and fiscal policy; fifthly, serve and promote housing development and related matters; and finally, collect, compile and analyse data about *inter alia* gender, race, age and geographic location.

¹⁷¹ Liebenberg S *Socio-Economic Rights* 289.

¹⁷² Liebenberg S *Socio-Economic Rights* 289.

that it is only through this involvement of the government and the provision of suitable alternative accommodation that solutions can be found for the complex housing problem in South Africa in a manner that will respect both the property rights of land owners and the housing rights of unlawful occupiers.¹⁷³ Put differently, joinder provides the court with the possibility to involve the government in instances where the owner established her right to evict the unlawful occupiers from her property and the unlawful occupiers convinced the court that their current access to housing would be infringed if evicted. In these circumstances the joinder of the government will enable the court to move beyond the stalemate that is created by the competing rights through the consideration of the constitutional and statutory obligations of the government. None of this would be possible without the joinder of local authorities to eviction proceedings.¹⁷⁴

A further development that flowed from the case law on joinder is the obligation that local authorities now have to compile reports that will provide a court with comprehensive and meaningful information on how the local authority has prioritised the individualised needs of a particular community¹⁷⁵ and when they can expect to be provided with relief.¹⁷⁶ These reports will have to contain information on the special efforts that local authorities make to accommodate people that stand to be evicted in temporary emergency housing pending their resettlement to permanent housing. The joinder of local authorities therefore ensures that courts have all the information pertaining to the eviction and housing situation in the local authorities' area of jurisdiction at their disposal so that they can properly evaluate the justice and equity of the proposed eviction. This goes a long way in finding the case specific solutions that Sachs J in *PE Municipality* had in mind for the complex housing crisis in South Africa. The added benefit of joinder is that it ensures that the local authority can be held to

¹⁷³ Liebenberg S *Socio-Economic Rights* 290.

¹⁷⁴ Wilson S "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270-290 285 ("Wilson "Breaking the tie").

¹⁷⁵ Liebenberg *Socio-Economic Rights* 289.

¹⁷⁶ Wilson "Breaking the tie" 286. See *Drakenstein Municipality v Hendricks and Others* 2010 (3) SA 248 (WCC) par 32 where Bignault J stated that:

"One cannot define the boundary line [between individuals and groups of desperately poor people] *in abstracto*. Classifications will have to be made on a case-by-case basis. In case of doubt the municipality would probably be well advised to file a report. The court, furthermore, as pointed out above, has a discretion and may call for information from the municipality, should it become necessary for a proper adjudication of the particular case."

account in future if it is unable to provide a permanent housing solution for the community over time because a court order is enforceable *inter partes*.¹⁷⁷ One way of obtaining the requisite information on the demographics and needs of the community for purposes of obtaining such permanent housing is to enter a process of meaningful engagement.

5 2 2 Meaningful engagement

5 2 2 1 Introduction

In *Occupiers of 51 Olivia Road* the City of Johannesburg sought to evict approximately 400 people from six buildings in terms of the fire bylaws of the city, section 20 of the Health Act 63 of 1977 and section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977. The City contended that the buildings posed serious fire risks because the rooms were partitioned with combustible materials and the building had no functioning emergency exits. This eviction formed part of the Inner City Regeneration Strategy that the City adopted during 2003. One of the pillars upon which this regeneration strategy rests is the project on addressing “sinkholes”. These “sinkholes” are properties that are slummed, abandoned, overcrowded, poorly maintained, often owned and neglected by the public sector. The occupiers opposed the application because an eviction and relocation to an informal settlement on the outskirts of the city would destroy their livelihood strategies that depended on being able to conduct informal trading, domestic work and recycling in the inner city of Johannesburg.¹⁷⁸

After hearing oral argument the Constitutional Court issued an interim order¹⁷⁹ that directed the parties “to engage with each other meaningfully”.¹⁸⁰ The purpose of this engagement was to determine whether the values of the Constitution, the constitutional and statutory obligations of the municipality and the rights of the applicants could direct the parties to resolve the difficulties of the application amicably.¹⁸¹ The engagement

¹⁷⁷ Wilson “Breaking the tie” 286.

¹⁷⁸ See section 4 4 in chapter 3 for a discussion of the case.

¹⁷⁹ The interim order was issued on 30 August 2007 (*Interim order Occupiers of 51 Olivia Road*) available online at www.constitutionalcourt.org.za/Archimages/10731.PDF (accessed on 7 March 2010).

¹⁸⁰ Interim order *Occupiers of 51 Olivia Road*, Order 1.

¹⁸¹ Interim order *Occupiers of 51 Olivia Road*, Order 1.

between the parties also had to determine whether the plight of the applicants would be alleviated if the dangerous and ailing buildings that they occupied could be upgraded.¹⁸² The interim order furthermore directed the parties to report back to the Court on the results of the engagement between them.¹⁸³ This engagement process resulted in the parties reaching an agreement¹⁸⁴ on the interim measures that the City would take to improve the living conditions on the properties¹⁸⁵ and the status of the City's eviction application against the occupiers.¹⁸⁶ The Court subsequently endorsed this agreement.¹⁸⁷

5 2 2 2 Creating a new concept

Five months later, the Court explained in its judgment that a municipality would be acting in a manner that was at odds with the spirit and purpose of a range of constitutional obligations if it evicted people from their homes without first meaningfully engaging with them.¹⁸⁸ The Court explicitly linked meaningful engagement with the obligation to take reasonable legislative and other measures within its available resources to provide access to adequate housing.¹⁸⁹ The Court affirmed its interpretive approach to the right of access to adequate housing by also linking the obligation to engage with the right to human dignity¹⁹⁰ and the right to life.¹⁹¹ Finally, the Court linked

¹⁸² Interim order *Occupiers of 51 Olivia Road*, Order 2.

¹⁸³ Interim order *Occupiers of 51 Olivia Road*, Order 3.

¹⁸⁴ The parties reached the agreement on 29 October 2007. The agreement is available online at <http://web.wits.ac.za/NR/rdonlyres/4B183D1D-C77A-493C-9CEF-526A5076438C/0/197MainStreet51OliviaRoadAgreement.pdf> (accessed on 7 March 2010) ('Agreement *Occupiers of 51 Olivia Road*').

¹⁸⁵ Agreement *Occupiers of 51 Olivia Road* clause 1.1.1.

¹⁸⁶ Agreement *Occupiers of 51 Olivia Road* clause 1.1.2.

¹⁸⁷ The order was issued on 5 November 2007 and is available online at www.constitutionalcourt.org.za/Archimages/11584.PDF (accessed on 7 March 2010).

¹⁸⁸ *Occupiers of 51 Olivia Road* par 16. See section 19 of the Local Government: Municipal Structures Act 117 of 1998 and sections 16(1) and 17 of the Local Government: Municipal Systems Act 32 of 2000. These provisions echo the emphasis that the Committee on Economic, Social and Cultural Rights has placed on the importance of "genuine consultation" in General Comment No 4 *The right to adequate housing*, UN Doc E/1992/23 as an aspect of the right to adequate housing which contributes to tenure security (par 8); as a means of achieving full realisation of the right to adequate housing (par 12). The need for genuine consultation also appears in General Comment No 7 *The right to adequate housing: forced evictions*, UN Doc E/1998/22 as a way of exploring all possible alternatives in an attempt to avoid or minimise the effect of eviction (par 13); and as a procedural protection against eviction (par 15).

¹⁸⁹ Section 26(2) of the Constitution and section 9(1)(a)(i) of the Housing Act.

¹⁹⁰ Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." See *Grootboom CC* par 83 and Liebenberg S "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1-31. See also See also Nedelsky J

meaningful engagement with the obligations that municipalities have to strive towards the provision of services in a sustainable manner;¹⁹² the promotion of social and economic development;¹⁹³ and the involvement of communities and community organisations in the affairs of local government.¹⁹⁴

The Court makes it plain in these reasons for the engagement order that homelessness as a result of eviction is still a very real possibility for many people. Local authorities should therefore engage these people before any decision is taken on the formulation and implementation of a housing policy or programme that will inevitably lead to their eviction and relocation.

The Court proceeded to define meaningful engagement as “a two-way process” in which a local authority and those that stood to be affected by the eviction would talk to each other meaningfully with the aim of achieving certain objectives.¹⁹⁵ The Court emphasised that there is no *numerus clausus* of objectives that must be achieved, but stated that where an organ of state institutes eviction proceedings in circumstances where it is likely that people will be rendered homeless as a result of the eviction, some of the objectives would include firstly, what the exact consequence will be of the eviction; secondly, whether and to what extent the local authority could ameliorate the consequences of the eviction; thirdly, whether and to what extent it was possible to upgrade dilapidated buildings to a point where they would be safe and conducive to human habitation for an interim period; fourthly, what the constitutional and statutory obligations of the local authority demanded of it in the prevailing circumstances; and finally, when and how the local authority would fulfil these obligations.¹⁹⁶ The Court was of the view that meaningful engagement had the potential to contribute towards the

“Reconceiving rights as relationship” (1993-1994) 1 *Rev Const Stud* 1-26; Nussbaum MC *Women and Human Development - The Capabilities Approach* (2000) and Nussbaum MC “Capabilities, human rights and the Universal Declaration” in Weston BH and Marks SP (eds) *The Future of International Human Rights* (1999) 25-64.

¹⁹¹ Section 11 of the Constitution provides that “[e]veryone has the right to life.”

¹⁹² Section 152(1)(b) of the Constitution.

¹⁹³ Section 152(1)(c) of the Constitution.

¹⁹⁴ Section 152(1)(e) of the Constitution.

¹⁹⁵ *Occupiers of 51 Olivia Road* par 14. Chenwi L and Tissington K *Engaging Meaningfully with Government on Socio-Economic Rights - A Focus on the Right to Housing* (2010) 9 observe that the objectives to be achieved will depend on the specific situation. They add that the government should not be the only party to state what these objectives should be or how such objectives could be achieved.

¹⁹⁶ *Occupiers of 51 Olivia Road* par 14

resolution of disputes and to develop an increased understanding and sympathetic care of the plight of the urban poor¹⁹⁷ if both the local authority and the unlawful occupiers grappled with the issues that pertain to the achievement of these objectives.¹⁹⁸

The Court found that the constitutional obligations of local authorities dictated that it should initiate the engagement process and continue to make reasonable efforts to engage unlawful occupiers when their initial efforts are resisted or rebuffed.¹⁹⁹ The Court foresaw that the unlawful occupiers would acquiesce in this process if it was managed by careful and sensitive people with experience in housing matters.²⁰⁰ This process will enable a municipality to explore the vast range of possibilities that are available on the continuum spanning from eviction without more to the provision of permanent housing.²⁰¹ The Court found that the nature and extent of the engagement process would be determined by the underlying purpose of the eviction and the number of people that stood to be affected by the eviction.²⁰² Yacoob J noted that the City of Johannesburg should have been conscious of the fact that their Inner City Regeneration Strategy would have drastic consequences for its rapidly increasing poor population and that it would require structured, consistent and careful engagement with all the affected parties.²⁰³

The Court further underscored that the engagement process must be conducted in good faith and any attempt by the unlawful occupiers to derail the engagement process through unreasonable demands or by adopting an intractable attitude should not be tolerated.²⁰⁴ The Court emphasised this point by clearly stating that “[p]eople in need of housing are not, and must not be regarded as a disempowered mass.”²⁰⁵ In conclusion,

¹⁹⁷ *Occupiers of 51 Olivia Road* par 15.

¹⁹⁸ See also Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* (2009) 30-32 available online at [http://web.wits.ac.za/NR/rdonlyres/D1176AF9-340B-413B-AF79-2F1152BE0CDA/0/Meaningful engagementreport_Dec09.pdf](http://web.wits.ac.za/NR/rdonlyres/D1176AF9-340B-413B-AF79-2F1152BE0CDA/0/Meaningful%20engagementreport_Dec09.pdf) (accessed on 7 March 2010).

¹⁹⁹ *Occupiers of 51 Olivia Road* par 15.

²⁰⁰ *Occupiers of 51 Olivia Road* par 15.

²⁰¹ *Occupiers of 51 Olivia Road* par 18.

²⁰² *Occupiers of 51 Olivia Road* par 19.

²⁰³ *Occupiers of 51 Olivia Road* par 19.

²⁰⁴ *Occupiers of 51 Olivia Road* par 20.

²⁰⁵ *Occupiers of 51 Olivia Road* par 20. Ross T “The rhetoric of poverty: Their immorality, our helplessness” (1991) 79 *Geo LJ* 1499-1547 (“Ross “The rhetoric of poverty”) argues that the first step in the rhetoric of poverty is to use economic wealth as a variable to create an abstraction of the poor (“them”) as a class of people that are different from the affluent (“us”). This classification makes it possible to conceive of “them” as morally weak, degenerate or deviant because “they” are unable or unwilling to

the Court noted that the constitutional value of openness should guide the engagement process so as to avoid the destructive allure of secrecy by ensuring that “a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process” is considered the norm.²⁰⁶

In *Residents of Joe Slovo*, Ngcobo J (as he then was) emphasised that the purpose of meaningful engagement should not be construed as a process whereby the parties must reach agreement on every aspect of the dispute.²⁰⁷ Instead, the parties should approach the engagement process in good faith and with a willingness to listen to the concerns of the other party. Conceived in this way meaningful engagement will lead to mutual understanding and accommodation of the concerns that unlawful occupiers have and the limits (both human and financial) of government in its pursuit of providing access to adequate housing on a progressive basis.²⁰⁸

Ngcobo J added that the primary objective of the engagement process in the context of the implementation of a programme to upgrade an informal settlement was to provide the residents with the details of the programme, its purpose and its implementation.²⁰⁹ This would include engagement on the purpose of the relocation to another site, the notice period required before the relocation takes place so the people can organise their lives, the details of the relocation, the consequences of the relocation and the extent of the disruption that this will cause, whether the government can mitigate the negative consequences of the relocation, the arrangements for temporary accommodation in those instances where an *in situ* upgrade is not possible, the right of return to the developed and upgraded site, and the plans for those who will be unable to return to the developed and upgraded site.²¹⁰

accept and commit to the norms “we” embrace. This failure to “straighten up and fly right” (at 1501) has led to the further division of “them” into the deserving (the elderly, children and disabled persons) and undeserving (able bodied persons) poor through history. Ross notes that the idea of the undeserving poor - the “paupers”, the “peasants”, the “strangers” and most recently the “underclass” - has contributed to the widely held sentiment that the poor in general are “unwilling to pull themselves up by their bootstraps” (at 1507). This rhetoric depicts poverty as “an inescapable societal tragedy” that we cannot remedy if the poor refuse to change (at 1509) which in turn fortifies “our inability to imagine the poor as strong, successful, ambitious, and responsible people who win the battles of life” (at 1542).

²⁰⁶ *Occupiers of 51 Olivia Road* par 21.

²⁰⁷ *Residents of Joe Slovo* par 244.

²⁰⁸ *Residents of Joe Slovo* par 244.

²⁰⁹ *Residents of Joe Slovo* par 242.

²¹⁰ *Residents of Joe Slovo* par 242.

The Constitutional Court developed its jurisprudence further when it affirmed the fact that meaningful engagement must be seen in its broader constitutional context. In this regard Ncgobo J explained that

“[t]he requirement of engagement flows from the need to treat residents with respect and care for their dignity. Where, as here, the government is seeking the relocation of a number of households, there is a duty to engage meaningfully with residents both individually and collectively. Individual engagement shows respect and care for the dignity of the individuals.”²¹¹

Sachs J added that the obligations of local government extended beyond the mere development and implementation of housing policy. Local authorities must denounce practices whereby unlawful occupiers are regarded as obstinate and obnoxious social nuisances and rather focus on treating those living in its area of jurisdiction with insight and a sense of humanity.²¹² Sachs J explained that meaningful engagement also expanded the concept of citizenship beyond its traditional contours to include the substantive benefits and entitlements envisaged by the Constitution for all the people who live in South Africa.²¹³

In *Abahlali baseMjondolo* the applicants argued that certain provisions of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 7 of 2007,²¹⁴ specifically section 16, were in conflict with section 26(2) of the Constitution because they did not constitute reasonable legislative measures that enabled the progressive realisation of the right of access to adequate housing. The applicants alleged that section 16 obliged owners and municipalities to launch eviction proceedings even where there had not been compliance with the provisions of PIE, and allowed no place for meaningful engagement between the unlawful occupiers and the municipality.

Yacoob J explained that private land owners had to engage with unlawful occupiers before they instituted eviction proceedings in terms of section 16. Moseneke DCJ added that it would be impossible to proceed with the eviction until the results of the engagement process are known. He explained that meaningful engagement in the context of the Act would require the taking into consideration of *inter alia* the wishes of

²¹¹ *Residents of Joe Slovo* par 238.

²¹² *Residents of Joe Slovo* par 406.

²¹³ *Residents of Joe Slovo* par 408.

²¹⁴ The applicants expressly abandoned their attack on the constitutionality of sections 9, 11, 12 and 13 of the Act. See *Abahlali baseMjondolo* par 9.

the people that stand to be affected by the eviction, the availability of alternative accommodation and the details of the eviction.²¹⁵

In *Occupiers of 51 Olivia Road*, Yacoob J noted that the need for meaningful engagement could be inferred from the applicant's contention that the local authority was under a constitutional and statutory obligation flowing from section 33 of the Constitution to give the occupiers a hearing before it took the decision to evict them.²¹⁶ However, the Court found that the obligation to engage meaningfully with occupiers who would be rendered homeless after an eviction was squarely grounded in section 26(2) of the Constitution. The question then is to what extent there is an intersection or duplication between the concept of meaningful engagement, in terms of section 26(2) of the Constitution, and procedurally fair administrative action, in terms of section 33(1) of the Constitution.

5 2 2 3 Procedural fairness

5 2 2 3 1 Introduction

The rules of natural justice has been defined as “the stereotyped expression which is used to describe those fundamental principles of [procedural] fairness which underlie every civilised system of law.”²¹⁷ These principles have been reduced over time to the maxims *nemo iudex in sua causa*²¹⁸ and *audi alteram partem*²¹⁹ which, according to Anglo-American jurisprudence,²²⁰ constitute the core of fair administrative action. The *audi* principle affords people the opportunity to participate in decisions that will affect them by apprising the administrative functionary of additional facts and possible alternatives that might influence the outcome of those decisions.²²¹ It is argued that this

²¹⁵ *Abahlali baseMjondolo* par 114.

²¹⁶ *Occupiers of 51 Olivia Road* par 9. In *Residents of Joe Slovo* O'Regan J added that “the obligation to engage meaningfully imposed by section 26(2) of the Constitution should be understood together with the obligation to act fairly imposed by section 33 of the Constitution, as spelt out in PAJA” (par 297).

²¹⁷ *Minister of the Interior v Bechler* 1948 (3) SA 409 (A) at 451.

²¹⁸ See Hoexter C *Administrative Law in South Africa* (2007) 404-412 (“Hoexter *Administrative Law*”).

²¹⁹ Corbett JA in *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 660H paved the way for South African courts to refer to this maxim simply as the *audi* principle or *audi* rule.

²²⁰ Corder H “The content of the *audi alteram partem* rule in South African administrative law” (1980) 43 *THRHR* 156-177 158.

²²¹ Hoexter *Administrative Law* 326. See *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) par 24 for a description of the link between the importance of fairness and the growth of discretionary power.

ensures the legitimacy of the decision because the quality and rationality of the decision is enhanced through respect for the dignity and worth of the people that stand to be affected.²²²

The application of the *audi* rule to administrative action was limited during the era of parliamentary sovereignty by the illogically rigid classification of administrative functions²²³ and the focus on decisions that prejudicially affected the property or liberty of an individual.²²⁴ However, towards the end of apartheid the former Appellate Division of the High Court (currently the Supreme Court of Appeal) changed this position dramatically by introducing the doctrine of legitimate expectation in South African law.²²⁵ Since then the courts have retreated from the narrow and formalistic approach to natural justice to embrace a broader and more flexible duty to act fairly in all cases.²²⁶ This change of direction gained constitutional legitimacy with the inclusion of a right to just administrative action in both the interim²²⁷ and final²²⁸ Constitutions and the enactment of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').²²⁹

²²² De Smith SA, Woolf HK and Jowell J *Judicial Review of Administrative Action* (1995) 375-376. In *De Lange v Smuts NO* 1998 (3) SA 785 (CC) Mokgoro J stated that

“everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance” (par 131).

²²³ Hoexter *Administrative Law* 351-355.

²²⁴ *R v Ngwevula* 1954 (1) SA 123 (A) at 127F.

²²⁵ This doctrine was adopted in South African law by Corbett CJ in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A). The term “legitimate expectation” was first used by Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 and was defined by Lord Fraser in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) as arising “either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue” (at 943j-944a). See Hlophe J “Legitimate expectation and natural justice: English, Australian and South African Law” (1987) 104 SALJ 165-185 and Pretorius DM “Ten years after *Traub*: The doctrine of legitimate expectation in South African administrative law” (2000) 117 SALJ 520-547.

²²⁶ Hoexter *Administrative Law* 327.

²²⁷ Section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 provided everyone with a right to

“(a) lawful administrative action where any of his or her rights or interests is affected or threatened; (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.”

²²⁸ Section 33(1) of the Constitution reads:

5 2 2 3 2 *Administrative action affecting the public*

PAJA, like meaningful engagement, provides adequately for public participation with an individual or specific household of unlawful occupiers, in terms of section 3, and with a community of unlawful occupiers, in terms of section 4, who stand to have their right of access to adequate housing adversely affected by the administrative decision to evict. Section 4 of PAJA concerns administrative action that “materially and adversely affects the rights of the public”.²³⁰ This is an innovative provision that incorporates new procedures for public participation into the general administrative law that has nearly no equivalent in the common law.²³¹ However, this provision is somewhat puzzling²³² because it is uncertain what the precise relationship is with administrative action “which materially and adversely affects the rights or legitimate expectations of any person” in terms of section 3 of PAJA.

“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and (c) promote an efficient administration.”

²²⁹ PAJA came into operation on 30 November 2000, with the exception of sections 4 and 10, which came into operation on 31 July 2002.

²³⁰ Section 1 of PAJA defines “public” as “any group or class of the public”.

²³¹ Decisions that affected large numbers of people were usually classified as legislative administrative action during the pre-democratic era and therefore the *audi* principle did not apply to them. In *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) (*‘South African Roads Board’*) Milne JA rejected the classification of administrative functions as being either quasi-judicial, purely administrative or legislative. Milne JA proposed

“that a distinction should be drawn between (a) statutory powers which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals. Here I use the word ‘individual’ to include a legal *persona* such as a corporation or a local authority, clothed with corporate personality; and the word ‘calculated’ to mean not ‘intended’ but ‘likely in the ordinary course of things’ to have this result” (at 12E-G).

The effect was that cases which fell into the first category (the equivalent of section 4 of the PAJA) would not attract procedural fairness while cases which fell into the second category (the equivalent of section 3 of the PAJA) would attract procedural fairness unless a statutory provision specifically provided otherwise.

²³² Hoexter *Administrative Law* 364.

Mass²³³ argues that sections 3 and 4 are linked because there is no longer a need to limit the application of the *audi* rule if the aim is to create a culture of accountability, openness and transparency in the administration.²³⁴ She insists that there is a close link between section 4 and the more general requirements for procedural fairness in section 3.²³⁵ She finds support for this argument in the fact that that section 4 does not contain all the requirements stipulated in section 3(2)(b). She therefore submits that section 4 cannot be freestanding because it is an incomplete provision that must be interpreted with recourse to the more general provisions for procedural fairness contained in section 3. The effect is that the relationship between sections 3 and 4 is “one of *lex generalis* and (incomplete) *lex specialis*.”²³⁶ Mass argues further that this approach to the relationship between sections 3 and 4 promotes the spirit, purport and object of the right to just administrative action much better than one founded on the semantic distinctions drawn between administrative action affecting any person and administrative action affecting the public.²³⁷

Currie and Klaaren point to the drafting history of section 4 in support of their argument that this provision is completely freestanding.²³⁸ Currie and Klaaren argue that the Justice and Constitutional Development Portfolio Committee severed the link between clauses 4 and 5 of the South African Law Reform Commission’s Draft Bill²³⁹ (currently sections 3 and 4 of PAJA) by changing the heading of clause 4 from

²³³ Mass C “Section 4 of the AJA and procedural fairness in administrative action affecting the public: A comparative perspective” in Lange C and Wessels J (eds) *The Right to Know - South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 63-80 (‘Mass “Section 4”’).

²³⁴ Preamble of PAJA.

²³⁵ Section 3(2)(b) of PAJA reads:

“In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) – (i) adequate notice of the nature and purpose of the proposed administrative action; (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal, where applicable; and (v) adequate notice of the right to request reasons in terms of section 5.”

See Hoexter *Administrative Law* 332-339 and Currie I and Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) 97-100 (‘Currie and Klaaren *Benchbook*’) for a discussion of these general requirements of procedural fairness.

²³⁶ Mass “Section 4” 66-67.

²³⁷ Mass “Section 4” 67.

²³⁸ Currie and Klaaren *Benchbook* 110-113.

²³⁹ South African Law Reform Commission, Project 115 *Report on Administrative Justice* (August 1999) available online at www.justice.gov.za/salrc/reports/r_prj115_aja_1999aug.pdf (accessed on 30 January 2010).

“procedurally fair administrative action” to “procedurally fair administrative action affecting any person”. This, according to Currie and Klaaren, created two separate and unrelated procedural fairness regimes.²⁴⁰ Administrative action with a particular effect would then fall under the purview of section 3, while administrative action with a general effect would fall under the purview of section 4.²⁴¹

This approach to the relationship between section 3 and 4 is problematic because there is no statutory right to procedural fairness for administrative action affecting the public parallel to that of section 3(1). Currie and Klaaren argue that section 3(1) must be read as creating an indirect general right to procedural fairness. This general right to procedural fairness would then also shape the minimum requirements administrators must adhere to in instances of administrative action affecting the public, since the requirements of section 3(2)(b) would simply not apply.²⁴²

Hoexter also points to the drafting history of section 4 in support of her argument that this provision is not linked to section 3. Hoexter notes that the Justice and Constitutional Development Portfolio Committee mistakenly left a reference to section 3 in section 4(1)(e) during its amendment process. Hoexter attributes this to poor drafting and recommends that the reference should simply be expunged through the amendment of section 4.²⁴³ Hoexter also notes that there are minimum requirements for procedurally fair administrative action in section 4 similar to those contained in section 3(2)(b).²⁴⁴ Finally, Hoexter argues that the attempted uncoupling of the two provisions and the narrower focus of section 3 is indicative of the “gulf” that exists between sections 3 and 4.²⁴⁵

The fact remains that section 4(1)(e) contains a reference to section 3 that cannot be ignored. Mass provides a workable approach that links sections 3 and 4 through this “hangover” of the South African Law Reform Commission’s Draft Bill.²⁴⁶ According to this approach an administrator will not be required to superficially classify an administrative action affecting any person in terms of section 3 or administrative action

²⁴⁰ Currie and Klaaren *Benchbook* 113.

²⁴¹ This is in accordance with the distinction that Milne JA made in *South African Roads Board* at 12E-G.

²⁴² Currie and Klaaren *Benchbook* 113.

²⁴³ Hoexter *Administrative Law* 369.

²⁴⁴ Hoexter *Administrative Law* 375.

²⁴⁵ Hoexter *Administrative Law* 375.

²⁴⁶ Currie and Klaaren *Benchbook* 130.

affecting the public in terms of section 4 when it is clear that it is both.²⁴⁷ Currie and Klaaren conceded this point when the administrative action presents itself in a *South African Roads Board* scenario. In this case the South African Roads Board declared an existing road a toll road. Currie and Klaaren explain that this decision would have a particular impact (section 3 of PAJA) on the Johannesburg City Council because it would have to upgrade its current roads infrastructure and increase maintenance to support the additional traffic congestion caused by motorists choosing alternative routes. The decision would also have a general effect (section 4 of PAJA) on all the motorists' freedom of movement. The result will be exactly the same where a local authority evicted a community of unlawful occupiers. The decision will have a particular impact on the surrounding local authorities because they would have to expand their housing programmes while also having a general impact on the community's right of access to adequate housing. Hoexter confirms that decisions with a general impact frequently have a special impact on a particular group of people.²⁴⁸

Furthermore, Mass does not focus disproportionately on the supposed intention of the legislature or its poor drafting abilities. Instead, her approach constitutes a purposive interpretation of the right to just administrative action that gives effect to the constitutional value of openness by making simpler and more efficient ways of public participation possible to the poor population of South Africa.

5 2 2 3 3 *Participation procedures in section 4 of PAJA*

It is clear from the structure of section 4 that a notice and comment procedure or a public inquiry or both are the default options available to an administrator.²⁴⁹ However, section 4 does not provide specific instructions for an administrator to guide her in deciding which procedure to follow. Currie and Klaaren recommend that the following criteria should be used to decide the appropriate procedure:²⁵⁰ (a) the geographic impact; and (b) the subject matter of the proposed administrative action. A notice and comment procedure is based on the consideration of written submissions, which makes

²⁴⁷ Currie and Klaaren *Benchbook* 116.

²⁴⁸ Hoexter *Administrative Law* 368.

²⁴⁹ Mass "Section 4" 73.

²⁵⁰ Currie and Klaaren *Benchbook* 120.

it more suited to administrative action on general issues with national or regional impact. A public inquiry is driven by hearing testimony at a particular place on a given time, which makes it more suited to administrative action on specific issues with a local impact. Mass adds that the following criteria could also be helpful:²⁵¹ (c) the cost and efficiency of the procedure; and (d) the size and duration of the process. A notice and comment procedure is often simple and cheap because the administrator may not delegate her powers and thus the procedure does not require many logistical arrangements. Public inquiries have the potential to be very complex and expensive because the administrator may delegate her powers to “a suitably qualified person or panel of persons”²⁵² who will conduct the public hearing.

A proposed decision to evict a community of unlawful occupiers will have a very specific impact on that particular community and could possibly extend to the surrounding local authorities as the unlawful occupiers move into other jurisdictions to find a place to stay. According to the abovementioned guidelines, circumstances of this nature will require conducting a public inquiry.

Regulation 5 of the Promotion of Administrative Justice Act, 2000: Regulations on Fair Administrative Procedures²⁵³ adds a new dimension to a public inquiry that may be invaluable to unlawful occupiers that stand to be evicted. The aim of regulation 5 is to provide assistance to communities consisting of a substantial proportion of people who cannot read or write or who otherwise need special assistance. Hoexter explains that

“[t]his regulation sets out special steps to be taken to solicit the views of such people where they are likely to be affected by administrative action that may be taken as a consequence of a public inquiry. These steps may include the holding of public or group meetings where the issues are explained and views recorded, a survey of public opinion and the provision of secretarial assistance.”²⁵⁴

This goes beyond the common law understanding of the *audi* principle and embraces the constitutional value of openness in a way that ensures broad public participation.²⁵⁵

The public hearing will still be the core feature²⁵⁶ of the public inquiry. While a public hearing is an effective way of obtaining the views and proposals of a community, it may

²⁵¹ Mass “Section 4” 73-74.

²⁵² Section 4(2)(a) of PAJA.

²⁵³ Published in GG 23674 GNR1022 on 31 July 2002.

²⁵⁴ Hoexter *Administrative Law* 372.

²⁵⁵ Mass “Section 4” 74.

be too adversarial²⁵⁷ in the housing context to ascertain anything of significance regarding the rights and needs of the community given that the impact of an eviction on the lives of the poor may preclude any meaningful interchanges. It is similarly problematic to expect impoverished communities to make effective use of a notice and comment procedure.

In these instances an administrator may follow “another appropriate procedure which gives effect to section 3”.²⁵⁸ Mass suggests that this provision allows an administrator to interact with the public on an individual basis by affording them a distinct opportunity to make representations or to follow other innovative procedures like consultations, mediation, and negotiated rule-making.²⁵⁹ These procedures require participation on a much smaller scale and their inquisitorial nature makes them cheaper and more efficient.²⁶⁰

5 2 2 3 4 *Procedural fairness does not equal meaningful engagement*

In *Occupiers of 51 Olivia Road and Residents of Joe Slovo* the *amici curiae*²⁶¹ argued that procedural fairness relates to the notion of participatory democracy because it guarantees individuals an active role in state administration.²⁶² In *Doctors for Life International v The Speaker of the National Assembly and Others*²⁶³ the Constitutional Court explained that participation represents a powerful response to the legacy of apartheid by ensuring that excluded voices are empowered in wider participatory processes.²⁶⁴ This conception of participatory democracy creates a unique link between

²⁵⁶ Currie and Klaaren *Benchbook* 121.

²⁵⁷ Mass “Section 4” 78.

²⁵⁸ Section 4(1)(e) of PAJA.

²⁵⁹ Mass “Section 4” 78.

²⁶⁰ Hoexter C (with Lyster R and Currie A) (ed) *The New Constitutional and Administrative Law, Volume II, Administrative Law* (2002) 49.

²⁶¹ In both cases the *amici curiae* were the Community Law Centre from the University of the Western Cape and the Centre on Housing Rights and Evictions (COHRE) from Geneva, Switzerland. The submission of the *amici* in *Occupiers of 51 Olivia Road* is available online at www.constitutionalcourt.org.za/Archimages/10661.PDF (accessed on 7 March 2010). The submission of the *amici* in *Joe Slovo* is available online at www.constitutionalcourt.org.za/Archimages/12720.PDF (accessed on 7 March 2010).

²⁶² Submission of the *amici* in *Occupiers of 51 Olivia Road* par 136 and submission of the *amici* in *Joe Slovo* par 167.

²⁶³ 2006 (6) SA 416 (CC).

²⁶⁴ J Morison “Models of democracy: From representation to participation?” in J Jowell and D Oliver (eds) *The Changing Constitution* (2004) 144 154.

the obligation of government to respect, protect, promote and fulfil the fundamental rights in the Constitution and the right of excluded voices to access adequate housing. Section 4 of PAJA enables local government to fulfil this duty because the public are likely to participate energetically when their rights are materially and adversely affected.²⁶⁵ Nedelsky explains that procedural fairness “offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power.”²⁶⁶

This conception of procedural fairness must be understood against the background that administrative decisions are often taken in stages²⁶⁷ and that procedural fairness must only be observed during the stage where a final decision is made.²⁶⁸ Hoexter notes that it would be impossible to have an efficient administration if it had to provide full-scale hearings at every stage of the administrative process.²⁶⁹ This is supported by the fact that “administrative action”²⁷⁰ must have a direct effect. Pre-democratic reasoning²⁷¹ further dictated that the interpretation of the requirement that a right must be adversely affected by the administrative action.²⁷² This amplifies the likelihood that preliminary decisions do not require the observance of procedural fairness.

This conceptualisation of the *audi* principle is problematic in the housing context because any investigation into the living conditions of unlawful occupiers or the upgrading of their informal settlement could result in the lodging of an eviction application and relocation to another site that is far away from *inter alia* employment

²⁶⁵ K Govender “An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa” (2003) 18 *SAPR/PL* 404 409.

²⁶⁶ J Nedelsky “Reconceiving autonomy: Sources, thoughts and possibilities” (1989) 1 *YJLF* 7 27.

²⁶⁷ Hoexter *Administrative Law* 392.

²⁶⁸ See *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA).

²⁶⁹ Hoexter *Administrative Law* 393.

²⁷⁰ Section 1 of PAJA defines “administrative action” as

“any decision taken, or any failure to take a decision, by - (a) an organ of state, when - (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power of performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, (...)”

²⁷¹ Hoexter *Administrative Law* 396.

²⁷² According to pre-democratic reasoning, preliminary inquiries did not “prejudicially affect ... the property or liberty of an individual” because it was “purely administrative” in nature and as such did not require the observance of procedural fairness unless it was explicitly required by legislation. See Hoexter *Administrative Law* 351-353 and *Law Society, Northern Provinces v Maseka* 2005 (6) SA 372 (B) at 382D-E.

opportunities. This will not only worsen the already insecure existence of the unlawful occupiers, but will also erode the fundamental values of accountability, responsiveness and openness²⁷³ upon which our democracy is founded.²⁷⁴ This is demonstrated unmistakably by the events leading up to the *Occupiers of 51 Olivia Road, Residents of Joe Slovo* and *Abahlali baseMjondolo* cases, where the applicants alleged that the conduct of municipal officials towards them was characterised by tactics aimed at persuading them to accept the plans that the government had for their future, threats of violence when they did not succumb to these tactics, attacks on their person when they denounced the government plans which were made without addressing their concerns or incorporating their proposals, and announcements that decisions had been taken about their future. These examples of abuse of power and blatant disregard for the inputs of the unlawful occupiers at the beginning of multi-stage decision making processes may fail to pass constitutional muster in the sense that they fall short of the lawful, reasonable and procedurally fair administrative action that the drafters of the Constitution had in mind or could even be excluded as action that does not attract the protection of just administrative action. The fact remains that these actions are commonplace and reflect the lived reality for many poor people of just administrative action. *Occupiers of 51 Olivia Road, Joe Slovo* and *Abahlali baseMjondolo* demonstrate that disastrous results can flow from preliminary inquiries into the housing conditions of unlawful occupiers where procedural fairness is not observed.

It is furthermore important to note that procedural fairness only applies to administrative action. The definition of administrative action explicitly excludes the executive powers and function of the provincial executive - which includes the powers referred to in sections 126 and 139 of the Constitution²⁷⁵ - and the executive powers and functions of a municipal council.²⁷⁶ These exclusions are significant in the housing context because section 126 of the Constitution enables a MEC responsible for housing in a specific province to assign any power or function in terms of section 7 of the

²⁷³ Section 1(d) of the Constitution.

²⁷⁴ See E Mureinik "Reconsidering review: Participation and accountability" 1993 *Acta Juridica* 35-46 and Quinot G "Snapshot or participatory democracy? Political engagement as fundamental human right" (2009) 25 *SAJHR* 392-402.

²⁷⁵ Subsection (bb) of the definition of "administrative action" in section 1 of PAJA.

²⁷⁶ Subsection (cc) of the definition of "administrative action" in section 1 of PAJA.

Housing Act to a municipality while section 139 of the Constitution obliges a MEC responsible for housing in a specific province to intervene where a municipality cannot or does not fulfill its obligations in terms of section 9 of the Housing Act. Section 156 of the Constitution provides that local authorities have executive authority over and the right to administer all matters listed in schedule 4B and 5B of the Constitution which, significantly, includes the provision of electricity and gas reticulation; water and sanitation; local amenities; refuse removal, refuse dumps and solid waste disposal; and street lighting. The result is that many housing related decisions are excluded from the operation of PAJA because they are considered to be of an executive nature. Meaningful engagement would therefore play an important role in adjudicating this category of decisions that do not require the observation of procedural fairness in terms of PAJA. This is where meaningful engagement transcends procedural fairness.

5 2 2 4 Meaningful engagement as a long term relationship

Sections 2(1)(b) and 2(1)(l) of the Housing Act lay the foundation for the establishment of a dialogic relationship between the executive and other role players in housing development. These general principles then concretise in obligations for municipalities to ensure that they promote the resolution of conflicts that arise in the housing development process,²⁷⁷ and facilitate and support the participation of other role players in the housing development process.²⁷⁸ However, these general principles and obligations stop short of ensuring that the dialogue is managed by careful and sensitive people who will continue to make good faith efforts to engage so as to ensure that an increased understanding of the interests involved and sympathetic care for the unlawful occupiers are developed. Meaningful engagement therefore clearly foresees a change in the approach to and practice of participation – specifically its duration and nature – in housing development.

In *Occupiers of 51 Olivia Road* the Constitutional Court stated that meaningful engagement should ordinarily be initiated before litigation commences²⁷⁹ because the outcome of the engagement process will be important for any court in determining

²⁷⁷ Section 9(1)(e) of the Housing Act.

²⁷⁸ Section 9(2)(a)(vi) of the Housing Act.

²⁷⁹ *Occupiers of 51 Olivia Road* par 30.

whether it would be just and equitable to grant an eviction order.²⁸⁰ In *Residents of Joe Slovo* the Court ordered the parties to engage on certain issues as part of the final order.²⁸¹ Meaningful engagement therefore requires the fostering of participation over a long period of time that commences with the conceptualisation of a plan, policy or piece of legislation and culminates with the implementation and preservation of that plan, policy or legislation.²⁸²

Participation during this process cannot be characterised by the manipulation, threats of violence, violent attacks and announcements which the applicants in *Occupiers of 51 Olivia Road, Residents of Joe Slovo* and *Abahlali baseMjondolo* attested to because it would be at odds with the dialogic, transparent and structured, coordinated, consistent and comprehensive engagement that the Constitutional Court described. The nature of the participation during the engagement process can be determined with reference to the ladder of citizen participation that Arnstein²⁸³ developed in the housing context from the terminology used in federal programmes of the United States of America that are directed at *inter alia* urban renewal.

The ladder consists of eight rungs, with each rung representing a form of participation.²⁸⁴ The bottom two rungs, manipulation²⁸⁵ and therapy,²⁸⁶ describe levels where there is no participation. These rungs are used as a substitute for genuine participation because the objectives of these forms of participation are to educate and cure citizens.²⁸⁷ The following three rungs, informing;²⁸⁸ consultation²⁸⁹ and placation,²⁹⁰

²⁸⁰ *Occupiers of 51 Olivia Road* par 18. See also *Residents of Joe Slovo* par 338.

²⁸¹ *Residents of Joe Slovo* par 7, Order 5 reads:

“The applicants and the respondents are ordered, through their respective representatives, to engage meaningfully with each other with a view to reaching agreement on the following issues: 5.1 a date upon which the relocation will commence different to that contemplated in annexure “A”; 5.2 a timetable for the relocation process different to that contemplated in annexure “A”; and 5.3 any other relevant matter upon which they agree to engage.”

²⁸² See Chenwi L and Tissington K *Engaging Meaningfully with Government on Socio-Economic Rights - A Focus on the Right to Housing* (2010) 21 notes that meaningful engagement should ordinarily take place before policies, strategies or development projects are planned. They add that meaningful engagement must also take place while these policies, strategies or projects are being implemented and when they are evaluated.

²⁸³ Arnstein SR “A ladder of citizen participation” (1969) 35 *JAIP* 216-224 (‘Arnstein “Ladder”’).

²⁸⁴ Arnstein “Ladder” 217 for the limitations of her typology.

²⁸⁵ Arnstein “Ladder” 218.

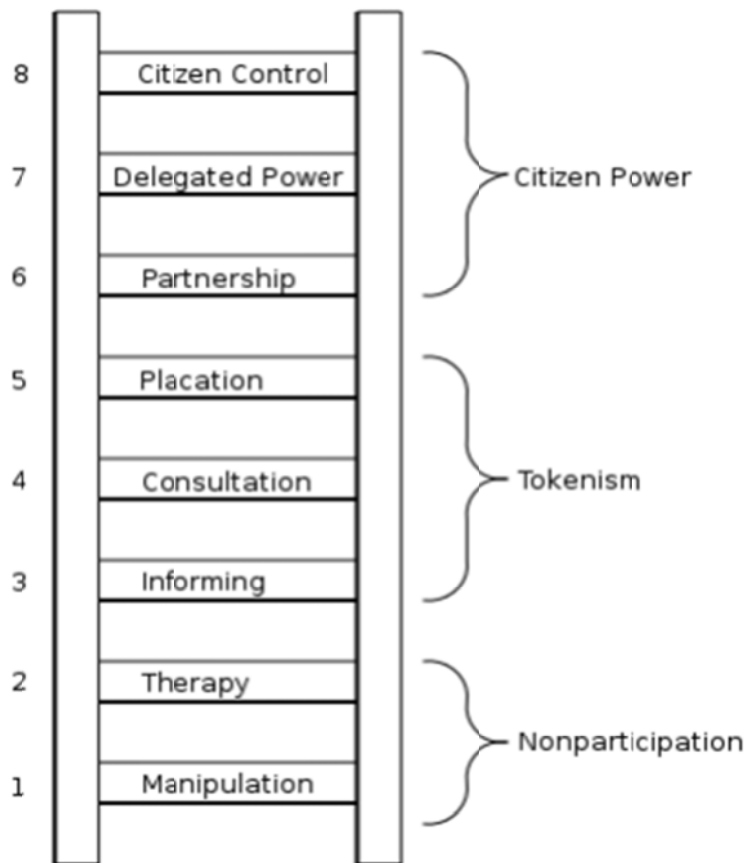
²⁸⁶ Arnstein “Ladder” 218.

²⁸⁷ Arnstein “Ladder” 217.

²⁸⁸ Arnstein “Ladder” 219.

²⁸⁹ Arnstein “Ladder” 219.

describe levels of tokenism where citizens will be informed of government plans and may voice their concerns regarding these plans. Arnstein notes that these rungs do not ensure citizens that their concerns will be heeded and as such do not confer any real power to effect a change in the status quo.²⁹¹ The final three rungs, partnership;²⁹² delegated powers²⁹³ and citizen control,²⁹⁴ describe levels of citizen power, where citizens are afforded increasing degrees of decision-making power which they can use to induce significant social reform so that they can share in the benefits of the affluent society.²⁹⁵



The terminology used in the Housing Act and the experiences of the unlawful occupiers in *Occupiers of 51 Olivia Road, Residents of Joe Slovo* and *Abahlali baseMjondolo*

²⁹⁰ Arnstein "Ladder" 220.
²⁹¹ Arnstein "Ladder" 217.
²⁹² Arnstein "Ladder" 221.
²⁹³ Arnstein "Ladder" 222.
²⁹⁴ Arnstein "Ladder" 223.
²⁹⁵ Arnstein "Ladder" 217.

indicates that participation in housing development currently occurs on the first five rungs of the participation ladder.²⁹⁶ Conversely, the description of meaningful engagement indicates that it could not extend to the final two rungs of the participation ladder because that would have the effect of delegating or abdicating the constitutional powers of the executive to the unlawful occupiers. It is therefore clear that partnership, as a form of participation, most closely resembles the contours of meaningful engagement. Arnstein explains that partnership, as a form of participation, would only work for as long as all the possible parties to the partnership find it useful to maintain the partnership.²⁹⁷ The possible parties to an engagement process - the community that stands to be affected by the eviction and the government - will find it useful to maintain this partnership if their concerns and limitations are appreciated as legitimate and real. However, this will only occur if the parties, their legal representatives and other possible parties re-evaluate their respective roles.

A community cannot be allowed to persist with unreasonable demands and must rather focus its energy and resources on electing a community leader or committee that is empowered with a clear mandate to organise and mobilise the community. The community leader or committee must ensure that communication with the community is done in clear language and in a culturally appropriate manner. The community leader or committee must be able to engage openly with other parties and ensure that all outcomes of any engagement are referred back to the community for approval before finalisation.²⁹⁸

The legal representatives of the community must be prevented from approaching the case with so much vigour that they prejudice the rights of their clients. Instead, the legal representatives must ensure that they obtain a clear mandate from the community so as to position themselves as the secondary voice to the community leaders during the engagement process. This will not only ensure the fostering of a trust relationship

²⁹⁶ In *Residents of Joe Slovo*, Sachs J observed that “[t]he evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself” (par 378, footnote omitted).

²⁹⁷ Arnstein AR “Ladder” 221.

²⁹⁸ Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* (2009) 37.

between the community leaders and the legal representatives, but will also allow the legal representatives to facilitate the mobilisation and organisation of the community.²⁹⁹

Non-governmental organisations will also have to apply their advocacy³⁰⁰ and research skills to support the engagement process. They can do so by facilitating the organisation and mobilisation of the community; ensuring that the legal representatives of the community are properly informed of existing international norms and examples from comparative jurisdictions that can be relied on to develop the law; and, finally, providing a court with a range of statistical data and budgetary information that may not appear in the papers of the parties.³⁰¹

The government cannot be allowed to persist with its intractable institutional and bureaucratic attitude which dictates that all people living in intolerable conditions must be viewed as criminals or as morally degenerate.³⁰² The government must rather ensure that it trains careful and sensitive officials to engage with communities in a manner that is characterised by access to information, flexibility, reasonableness and transparency so that it can fulfil its constitutional and statutory obligations to provide access to adequate housing.

Conceived in this way, meaningful engagement is a type of public participation that transcends procedural fairness in terms of section 33 of the Constitution and sections 3 and 4 of PAJA in two ways. First, the process of meaningful engagement occurs over a long period of time, as opposed to the moment of decision-making in multi-staged administrative decision-making. Second, the nature of the participation required by meaningful engagement for it to be meaningful mandates the forging of a partnership between the government and the occupiers. It is only through the fostering of this long term relationship that unlawful occupiers will be able to rise above the often misconceived perceptions of being helpless, passive and weak recipients of government largesse.³⁰³

²⁹⁹ Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* (2009) 38.

³⁰⁰ Ray B “Occupiers of 51 Olivia Road: Enforcing the right to adequate housing through ‘engagement’” (2008) 8 *HRLR* 703-713 711 (“Ray “Occupiers of 51 Olivia Road”) for an explanation of why it is significant that the Constitutional Court envisaged an active role for civil society in the engagement process.

³⁰¹ Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* (2009) 39.

³⁰² Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* (2009) 42.

³⁰³ See Nedelsky “Reconceiving autonomy” 27.

5 2 2 5 Further development

The need for meaningful engagement has become all the more important with the rising number of violent service delivery protests. These protests indicate that communities are feeling increasingly disconnected from and neglected by local government. This can be ascribed to the intransigent attitude of local government in dealing with the people living within its area of jurisdiction,³⁰⁴ severe instances of underspending,³⁰⁵ and the general lack of capacity to respond to the needs of communities.³⁰⁶

Local authorities should take the obligation of meaningful engagement seriously because a large amount of money is currently being wasted on rebuilding housing development projects that are destroyed in violent service delivery protests and in conducting protracted litigation proceedings. In *Occupiers of 51 Olivia Road* litigation

³⁰⁴ See the examples of abuse of power and blatant disregard for the inputs of the unlawful occupiers in the events leading up to *Occupiers of 51 Olivia Road*, *Residents of Joe Slovo* and *Abahlali baseMjondolo*, where the applicants alleged that the conduct of municipal officials towards them was characterised by tactics aimed at persuading them to accept the plans that the government had for their future, threats of violence when they did not succumb to these tactics, attacks on their person when they denounced the government plans which were made without addressing their concerns or incorporating their proposals, and announcements that decisions had been taken about their future.

³⁰⁵ National Treasury *Press Release, Provincial Budgets: 2010/11 Financial Year, Mid-Term Provincial Budgets and Expenditure Report, 18 November 2010* (2010) 5 shows that provincial housing and local government departments spent R 8 billion or 38.6% of the R 20.8 billion budget appropriated to them collectively. This represents a 14.9% year-on-year decrease in spending. The spending per province was: R 1.129 million or 44.6% of the R 2.533 million budget in the Eastern Cape, R 0.449 million or 26.7% of the R 1.684 million in the Free State, R 1.738 million or 38.5% of the R 4.511 million budget in Gauteng, R 1.459 million or 35% of the R4.173 million budget in KwaZulu-Natal, R 0.882 million or 46.8% of the R 1.885 million budget in Limpopo, R 0.650 or 40.6% of the R 1.601 million budget in Mpumalanga, R 0.267 million or 54.2% of the R 0.493 million budget in the Northern Cape, and R 0.652 million or 38.3% of the R 1.704 million budget in the Western Cape. The press release is available online at www.treasury.gov.za/comm_media/press/2010/2010111801.pdf (accessed on 11 July 2011).

³⁰⁶ National Treasury *Estimates of National Expenditure* (2011) 669 shows that the Department of Human Settlements' budget vote of R 22.578 billion has been appropriated as follows: R 234.4 million or 1.04% for administration; R 39.2 million or 0.17% for housing policy, research and monitoring; R 156.2 million or 0.69% for housing planning and delivery support; R 21.995 billion or 97.42% for housing development finance; and R 155.5 million or 0.69% for strategic relations and governance. On 30 September 2010 only 697 of the 922 positions were filled in the Department of Human Settlements. Most of these vacancies were in the housing planning and delivery support division. The underspending on human resources in this division are as follows: 20 staff who accounts for 10% of the R 12.6 million budget for programme implementation; 19 staff who accounts for 67% of the R 13.2 million budget for rental housing and people's housing process; 21 staff who accounts for the 67% of the R 13.7 million budget for stakeholder mobilisation; 35 staff who accounts for the 48.9% of the R 24.5 million budget for capacity development; 10 staff who accounts for the 100% of the R 9.9 million budget for priority projects facilitation; 25 staff who accounts for the 68.2% of the R 12.4 million budget for human settlement planning; and 97 staff who accounts for the 53.7% of the R 65.9 million budget for sanitation services. See National Treasury *Estimates of National Expenditure* (2011) 676. The National Treasury *Estimates of National Expenditure* (2011) is available online at www.treasury.gov.za/documents/national%20budget/2011/ene/FullENE.pdf (accessed on 25 July 2011).

commenced in the South Gauteng High Court, Johannesburg on 6 February 2006 and the parties submitted an agreement following the process of meaningful engagement to the Constitutional Court on 27 October 2007. The parties would have saved at least 21 months' worth of litigation costs if the City of Johannesburg engaged with all the unlawful occupiers of the inner city of Johannesburg when the Inner City Regeneration Strategy was adopted during 2003.

The recent judgment of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another as Amici Curiae)*³⁰⁷ (*'Residents of Joe Slovo II'*) serves as a further example of the fact that a great deal of public money is being wasted on litigation costs because government prefers not to engage with the people living in its area of jurisdiction. In this case litigation commenced on 20 September 2007 in the Western Cape High Court, Cape Town and the Constitutional Court delivered its judgment on 30 June 2009. On 31 March 2011 the Constitutional Court delivered the follow-up judgment of *Residents of Joe Slovo II* which focussed on whether the original order it made in *Residents of Joe Slovo* should be rescinded or discharged in the light of the changed circumstances.³⁰⁸ In this regard the Court emphasised that the prerequisite of the eviction order in *Residents of Joe Slovo* was that it was just and equitable.³⁰⁹ The Court added that it probably would not have made the relocation order had it not found that the relocation was necessary to facilitate the housing development.³¹⁰ The Court emphasised that the change in circumstances since the judgment in *Residents of Joe Slovo* made it impossible to comply with various aspects of the order in that judgment.³¹¹ The Court therefore concluded that, save for the cost order contained in Order 22 of *Residents of Joe Slovo*, Orders 4-21 of *Residents of Joe Slovo* should be discharged for the following reasons: firstly, the government failed to take adequate steps to carry out the supervised eviction order that the Court made on 10 June 2009; secondly, the respondents indicated that it had no intention of proceeding with the supervised eviction order because it made alternative plans for an *in situ* upgrade of the

³⁰⁷ 2011 (7) BCLR 723 (CC).

³⁰⁸ *Residents of Joe Slovo II* par 1.

³⁰⁹ *Residents of Joe Slovo II* par 29.

³¹⁰ *Residents of Joe Slovo II* par 29.

³¹¹ *Residents of Joe Slovo II* paras 30-36.

site; thirdly, it would be impossible to execute the eviction order in the absence of an agreement between the parties or a complex amendment of the initial order; fourthly, the eviction and relocation order pertained to thousands of people; fifthly, the circumstances that underpinned the Court's reasoning to grant the eviction order has since fallen away; and finally, the plans for the *in situ* upgrade of the Joe Slovo site posed no threat to the appellants.³¹² In this case the parties would have saved at least 36 months' worth of litigation costs if Thubelisha Homes, the MEC for Housing and Local Government in the Western Cape and - perhaps also - the City of Cape Town engaged with the residents of the Joe Slovo informal settlement since the *Breaking New Ground Policy: Comprehensive Plan for the Development of Sustainable Human Settlements* was adopted during 2004.

The number of service delivery protests and the instances in which these protests turn violent will decrease if local authorities start engaging with the people resident within their areas of jurisdiction. During this process the residents living in the area of a local authority's jurisdiction will have to appreciate the budgetary and policy challenges of providing for a range of interests, while the local authority will have to listen and respond with compassion to the plight of the urban poor. If the engagement process is unsuccessful the parties will at least have a full record of the instances when they attempted to engage with each other and what the concerns were that prevented them from finding a solution for housing development in the area. The result would be a narrower focus of disputes and fewer costs being wasted on unnecessary litigation proceedings.

In the long term, individual instances of meaningful engagement have the potential to produce the comprehensive and co-ordinated housing policies and programmes that the Constitutional Court envisaged.³¹³ Individual instances of meaningful engagement will show municipalities what it can in actual fact achieve in fulfilment of its constitutional and statutory obligations to provide access to adequate housing. Instances of successful engagement processes in specific municipalities will provide the blueprint for other municipalities to follow their example. The sheer force of positive results flowing

³¹² *Residents of Joe Slovo II* par 37.

³¹³ *Grootboom* par 40.

from instances of successful engagement processes can create a ripple effect for the re-evaluation and amendment of housing policies and programmes that could include local-, provincial- and national government.

5 2 2 6 Conclusion

Meaningful engagement creates a space for public participation that transcends procedural fairness in terms of PAJA. In this space the unlawful occupiers are required to appreciate the budgetary and policy challenges of providing for a range of interests, while the government must listen and respond with compassion to the plight of the urban poor.³¹⁴ Meaningful engagement must be viewed as an innovative mechanism for enforcing socio-economic rights.³¹⁵ In the long term individual engagement processes will create an incentive to develop the intricate and strong housing policies that section 26 requires³¹⁶ by incorporating the range of housing needs of unlawful occupiers. Meaningful engagement requires government to take certain positive steps without mandating it to implement a specific court-directed housing development programme. The immediate remedial effect of an engagement process is that the unlawful occupiers may be able to retain their existing access to housing - with some improvements to render it safer and more suitable for human habitation - or to gain access to alternative accommodation that is of a relatively better standard.³¹⁷

Liebenberg notes that a mandatory order by a court for the parties to participate in a process of meaningful engagement can lead to the provision of concrete benefits to a particular group of people.³¹⁸ Meaningful engagement furthermore ensures that a dialogic relationship is established between the local government and the unlawful occupiers.³¹⁹ This is preferable to a relationship which requires judicial intervention and

³¹⁴ See Chenwi L and Tissington K *Engaging Meaningfully with Government on Socio-Economic Rights - A Focus on the Right to Housing* (2010) 9.

³¹⁵ B Ray "Occupiers of 51 Olivia Road: Enforcing the right to adequate housing through 'engagement'" (2008) 8 *HRLR* 703 708.

³¹⁶ 709.

³¹⁷ See Agreement *Occupiers of 51 Olivia Road*, Clauses 5-13 and *Residents of Joe Slovo* par 7, Order 10.

³¹⁸ Liebenberg *Socio-Economic Rights* 420.

³¹⁹ In *Residents of Joe Slovo* Sachs J observed that "[w]hen all is said and done, and the process [referring to meaningful engagement] has run its course, the authorities and the families will still be connected in ongoing constitutional relationships" (par 408).

control. Liebenberg argues that the terms of the agreement which the parties reached in *Occupiers of 51 Olivia Road* went further than an order which even a sympathetic court would have granted because the occupiers were afforded accommodation in the inner city of Johannesburg.³²⁰ This is evidence of the change that meaningful engagement has already brought about and will ensure that the government re-appreciates the nature and scope of its constitutional and statutory obligations to provide access to adequate housing. Meaningful engagement will transform the way in which government approaches housing development projects in the sense that it will have to appraise itself of *inter alia*: firstly, the full range of consequences that could flow from the proposed housing development; secondly, what will be required to alleviate the plight of those living in deplorable conditions and, finally, the cost and extent of interim measures it may need to take.

The only way in which this will happen is if both government and the unlawful occupiers approach the engagement process in good faith and a renewed appreciation of their respective roles. This will ensure that the engagement process which creates the space for public participation and dialogue is open, honest and transparent. Proceeding from this foundation will make it easier for the parties to find common ground and thereby to foster an increased understanding and appreciation of the limitations of government by unlawful occupiers while simultaneously enabling government to respond to the plight of the unlawful occupiers with sympathetic care and concern. To this extent, meaningful engagement is a welcome addition to the South African law because it opens up space for prolonged, intense and honest contestation.

In *Residents of Joe Slovo* the Constitutional Court made it clear that meaningful engagement could even have a role to play in the remedial stage of litigation in relation to controlling the effects of an eviction order. While engagement at this stage should by no means be viewed as a substitute for the engagement that precedes litigation, engagement at this stage could concern the upgrading of the properties where the

³²⁰ The Supreme Court of Appeal in *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 404 (SCA) stated that it was hesitant to create an entitlement which would allow the unlawful occupiers to demand alternative accommodation in the inner city of Johannesburg (par 75), but added that it would be remiss if it did not consider the consequences that might flow from an eviction order where it was likely that the unlawful occupiers would become homeless or otherwise destitute. See Wilson S “Litigating housing rights in Johannesburg’s inner city” in Jenkins C, Du Plessis M and Govender K (eds) *Law, Nation-Building and Transformation* (forthcoming).

unlawful occupiers currently reside in order to make it safer or more suitable for human habitation.³²¹ However, engagement at this stage³²² will invariably pertain to the details of the eviction,³²³ possible relocation to temporary accommodation,³²⁴ and ultimately the provision of permanent alternative accommodation.³²⁵

5 3 Pending developments: Alternative accommodation

5 3 1 Introduction

Courts have recently been at pains to incorporate detailed descriptions of the squalid conditions³²⁶ that prevail in informal settlements and inner city buildings that have been abandoned by their owners as a reminder - perhaps for themselves - of the circumstances that unlawful occupiers have to endure every day. It has also become customary for courts to include a detailed overview of the history of the occupation³²⁷ to highlight the daily struggles of these unlawful occupiers.³²⁸ Despite this acknowledgment of the realities of the accommodation of impoverished groups, the courts have continued to issue eviction orders that are sought in the name of health and safety considerations³²⁹ or development³³⁰ without any serious regard to the disastrous impact that the evictions and subsequent relocations to distant accommodation will have on the livelihoods of these unlawful occupiers.³³¹

³²¹ See Interim order *Occupiers of 51 Olivia Road*, Orders 1 and 2.

³²² The recent judgment of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another as Amici Curiae)* 2011 (7) BCLR 723 (CC) illustrates that meaningful engagement at this late stage may not bare any fruits.

³²³ See *Residents of Joe Slovo* par 7, Orders 4-7 and 11-15.

³²⁴ See *Residents of Joe Slovo* par 7, Orders 8-10.

³²⁵ See *Residents of Joe Slovo* par 7, Orders 17-20.

³²⁶ See *Grootboom CC* par 7 and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 404 (SCA) par 10.

³²⁷ See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) par 3; *Pedro and Others v Greater George Transitional Council* 2001 (2) SA 131 (C) paras 5-6; *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C) at 1239D-F; *Baartman and Others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) paras 2-3 and *Murray* par 6.

³²⁸ See *Sailing Queen Investments* par 4 and *Lingwood* par 5.

³²⁹ See *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T) and *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA).

³³⁰ See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 404 (SCA); *Occupiers of 51 Olivia Road; Thubelisha Homes & Others v Various Occupants and Others* [2008] JOL 21559 (C) and *Residents of Joe Slovo*.

³³¹ See *Residents of Joe Slovo* par 321 (O'Regan J).

Against this background it is important to note that the availability of alternative accommodation is widely regarded as the most important factor for a court to consider in determining whether it is just and equitable to issue an eviction order.³³² It is therefore sad that the courts do not use the social and historical context of the unlawful occupation that they narrate at the beginning of most judgments to craft context sensitive remedies. This lack of real engagement with the intolerable conditions that unlawful occupiers live in significantly reduces the impact that the availability of alternative accommodation has as a consideration. This is furthermore at odds with the principle that courts should be hesitant to evict relatively settled occupiers unless it is satisfied that alternative accommodation is available.³³³

In *Residents of Joe Slovo* the Constitutional Court had to determine whether it was just and equitable to evict 20 000 people from the Joe Slovo informal settlement in terms of the N2 Gateway Project. One of the issues the Court grappled with was a decision by Thubelisha Homes and the MEC for Local Government and Housing that it was not feasible to conduct an *in situ* upgrade of the settlement. It was therefore decided that the unlawful occupiers had to be relocated to temporary residential units in Delft while the site was upgraded. The unlawful occupiers initially supported the temporary relocation to Delft because they would be able to return to the developed site and occupy low-income housing against payment of an agreed rental. When it became clear that Thubelisha and the MEC would not be able to honour their commitments the remaining unlawful occupiers on the site refused to relocate fearing that they too would not be able to return from Delft. This brought the whole N2 Gateway Project to an abrupt halt. The Court held that it was just and equitable to evict the unlawful occupiers³³⁴ and to relocate them to temporary residential units in Delft that had to comply with certain quality standards.³³⁵ The Court must be lauded for giving specific

³³² *Lingwood* par 18.

³³³ *PE Municipality* par 28.

³³⁴ *Residents of Joe Slovo* Order 4.

³³⁵ *Residents of Joe Slovo* Order 10 states that the temporary residential units had to comply with the following requirements: (a) "be at least 24m² in extent"; (b) "be serviced with tarred roads"; (c) "be individually numbered for purposes of identification"; (d) "have walls constructed with a substance called Nutec"; (e) "have a galvanised iron roof"; (f) "be supplied with electricity through a pre-paid electricity meter"; (g) "be situated within reasonable proximity of a communal ablution facility"; (h) "make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage"; and (i) "make reasonable provision (which may be communal) for fresh water."

content to the obligation to provide alternative accommodation in this order. Liebenberg observes that the order of the court is the “strongest affirmation to date of suitable alternative accommodation as a critical factor in evaluating the justice and equity of evicting a large settled community.”³³⁶ However, the focus of the order was still very much on the bricks and mortar side of the right of access to adequate housing and therefore failed to appreciate that the relocation to Delft might not appropriately respond to the rights and needs of the unlawful occupiers. This is attributable to the lack of a central organising framework within which to locate the home interest of the occupiers,³³⁷ and the failure to use existing legislation to craft orders that are responsive to the housing rights and needs of those living in informal settlements and inner city buildings that have been abandoned by their owners.

What follows is an attempt to show how courts can tailor their orders to provide alternative accommodation in terms of the existing legislative framework and with reference to international law.

5 3 2 The rights and needs of vulnerable people

5 3 2 1 Introduction

People living in informal settlements³³⁸ are poor because they suffer from a combination of income poverty, human development poverty and social exclusion.³³⁹ Policies which

³³⁶ Liebenberg *Socio-Economic Rights* 311.

³³⁷ Fox L *Conceptualising Home - Theories, Laws and Policies* (2007) 12. See section 2 1 2 in chapter 3 for a discussion of the intangible elements of the right of access to adequate housing. See also the submissions of the *amici curiae* in *Residents of Joe Slovo* paras 27-49. These submissions are available online at <http://www.constitutional.court.org.za/Archimages/12720.PDF> (accessed on 1 August 2011).

³³⁸ The Presidency of the Republic of South Africa *Development Indicators 2009* (2010) 30 (‘The Presidency *Development Indicators 2009*’) indicate that the 13,448 million households in South Africa during 2008 can be divided into the following types of households: 9,879 million or 73,5% of households were in a formal dwelling; 1,8 million or 13,4% of households were in informal dwellings; and 1,417 million or 10,5% of households were in traditional structures. Available online at http://italcoop.co.za/Public Documents/SA%20%20Development%20Indicators_2009.pdf (accessed 18 June 2010).

³³⁹ Sengupta A *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development* UN doc A/HRC/7/15 (28 February 2008) par 23. Available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/111/56/PDF/G0811156.pdf> (accessed on 28 February 2011). In this report the former independent expert on the question of human rights and extreme poverty explained that social exclusion is viewed as something “quite distinct” from income and human development poverty because it explains in relational terms why the “the poor, the unemployed, ethnic minorities and vulnerable groups have remained ‘outsiders’ in the social hierarchy.” Human development poverty is formulated as the deprivation of “health, education, food, nutrition and other basic needs” that supports a “person’s ability to lead a life that she or he values with freedom of

are developed to uplift impoverished people without their participation on the most appropriate way to do so fail to acknowledge their dignity and impede their right to enjoy all rights and freedoms equally.³⁴⁰ This position is exacerbated in the case of evictions that are sought in the name of health and safety considerations or development. Policy guidance in this regard is usually dominated by the rhetoric of economic growth and its trickle-down benefits for the alleviation of poverty. Such policies do not take into consideration the human cost involved in the process of development and consequently they fail to appreciate the inconvenience³⁴¹ and extreme hardship³⁴² that an eviction and relocation will bring about for the communities that stand to be affected.

The reality of an eviction is that the evictees are unable to take the physical site and its intangible elements as a home with them to the alternative accommodation. The result is that an eviction order usually breaks the strong emotional ties between a community and the place that they called home for many years or, perhaps, generations. An eviction will cause many people to lose the support structure that they have established for themselves as well as for others who have come to rely thereon. An eviction will furthermore, perhaps most dramatically, destroy the livelihoods of individuals and their families because relocation to another area brings with it various uncertainties. These uncertainties vary from their ability to earn an income as informal traders or take up other unskilled employment³⁴³ that depends on living in close proximity to those employment opportunities,³⁴⁴ the general safety of the area and the

‘being and doing.’” Income poverty can be defined in absolute terms “as a per capita level of expenditure or poverty line, such as \$1 or \$2 per day, in terms of a comparable level of purchasing power” or in relative terms according to “the sociocultural context of a country, while defining capacity to fulfill basic needs.” The Presidency *Development Indicators 2009* 23 indicates that the per capita income of the poorest 10% of people in South Africa during 2008 where R 1 041 per month. The mean per capita income per race group during 2008 where R 845,83 (African); R 1 495,53 (Coloured); R 2 986,67 (Asian); and R 8 141,15 (White). The Presidency *Development Indicators 2009* 26 further indicates that 49% of the population lives below the poverty of R 524 per month, the 39% of the population live below the poverty line of R 388 per month and that 22% of the population lives below the poverty line of R 283 per month.

³⁴⁰ Section 9(2) of the Constitution.

³⁴¹ See *Residents of Joe Slovo* paras 107 (Yaccob J), 169 (Moseneke DCJ) and 384 (Sachs J).

³⁴² See *Residents of Joe Slovo* par 321 (O’Regan J).

³⁴³ The Presidency *Development Indicators 2009* 20 indicates that 2,109 million or 15,78% of the population in South Africa have employment in the informal sector and that 1,194 million or 8,93% of the population have employment as domestic workers. In contrast, 23,6% (official, narrow definition) and 32,5% (unofficial, broad definition) of the population were unemployed during June 2009.

³⁴⁴ See the arguments of the occupiers in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) par 20 and the submissions of the *amicus curiae* in *Residents of Joe Slovo*.

prevalence of gang related violence; the closeness of health care facilities, recreational facilities, religious institutions and schools; infrastructure; and service delivery.

These circumstances should be taken into consideration by any court in determining the justice and equity of an eviction because a failure to do so may perpetuate or even exacerbate the impoverished position³⁴⁵ of the occupiers who sacrifice their homes and livelihoods in the name of development and economic growth.

In *Residents of Joe Slovo* all the judgments acknowledged that the relocation to Delft would cause considerable inconvenience and bring about immeasurable suffering for the occupiers. The court, most notably in the judgments of Moseneke DCJ³⁴⁶ and O'Regan J,³⁴⁷ held that any order that granted an eviction order without making provision for alternative accommodation according to the rights and needs of occupiers that stand to be affected would be far less likely of being just and equitable. *Residents of Joe Slovo* is therefore the strongest affirmation of the importance of alternative accommodation³⁴⁸ because it emphasises that the government must adopt legislative and other measures that cater for the emergency and short term housing needs of people who stand to be evicted.³⁴⁹ The provision of emergency or temporary alternative accommodation upon eviction is a manifestation of this obligation. This obligation must be fulfilled by ascertaining what the needs of the unlawful occupiers are and to then attempt to provide alternative accommodation that matches these needs. However, this task is hampered by the fact that the composition of communities differs and the respective interests of individuals, and families, within each community exponentially increase the scope of concerns that can be harboured and may require consideration. It is therefore necessary to reduce the circumstances that a court must take into consideration to a realistic number in a principled and non-discriminatory manner,

³⁴⁵ Sengupta A *Promotion and Protection of Human Rights: Human Rights questions, including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms* UN doc A/63/274 (13 August 2008) paras 14-15 ('A/63/274') available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/459/30/PDF/N0845930.pdf?OpenElement> (accessed on 18 March 2011).

³⁴⁶ *Residents of Joe Slovo* par 138.

³⁴⁷ *Residents of Joe Slovo* par 313.

³⁴⁸ Liebenberg *Socio-Economic Rights* 311.

³⁴⁹ See section 2 2 2 in chapter 3 for the model of reasonableness review.

without perpetuating the rhetoric associated with the deserving and undeserving poor.³⁵⁰

I appreciate that by focussing on the housing rights of specific groups to the exclusion of all other groups the discussion below could be perpetuating this rhetoric. However, it is convenient to limit the enquiry here to the housing interests of the elderly, children, persons with disabilities and female-headed households because these are also the categories of people which PIE explicitly includes in sections 4(7) and 6(3)(c) for purposes of considering the availability of alternative land or accommodation. The discussion below shows how courts could create an organising framework for the consideration of alternative accommodation in terms of the housing and housing-related rights in international law, regional human rights instruments, and national legislation and policy guidance that focuses on the elderly, children, persons with disabilities and female-headed households. This does not exclude the possibility that similar arguments could be made for other groups of people. Courts should tailor their approach to the consideration of alternative accommodation based on the cumulative home interests of the community as a whole and its constitutive groups.

5 3 2 2 The elderly

Recent advances in medicine have led to the rapid increase of the number and percentage of the elderly population of the world.³⁵¹ In many instances this increase in life expectancy³⁵² has required the elderly to relocate to urban areas to ensure that health care facilities are readily available. Such resettlements have brought the elderly

³⁵⁰ See Ross T “The rhetoric of poverty” 1501.

³⁵¹ Currently there are 737.3 million people (11% of the total world population) in the world older than 60 years of age. This includes the 103.2 million people that are older than 80 years of age. During 2009 there were 4.013 million people in South Africa (7% of the population) older than 60 years of age and 321040 people (0.5% of the population) older than 80 years of age. During the same time the sex ratio (number of men per 100 women) was 70 for all the men older than 60 years of age and 43 for all the men older than 80 years of age. During the period from 2005 to 2010 the life expectancy at 60 years of age was 14 years for men and 18 years for women. Of all the people older than the age of 60 years of age, 78% of men were still married and 37% were still employed, while only 46% of women were still married and only 18% were still employed. In 2009 there were 15 people in the work force (between the ages of 15 and 64 years of age) for every person older than 60 years of age. United Nations Department of Economic and Social Affairs, Population Division *Population Ageing and Development 2009* (‘UN Population Ageing and Development’) available online at www.un.org/esa/population/publications/ageing/ageing2009chart.pdf (accessed on 7 March 2010).

³⁵² Globally the life expectancy at the age of 60 is an additional 18 years for men and an additional 21 years for women. See UN *Population Ageing and Development 1*.

closer to their children and the much needed care and financial support that they can provide. The increased dependence³⁵³ of the elderly on their children and extended families ensures that they feature among the most vulnerable and unprotected groups³⁵⁴ in any community. The rights and interests of the elderly therefore require special attention and protection during evictions and relocations.

The Vienna International Plan of Action on Ageing³⁵⁵ ('International Plan') was the first international instrument dedicated to addressing the humanitarian and developmental aspects of ageing. One of the primary aims of the plan is to strengthen the capacity of countries to cater for their ageing populations and their needs.³⁵⁶ The World Assembly on Ageing recognised that the activities, safety and well-being of the elderly should be protected and developed according to certain principles. These principles require states to improve the welfare of the entire population³⁵⁷ by developing responses to its changing demography according to its own traditions and cultural values.³⁵⁸ Countries are encouraged to consider all development costs for the accommodation of the elderly as a perpetual investment in the community for the wide array of contributions the elderly make during their lives and will continue to make through their legacy.³⁵⁹ Countries are therefore encouraged to protect, maintain and strengthen the family as a fundamental unit³⁶⁰ in a manner that will promote cohesion and support among generations.³⁶¹ The homes of the elderly cannot be considered as constituting mere shelter because homes acquire a certain psychological and social significance after years of functioning as the centre of their existence.³⁶² Every effort should therefore be made to secure their social integration³⁶³ by ensuring that they are

³⁵³ Globally the old-age support ratio (the number of persons aged 15 to 64 years per person aged 65 or older) is 9. See UN *Population Ageing and Development* 1.

³⁵⁴ Committee on Economic, Social and Cultural Rights, General Comment No 6 *The economic, social and cultural rights of older persons*, UN Doc E/1996/22 ('General Comment No 6') par 17.

³⁵⁵ UN doc A/RES/37/51 available online at <http://www.un.org/documents/ga/res/37/a37r051.htm> (accessed on 18 March 2011). The World Assembly on Ageing adopted this plan when it convened in Vienna from 26 July to 6 August 1982.

³⁵⁶ Par 2 of the International Plan.

³⁵⁷ Par 25(a) of the International Plan.

³⁵⁸ Par 25(d) of the International Plan.

³⁵⁹ Par 25(e) of the International Plan.

³⁶⁰ Par 25(f) of the International Plan.

³⁶¹ Par 25(h) of the International Plan.

³⁶² Recommendation 19 and General Comment No 6 par 33.

³⁶³ Recommendation 20.

relocated to a familiar environment where their involvement in the community will be welcomed and where they will have the opportunity to lead a normal life without fear of falling prey to crime.³⁶⁴

Every effort should further be made to support, protect and strengthen the family unit³⁶⁵ by adopting social policies that encourage family continuity.³⁶⁶ These policies should ensure that appropriate support from the wider community is available to families because that will make it possible for families to care for their elderly relatives.³⁶⁷ Secondly, an integrated approach to planning and development should be adopted because that will recognise the special needs and characteristics of older persons³⁶⁸ and, finally, social services must be established to support families with meagre income who wish to keep elderly people at home.³⁶⁹

The Older Persons Act 13 of 2006 was enacted to protect older persons³⁷⁰ by ensuring that an enabling environment³⁷¹ is created where they can continue to make constructive and meaningful contributions to a society that recognises them as important sources of knowledge and wisdom.³⁷² The objectives of the Act are to³⁷³ firstly, maintain and promote the status, well-being, safety and security of older persons; secondly, protect the rights of older persons;³⁷⁴ thirdly, ensure that an elderly person remains in his or her home within a community for as long as possible; fourthly, regulate

³⁶⁴ Recommendation 23.

³⁶⁵ General Comment No 6 par 31.

³⁶⁶ Recommendation 25.

³⁶⁷ Recommendation 26.

³⁶⁸ Recommendation 28.

³⁶⁹ Recommendation 29.

³⁷⁰ Long title of the Act.

³⁷¹ Section 6(1) of the Act empowers the Minister of Social Development to prescribe national norms and standards for acceptable levels of services that may be provided to older persons and in terms of which these services must be monitored and evaluated.

³⁷² Preamble of the Act.

³⁷³ Section 2(a)-(e) of the Act.

³⁷⁴ See section 7 of the Act for the rights that older persons enjoy.

the establishment and management of services³⁷⁵ and residential facilities³⁷⁶ for older persons and, finally, address the abuse of older persons.³⁷⁷

Elderly people are vulnerable during relocations because they can either lose their homes or be separated from their families and then placed in an institution. This will not only deprive the elderly from the possibility of living independently and earning a living, but will also prevent them from flourishing in an enabling environment and contributing to the society. Local government should therefore compile a comprehensive report that includes *inter alia* the following information about the elderly people in the community: the total number of elderly people; the number of married couples; the number of widows and widowers; how many are employed; how many are or could be living independently; how many are or would like to live with their families; and how the relocation site will be able to accommodate these people.

When a court decides to evict a community it could formulate an order that would direct the local government to establish an enabling environment to suit the rights and needs of elderly people or to comply with sections 6 and 7 of the Act; the National Norms and Standards regarding the Acceptable Levels of Services to Older Persons and Service Standards for Community-Based Care and Support Services;³⁷⁸ and the National Norms and Standards regarding the Acceptable Levels of Services to Older Persons and Service Standards for Residential Facilities.³⁷⁹

5 3 2 3 Children

Children are vulnerable because the biological and psychological fact of their childhood makes them susceptible to influences that prey on their physical and mental immaturity, so that constant care and protection from their family is required, or suitable alternative

³⁷⁵ Section 1 of the Act defines a “service” as “any activity or programme designed to meet the needs of an older person.” See also section 9 of the Act for the requirements of the environment in which these services must be rendered.

³⁷⁶ Section 1 of the Act defines a “residential facility” as “a building or other structure used primarily for the purpose of providing accommodation and of providing a 24-hour service to older persons.”

³⁷⁷ Section 1, read with section 30(2), of the Act defines “abuse” as “[a]ny conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person.” See also section 30(3) of the Act for a description of the types of abuse that the elderly can be subjected to.

³⁷⁸ GG 33075, GN 9255 of 1 April 2010, Annexure B (Part 1).

³⁷⁹ GG 33075, GN 9255 of 1 April 2010, Annexure B (Part 2).

care, if they lack or are removed from their families.³⁸⁰ The Convention on the Rights of the Child³⁸¹ ('CRC') recognises that children are entitled to special care and assistance³⁸² because they are "disproportionately vulnerable to the negative effects of [in]adequate and insecure living conditions."³⁸³ The family of a child should therefore be afforded the necessary protection and assistance so that it can care for that child.³⁸⁴ However, the real concern is that many children in South Africa do not have access to adequate housing³⁸⁵ and are forced to live in overcrowded households³⁸⁶ that do not have electricity,³⁸⁷ basic sanitation³⁸⁸ or safe drinking water.³⁸⁹ Living in these conditions

³⁸⁰ Brett R "Rights of the child" in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) 227-246 227 ('Brett "Rights of the child"') and Van Bueren G "Committee on the Rights of the Child - Overcoming inertia in this age of no alternatives" in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 569-587 575 ('Van Bueren "Overcoming inertia"').

³⁸¹ 1577 UNTS 3. The General Assembly of the United Nations adopted the Convention on 20 November 1989 and it came into force on 2 September 1990. South Africa signed the Convention on 29 January 1993 and ratified the Convention on 16 June 1995 without filing any reservations or interpretive declarations. As at 18 March 2011 there were 194 States Parties to the Convention. The Committee on the Rights of the Child (article 43(1) of the Convention) monitors the implementation of the rights contained in the Convention by receiving and considering States Parties reports (articles 44 and 45 of the Convention). The Committee consists of 10 experts that serve in their personal capacity (article 43(2) of the Convention) for a four year term that may be renewed once (article 43(6) of the Convention). The Committee reports to the General Assembly and Economic and Social Council biannually (article 44(5) of the Convention).

³⁸² Preamble of the CRC.

³⁸³ United Nations Special Rapporteur on the right of access to adequate housing as a component of the right to an adequate standard of living, Mr Miloon Kothari, UN Doc E/CN.4/2001/51 par 69.

³⁸⁴ Preamble of the CRC.

³⁸⁵ Children living in formal housing, as opposed to informal or traditional housing, have increased from 11.92 million (68%) in 2002 to 12.48 million (68.3%) in 2007. See Pendlebury S, Lake L and Smith C (eds) *South African Child Gauge 2008/2009* (2009) 98 ('Pendlebury *et al Child Gauge*').

³⁸⁶ Children living in households with a ratio of more than two people per room have increased from 4.19 million (24%) in 2002 to 4.76 million (26.1%) during 2007. In addition to the lack of privacy and a difficult learning environment children are increasingly susceptible to sexual abuse and the spread of communicable diseases. See Pendlebury *et al Child Gauge* 99.

³⁸⁷ Children living in households that are connected to the main electricity supply increased from 12.63 million (72%) in 2002 to 14.56 million (79.6%) during 2007. People living in informal housing and traditional dwellings have, however, not abandoned the use of flammable fuels for cooking, lighting and heating purposes. Children are therefore still exposed to rampaging fires, inadequate lighting for study purposes and smoke inhalation. See Pendlebury *et al Child Gauge* 102.

³⁸⁸ Children living in households with access to toilet facilities have increased from 8.3 million (47.4%) in 2002 to 10.76 million (58.9%) during 2007. The continued use of pit latrines, the bucket system or open land by nearly 8 million children still poses significant health, safety and nutritional risks that can lead to diarrhoea, cholera, malaria, bilharzia, eye infection and skin diseases. See Pendlebury *et al Child Gauge* 101.

³⁸⁹ Children living in households with access to a safe and reliable supply of drinking water in the home or on the site have increased from 10.62 million (60.6%) in 2002 to 11.47 million (62.7%) during 2007. The continued use of public taps, water tankers, dams and rivers still poses significant health, safety and nutritional risks that can lead to diarrhoea and cholera. See Pendlebury *et al Child Gauge* 100.

is not in the “best interest of the child” and this constitutional principle should therefore be used to inform the interpretation of a child’s right to shelter and adequate housing.³⁹⁰

In *Grootboom v Oostenberg Municipality and Others*³⁹¹ (*Grootboom HC*) the Western Cape High Court, Cape Town used the principle of the best interests of the child to interpret a child’s right to shelter in section 28(1)(c) of the Constitution.³⁹² The applicants argued that the children of the Wallacedene community and their parents should be provided with shelter from the government in terms of section 28(1)(c) read with section 28(1)(b) of the Constitution.³⁹³

Davis J found that section 28(1)(b) would be redundant if “shelter” in section 28(1)(c) was defined in terms of chapter 5 of the Child Care Act 74 of 1983, which envisaged the establishment and maintenance of places of safety for the reception, custody, observation, examination and treatment of children in government institutions. Davis J reasoned that this definition of shelter left no room for children to receive care and protection from their family and would result in children being taken from their families and any form of parental control.³⁹⁴ He found that this would not be in the best interests of the child especially where there is no suggestion that the parents have neglected their children.³⁹⁵ He therefore found that section 28(1)(c) provided a right to be protected from the elements in circumstances where there is no need to remove healthy children from their parents.³⁹⁶

³⁹⁰ Section 28(2) of the Constitution provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.” This was modelled on article 3(1) of the CRC, which states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. See also article 4 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49.

³⁹¹ 2000 (3) BCLR 277 (C).

³⁹² Section 28(1)(c) of the Constitution states that “[e]very child has the right to basic nutrition, shelter, basic health care services and social services”.

³⁹³ Section 28(1)(b) of the Constitution states that “[e]very child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment”.

³⁹⁴ *Grootboom HC* at 288G.

³⁹⁵ *Grootboom HC* at 288H.

³⁹⁶ *Grootboom HC* at 287J-288A. Liebenberg *Socio-Economic Rights* 235 explains that Davis J’s reasoning appreciates the fact that many families require the assistance of the government to meet their socio-economic needs because they are unable to do so as a result of their historical and social circumstances. However, she also points out that this approach to the interpretation of sections 26 and 28(1)(c) of the Constitution makes the short-term provision of shelter for adults dependent on them being parents or primary caregivers of children and therefore excludes those adults who are neither.

On appeal the Constitutional Court in *Grootboom CC* found that the interpretation that Davis J afforded section 28(1)(c) gave rise to an anomaly. Yacoob J explained that Davis J's interpretation afforded the parents of children with an immediate right to housing in terms of section 28(1)(c) of the Constitution to the exclusion of people with no children or whose children are adult and do not attract the protection of section 28 of the Constitution.³⁹⁷ He therefore held that Davis J erred in drawing a distinction between the right to housing in section 26 and the right to shelter in section 28(1)(c) of the Constitution. He explained that housing and shelter are related concepts and that one of the aims of providing access to adequate housing is to provide physical shelter³⁹⁸ from inclement weather and life threatening danger. The obligation in section 28(1)(c) of the Constitution must therefore be ascertained with regard to the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution.³⁹⁹ When subsections 28(1)(b) and (c) are read together the former provision defines those responsible for providing care while the latter simply lists various aspects of the care entitlement.⁴⁰⁰ The primary duty to fulfil a child's socio-economic rights therefore rests with the parents or extended family.⁴⁰¹ On the other hand, where children are being cared for by their families the primary obligation of the government is to provide "the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28."⁴⁰² He accordingly held that the government did not incur any primary obligation in terms of section 28(1)(c) to provide the children and, through them, their parents with shelter because they were in the care of their parents.⁴⁰³

This judgment has been criticised by many commentators for the way it characterised the obligations of government in the provision of shelter to children that

³⁹⁷ *Grootboom CC* par 71.

³⁹⁸ *Grootboom CC* par 73.

³⁹⁹ *Grootboom CC* par 74. Liebenberg *Socio-Economic Rights 237* observes that the Constitutional Court is reluctant to recognise direct entitlements to the provision of social goods and services "even when this is strongly suggested by the text of the relevant provision."

⁴⁰⁰ *Grootboom CC* par 76.

⁴⁰¹ *Grootboom CC* par 76. See also articles 19 and 20 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49.

⁴⁰² *Grootboom CC* par 78. See also *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par 20.

⁴⁰³ *Grootboom CC* par 79.

lack parental care⁴⁰⁴ due the realities of extreme poverty. Pieterse argues that *Grootboom CC* limited the enforcement of the rights contained in section 28(1)(c) of the Constitution to the confines of impoverished families that cannot provide the most basic forms of social goods to their children. He argues further that the Constitutional Court created the impression that it would be better for the well-being of the children to be removed - forcibly or voluntarily - from their parents because then the government would have obligations to provide social goods to the children.⁴⁰⁵

In *Minister of Health v Treatment Action Campaign (No 2)* the Constitutional Court appeared to retreat from its initial interpretation of the obligations that section 28 of the Constitution imposes on government when it held that the government had to protect children “when the implementation of the right to parental or family care is lacking.”⁴⁰⁶ This is in accordance with the CRC, which requires States Parties to render material assistance and support programmes⁴⁰⁷ to parents that are unable to provide their children with an adequate standard of living.⁴⁰⁸ States Parties must provide this assistance according to what the prevailing national conditions demand so that the living conditions needed for the development of the child can be fostered.⁴⁰⁹ This requires the establishment of an environment that will advance the child’s physical,

⁴⁰⁴ An orphan is defined as a child under the age of 18 years whose mother, father, or both biological parents have died. Maternal orphans (children whose mother has died but whose father is alive) have increased from 488 000 (2.8%) in 2002 to 614 000 (3.4%) in 2007. Paternal orphans (children whose father has died but whose mother is alive) have increased from 2.15 million (12.3%) in 2002 to 2.36 million (12.9%) in 2007. This can be attributed to the prevalence of HIV/AIDS, the high mortality rates of men and the general absence of fathers from households. Double orphans (children whose mother and father have died) have increased from 352 000 (2%) in 2002 to 701 000 (3.8%) in 2007. South Africa, however, has a long history of children not living consistently in the same dwelling as their biological parents due to poverty, labour migration, educational opportunities or cultural practice. This is also why the right to family care in section 28(1)(b) of the Constitution includes the care provided by the extended family according to customary law. This protection is significant in view of the fact that the number and proportion of children living in a household with both biological parents has decreased from 6.63 million (37.8%) in 2002 to 6.27 million (34.3%) in 2007. See Pendlebury *et al Child Gauge 72-75*. See also *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) and *The Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T).

⁴⁰⁵ Pieterse “Reconstructing the private/public dichotomy?” 11.

⁴⁰⁶ 2002 (5) SA 721 (CC) par 78. See also article 18 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49.

⁴⁰⁷ Article 27(3) of the CRC.

⁴⁰⁸ Article 27(1) of the CRC.

⁴⁰⁹ Article 27(2) of the CRC. Van Bueren “Overcoming inertia” 576-577 argues that the “national conditions” of States Parties do not function as a limitation for the application of the provision in addition to the limitations provided for in article 4 of the CRC.

mental, spiritual, moral and social development.⁴¹⁰ The best interests of the child⁴¹¹ then imply that a home be established for a child in an environment that promotes her well-being⁴¹² by encouraging her to learn,⁴¹³ to partake in social activities,⁴¹⁴ to discover her culture and to practice a religion⁴¹⁵ while living in close proximity to health care and other services.⁴¹⁶

Children are vulnerable during relocations because they may be required to enrol in new schools - perhaps in the middle of a semester - and to partake in social activities in an area that is unfamiliar and often more dangerous. Every effort should be made to ameliorate the impact of the relocation because the impact that this will have on a child cannot be underestimated. Local government should therefore compile a comprehensive report that includes *inter alia* information on the total number of children in the community, the name and age of each child, whether the child attends school and which grade she is in, and how the relocation site will be able to facilitate the “physical, mental, spiritual, moral and social development” of the children.

When a court then decides to evict a community it could formulate an order that would direct the local government to establish an environment to suit the rights and needs of children or to comply with articles 24, 26, 28(1)(a), 29(1)(a), 30, 31 and 32 of

⁴¹⁰ Article 27(1) of the CRC.

⁴¹¹ The Constitutional Court has considered the obligations contained in the CRC in detail in other contexts. See *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 322 (CC) par 16 (in considering whether to impose imprisonment on the primary caregiver of young children) and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC) paras 71-79 (whether the protection afforded to child complainants in criminal proceedings involving sexual offences in terms of sections 153(3) and (5), 158(5), 164(1), and 170A(1) and (7) of the Criminal Procedure Act 51 of 1977 are sufficient).

⁴¹² Article 32 of the CRC requires States Parties to protect children from “economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or be harmful to the child’s health or physical, mental, spiritual, moral or social development.”

⁴¹³ Article 28(1)(a) of the CRC requires States Parties to “make primary education compulsory and available free to all” while article 29(1)(a) of the CRC requires education to be directed to “[t]he development of the child’s personality, talents and mental and physical abilities to their fullest potential”.

⁴¹⁴ Article 31 of the CRC affords children the right “to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.”

⁴¹⁵ Article 30 of the CRC affords children the right “to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.” See also article 12 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49.

⁴¹⁶ Article 24 of the CRC requires States Parties to ensure that children enjoy “the highest attainable standard of health” while article 26 of the CRC require State Parties to ensure that children “benefit from social security.” See also article 14 of the African Charter on the Rights and Welfare of the Child OAU doc CAB/LEG/24.9/49.

the CRC and articles 12, 14, 18, 19 and 20 of the African Charter on the Rights and Welfare of the Child.

5 3 2 4 Persons with disabilities

The issues that relate to disability were traditionally approached from a welfare perspective. This approach focused on the maintenance of persons with disabilities because it was believed that their lack of human capacities eroded rather than simply complicated their existence.⁴¹⁷ The requisite “mixture of charity, paternalism and social policy”⁴¹⁸ in legislation and best practices reinforced the perception that persons with disabilities were of inferior worth and contributed to the continued formation of dependency relationships. However, there has been a shift to a rights-based approach⁴¹⁹ that is conceptually and instrumentally different from the welfare approach. The rights-based approach is premised on the ability and inclusion of persons with disabilities by focusing on the ways in which barriers to their participation in society can be eliminated so that their voices can become the principal point of departure for the evaluation of their rights and needs.

This shift in approach is significant because it regards persons with disabilities as “subjects” with full legal capacity as distinct from “objects” that require maintenance.⁴²⁰ This approach furthermore enables critical reflection on firstly, whether difference requires special treatment; secondly, whether non-discrimination is currently adequately conceptualised; thirdly, the indivisibility and interdependence of human rights and, finally, how socio-economic rights can contribute to the creation of inclusive societies and economies.⁴²¹

This gradual shift in perspective gained inspiration from the norms and standards contained in various awareness campaigns,⁴²² declarations,⁴²³ resolutions,⁴²⁴ General

⁴¹⁷ Quinn G “Disability and human rights: A new field in the United Nations” in Krause C and Scheinin M (eds) *International Protection of Human Rights: A Textbook* (2009) 247-271 247 (“Quinn “Disability and human rights”).

⁴¹⁸ Quinn “Disability and human rights” 247.

⁴¹⁹ See Stein MA “Disability human rights” (2007) 95 *California Law Review* 75-122.

⁴²⁰ Quinn “Disability and human rights” 248.

⁴²¹ Quinn “Disability and human rights” 248–249.

⁴²² The United Nations Decade of Disabled Persons (1983-1992). During the final year of the UN Decade the United Nations Economic Commission for Asia and the Pacific adopted the Asian and Pacific Decade of Disabled Persons (1993-2002) to inspire reform in the east - available online at

Comments on disability,⁴²⁵ Special Rapporteur reports⁴²⁶ and the inclusion of rights for persons with disabilities in other international human rights instruments.⁴²⁷ This paved the way for the adoption of the Convention on the Rights of Persons with Disabilities⁴²⁸ ('CRPD').

www.unescap.org/esid/psis/disability (accessed on 7 March 2010). The Asian and Pacific Decade was extended to 2012 after the adoption of the *Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific* during 2002. The African Union was the benefactor of the African Decade of Persons with Disabilities (2000-2009) which had to be the catalyst of reform throughout the continent - available online at www.africandecade.org (accessed on 7 March 2010). The African Decade was extended to 2019 upon completion of the Africa Regional Conference on the Millennium Development Goals and Disability that was held in Nairobi during 2008. The League of Arab States and the Arab Organization of Disabled Persons declared the Arab Decade of Disabled Persons (2003-2012) available online at <http://www.un.org/esa/socdev/enable/disarabdecade.htm> (accessed on 7 March 2010). The Organization of American States declared a Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006–2016) that was thematically entitled *Equality, Dignity, and Participation* available online at www.oas.org/DIL/persons_with_disabilities.htm (accessed on 7 March 2010). The European Union adopted a Disability Action Plan (2003-2010) while the Council of Europe adopted its own Disability Action Plan (2006-2015). The Secretary of the United Nations has stated that these “[r]egional decades and strategies on disability are crucial for raising awareness and establishing information and support networks for mainstreaming.” See Economic and Social Council *Mainstreaming disability in the development agenda*, UN doc E/CN.5/2010/6 par 12.

⁴²³ The United Nations adopted the *Declaration on the Rights of Mentally Retarded Persons*, General Assembly resolution 2865 (XXVI) on 20 December 1971 and supplemented it with the *Declaration on the Rights of Disabled Persons*, General Assembly Resolution 3447 (XXX) on 9 December 1975.

⁴²⁴ In 1982 the United Nations adopted its *World Programme of Action Concerning Disabled Persons* General Assembly Resolution 61/106, annex I which defined the role of persons with disabilities as both agents and beneficiaries and provided an international policy framework for disability-inclusive development. In 1993 the principles of inclusive policies, plans and activities were reaffirmed in the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* General Assembly resolution 48/96, annex. These rules also established a Special Rapporteur on Disability that is tasked to monitor the implementation of these rules for the Commission for Social Development. The Commission on Human Rights passed resolutions on disability in 1994 (Resolution 1994/27) and 1996 (Resolution 1996/27) which required UN treaty bodies to monitor States Parties compliance with their obligations with respect to persons with disabilities, and in 1998 (Resolution 1998/31) which declared that a violation of the right to equality of persons with disabilities would amount to an infringement of their human rights.

⁴²⁵ See UN Committee on Economic, Social and Cultural Rights, General Comment No 5 *Persons with disabilities*, UN Doc E/1995/22 and UN Committee on the Rights of the Child General Comment No 9 *The rights of children with disabilities*, UN doc HRI/GEN/1/Rev 9(vol II).

⁴²⁶ Report of the Special Rapporteur on the Right to Education *The Right to Education of Persons with Disabilities*, UN doc A/HRC/4/29 (19 February 2007) and the Interim report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc A/63/175 (28 July 2008).

⁴²⁷ Article 23 of the Convention on the Rights of the Child, article 18(4) of the African Charter on Human and People's Rights, Art 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

⁴²⁸ 999 UNTS 171. The General Assembly of the United Nations adopted the Convention on 13 December 2006 and it came into force on 3 May 2008. South Africa ratified the Convention on 30 March 2007 without filing any reservations or interpretive declarations. As at 18 March 2011 there were 78 States Parties to the CRPD. The Committee on the Rights of Persons with Disabilities (article 34(1) of the Convention) monitors the implementation of the rights contained in the Convention by receiving and

The CRPD describes persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁴²⁹ Put differently, discrimination on the basis of disability amounts to the denial of reasonable accommodation.⁴³⁰ This requirement of reasonable accommodation is unique to the CRPD and has proved to be very controversial.⁴³¹ Quinn explains that the requirement of reasonable accommodation requires States Parties to respond directly to the individual needs of a person with a disability and a failure to do so may be cause for litigation. While the requirement of reasonable accommodation falls short of the classic construction of positive obligations, it nevertheless requires States Parties to take action that go beyond negative obligations.⁴³²

The requirement of reasonable accommodation establishes an obligation through its link with the definition of discrimination that is cast in the form of an obligation of result.⁴³³ The requirement of reasonable accommodation accordingly sets the standard

considering States Parties reports (articles 35 and 36 of the Convention). The Committee was elected by secret ballot (article 34(5) of the Convention) on 3 November 2008 (article 34(6) of the Convention) in New York. The Committee currently consist of 12 experts, which will be increased to 18 experts with the 80th ratification of the Convention, that serve in their personal capacity (article 34(3) of the Convention) for an four year term that may be renewed once (article 34(7) of the Convention). The Committee reports to the General Assembly and Economic and Social Council biannually. The Committee may also receive individual complaints in terms of article 1 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities 46 ILM 443. The Optional Protocol entered into force on 3 May 2008 and had 88 signatories and 49 States Parties as at 18 March 2011.

⁴²⁹ Article 1 of the CRPD.

⁴³⁰ Article 2 of the CRPD. The full definition of “discrimination on the basis of disability” provides for “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation”.

See also sections 9, 29 and the schedule (illustrative unfair practice 9) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘PEPUDA’).

⁴³¹ During the drafting of the CRPD the EU Presidency argued that the principle of reasonable accommodation should be severed from the definition of discrimination because “it could become a Trojan horse for the enforceability of more and more slices of social and economic rights.” See Quinn “Disability and human rights” 258.

⁴³² Quinn “Disability and human rights” 258.

⁴³³ The *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* reprinted in (1998) 20 *Human Rights Quarterly* 691-705 defines an obligation of result is an obligation that “requires States to achieve specific targets to satisfy a detailed substantive standard” (par 7). In the housing context the obligation of result could, for example, translate into giving effect to Millennium Development Goal 7 (Ensure environmental sustainability), target 11 by achieving “a significant improvement in the lives of at least 100 million slum dwellers” by 2020. However, South Africa has misinterpreted this target as

for the evaluation of individual claims and the crafting of tailored remedies where there is a violation of the provisions of the CRPD.⁴³⁴ The CRPD requires States Parties to respect the home of persons with disabilities⁴³⁵ and to protect their aspirations of an adequate standard of living⁴³⁶ by ensuring that their homes are accessible⁴³⁷ in a manner that will promote an independent existence⁴³⁸ and personal mobility.⁴³⁹ The CRPD thus provides a framework against which a specific relocation site can be evaluated for its suitability as alternative accommodation.

The prevalence of physical barriers prevents persons with disabilities⁴⁴⁰ from having access to housing,⁴⁴¹ water,⁴⁴² electricity⁴⁴³ and employment.⁴⁴⁴ In a home the most common barriers include inaccessible toilets and other sanitary facilities, grab rails to assist mobility, the lack of security from intruders, and health and safety problems caused by incomplete structures.⁴⁴⁵ The impairments of these people usually prevent them from reaching objects that are too high; carrying heavy objects; travelling in

requiring the elimination of slums and subsequently adopted the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 to eliminate slums by 2015.

⁴³⁴ Quinn "Disability and human rights" 258.

⁴³⁵ See article 23 of the CRPD.

⁴³⁶ See article 28(1) of the CRPD.

⁴³⁷ See article 9(1) and (2) of the CRPD.

⁴³⁸ See article 19(1) of the CRPD.

⁴³⁹ See article 20 of the CRPD.

⁴⁴⁰ According to Statistics South Africa there were 2 255 982 people (or 5% of the total population) living with some sort of disability in South Africa. These disabilities include sight (32.1%), hearing (20.1%), communication/speech (6.5%), physical (29.6%), intellectual (12.4%) and emotional (15.7%). The census showed that 1 854 376 (879 680 males and 974 696 females) black people, 191 693 (92 230 males and 99 462 females) white people, 168 678 (88 583 males and 80 095 females) coloured people, and 41 235 (21 550 males and 19 685 females) Indian people suffered from some sort of disability. See Statistics South Africa *Prevalence of Disability in South Africa: Census 2001* (2005) 11-12 and 14-15. Available online at www.statssa.gov.za/census01html/Disability.pdf (accessed on 21 August 2010) ("Stats SA *Prevalence of Disability*").

⁴⁴¹ The census showed that households headed by disabled people had access to the following types of dwelling: house or brick structure on separate stand or yard (53.2%), traditional dwelling/hut/structure (22.4%), flat in block of flats (4.1%), town-/cluster-/semi-detached house (1.9%), house/flat/room in backyard (2.7%), informal dwelling/shack in backyard (3.5%), informal dwelling/shack not in backyard (11%), and room/flatlet not in backyard (0.9%). See Stats SA *Prevalence of Disability* 26.

⁴⁴² The census showed that 22.3% of households headed by disabled people did not have access to piped water. See Stats SA *Prevalence of Disability* 30.

⁴⁴³ Stats SA *Prevalence of Disability* 30 indicates that 38.2% of households headed by disabled people did not have access to electricity for lighting.

⁴⁴⁴ Stats SA *Prevalence of Disability* 21 indicates that only 18.6% of disabled people were employed compared to the 34.6% of able-bodied people.

⁴⁴⁵ Coulson J, Napier M and Matsebe G "Disability and universal access: Observations on housing from the spatial and social periphery" in Watermeyer B, Swartz L, Lorenzo T, Schneider M and Priestley M (eds) *Disability and Social Change - A South African Agenda* (2006) 325-349 332 ("Coulson "Disability and universal access").

narrow doorways and down stairs; moving on uneven, stony or steep surfaces; maintaining the structure of the home; and cooking and completing household chores.⁴⁴⁶ The barriers in the community environment include unsurfaced roads; uneven, muddy, rocky and high pavements; crossing busy streets; accessing buildings; utilising public toilets, public phones and automated teller machines; long distances between public transport hubs and their homes or other destinations and accessing public transport vehicles.⁴⁴⁷

These barriers are usually created by architects, contractors, designers and developers that do not have a firm grasp of the needs of persons with disabilities. The effect is that persons with disabilities are precluded from enjoying certain opportunities, receiving services and actively participating in normal community life. This has a significant impact on the families, friends and communities of persons with disabilities because they are forced into relationships of dependency when they are capable of leading productive lives in an enabling environment.⁴⁴⁸ Local government should ideally include comprehensive information on the number of persons with disabilities within the community they want to relocate, the nature of the impairments and how the relocation site will be able to accommodate these people.

When a court decides to evict the community it could formulate an order that would direct the local government to alter an existing environment to suit the needs of persons with disabilities or to comply with Part S (Facilities for Persons with Disabilities) of the National Building Regulations;⁴⁴⁹ and the key principles of accessibility, self-sufficiency, access to appropriate services and social integration of the *Policy on Disability*.⁴⁵⁰

⁴⁴⁶ Coulson "Disability and universal access" 335.

⁴⁴⁷ Coulson "Disability and universal access" 337-340.

⁴⁴⁸ Mji G "Disability and homelessness: A personal journey from the margins to the centre and back" in Watermeyer B, Swartz L, Lorenzo T, Schneider M and Priestley M (eds) *Disability and Social Change – A South African Agenda* (2006) 350-360 354-355.

⁴⁴⁹ GG 12780 GN R.2378 (12 October 1990) 1.

⁴⁵⁰ Available online at www.pmg.org.za/files/docs/090317disabilitypolicy.pdf (accessed on 21 August 2010).

5 3 2 5 Female-headed households

Women may be vulnerable in situations where they “experience structural discrimination and inequality”⁴⁵¹ as a result of inadequate protection against the implementation of gender neutral legislative provisions that are used to discriminate against them in various areas of life. This often forces women into relationships of dependence and subjugation, which discriminates against them and in turn makes them susceptible to homelessness and abject poverty.⁴⁵² This position is exacerbated when the relationship breaks down or the husband/partner dies and leaves the woman in charge of the household because women find it particularly difficult to obtain tenure security.⁴⁵³

The Convention on the Elimination of All Forms of Discrimination against Women⁴⁵⁴ (‘CEDAW’) is uniquely placed to address the lived experience of discrimination and unequal treatment of women because it is the only treaty devoted exclusively to elaborating the right to equality and non-discrimination against women in different spheres.⁴⁵⁵ CEDAW recognises that discrimination against women violates the principles of equality of rights and respect for human dignity because it prevents women from participating in the political, social, economic and cultural life of their countries on

⁴⁵¹ Farha L “Committee on the Elimination of Discrimination against Women - Women claiming economic, social and cultural rights - The CEDAW potential” in Langford M (ed) *Social Rights Jurisprudence - Emerging Trends in International and Comparative Law* (2008) 553-568 555 (‘Farha “The CEDAW potential”’).

⁴⁵² Centre on Housing Rights and Evictions *Source 5: Women and Housing* Second Edition (2008) available online at <http://www.cohre.org/store/attachments/COHRE%20Sources%205%20%5B2%5D.pdf> (accessed on 4 September 2010) 13 (‘COHRE *Women and Housing*’).

⁴⁵³ COHRE *Women and Housing* 36-37.

⁴⁵⁴ 1249 UNTS 13. The General Assembly of the United Nations adopted the Convention on 18 December 1979 and it came into force on 3 September 1981. South Africa signed the Convention on 29 January 1993 and ratified it on 15 December 1995. As at 18 March 2011 there were 182 States Parties to the Convention. The Committee on the Elimination of Discrimination against Women (article 17(1) of the Convention) monitors the implementation of the rights contained in the Convention by receiving States Parties reports (article 18 of the Convention). The Committee can also receive individual complaints in terms of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 2131 UNTS 83, which the General Assembly of the United Nations adopted on 6 October 1999 and which entered into force on 22 December 2000. The Committee consists of 23 experts of “high moral standing and competence” that serve in their personal capacity (article 17(1) of the Convention) for a four year term that may be renewed once (article 17(5) of the Convention). The Committee annually reports to the General Assembly through the Economic and Social Council on its activities and “may make suggestions and general recommendations based on the examination” of States Parties reports (article 21 of the Convention).

⁴⁵⁵ Farha “The CEDAW potential” 555.

an equal footing with men⁴⁵⁶ and therefore “hampers the growth of the prosperity of society and the family”, which in turn makes it more difficult to achieve “the full development of the potentialities of women in the service of their countries and of humanity.”⁴⁵⁷ CEDAW defines discrimination against women as

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁴⁵⁸

CEDAW affords women the right to substantive equality and protects them against discrimination in certain areas of daily life that include education;⁴⁵⁹ employment;⁴⁶⁰ health care;⁴⁶¹ family benefits, forms of financial credit, and participation in recreational activities, sport and cultural life;⁴⁶² rural life;⁴⁶³ equality before the law;⁴⁶⁴ and marriage.⁴⁶⁵ However, CEDAW recognises the indivisibility and interdependence of all human rights and therefore acknowledges that the infringement of one right will invariably lead to the infringement of another right.⁴⁶⁶ This is particularly true in the case of evictions, where relocation to another area could have a detrimental impact on *inter alia* the employment relationship of the breadwinner of a female-headed household. In this regard CEDAW recognises that women have the right to work,⁴⁶⁷ that they have the

⁴⁵⁶ See Committee on Economic, Social and Cultural Rights, General Comment No 16: *The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2005/4 (‘General Comment No 16’) paras 6-9.

⁴⁵⁷ Preamble of CEDAW.

⁴⁵⁸ Article 1 of CEDAW. See also General Comment No 16 par 11 and Committee on Economic, Social and Cultural Rights, General Comment No. 20: *Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20 par 20.

⁴⁵⁹ Article 10 of CEDAW.

⁴⁶⁰ Article 11 of CEDAW.

⁴⁶¹ Article 12 of CEDAW.

⁴⁶² Article 13 of CEDAW.

⁴⁶³ Article 14 of CEDAW.

⁴⁶⁴ Article 15 of CEDAW.

⁴⁶⁵ Article 16 of CEDAW.

⁴⁶⁶ Farha “The CEDAW potential” 557.

⁴⁶⁷ Article 11(1)(a) of CEDAW. See also General Comment No 16 par 24.

right to the same employment opportunities as men,⁴⁶⁸ and that they have the right to choose their profession and a right to job security.⁴⁶⁹

These rights are complemented by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁴⁷⁰ ('Maputo Protocol'). The Maputo Protocol includes a range of civil and political rights⁴⁷¹ alongside economic, social and cultural rights⁴⁷² that have been specifically tailored to the rights and needs of women in the African context. The Maputo Protocol, like CEDAW, specifically recognises a number of economic rights that the breadwinner of a female-headed household could have recourse to should a proposed eviction and relocation threaten her employment. In this regard States Parties must promote equal access to employment⁴⁷³ and the right to receive equal remuneration for jobs of equal worth.⁴⁷⁴ States Parties must guarantee women the freedom to choose their occupation and must protect them against exploitation by their employers.⁴⁷⁵ The Maputo Protocol, significantly, recognises that States Parties must create conditions to promote and support the occupations and economic activities of women in the informal sector.⁴⁷⁶ These rights must be read in conjunction with the right to adequate housing which

⁴⁶⁸ Article 11(1)(b) of CEDAW.

⁴⁶⁹ Article 11(1)(c) of CEDAW.

⁴⁷⁰ OAU doc. CAB/LEG/66.6. The African Union adopted this Protocol on 11 July 2003 and it came into operation on 25 November 2005 when the fifteenth African Union member nation deposited its instrument of ratification with the Chairperson of the Commission of the African Union in terms of article 28(2) of the Protocol. South Africa signed the Protocol on 16 March 2004 and ratified the Protocol on 17 December 2004. South African has filed reservations with regard to articles 6 and 7 of the Protocol. As at 15 July 2010, 46 African Union member states were signatories to the Protocol and 28 member states have ratified the Protocol.

⁴⁷¹ These rights include the elimination of discrimination against women (article 2); the right to dignity (article 3); the right to life, integrity and security of the person (article 4); the elimination of harmful practices (article 5); marriage rights (article 6); the right to separate, divorce and annul a marriage (article 7); the right of access to justice and equal protection before the law (article 8); the right to participation in the political and decision-making process (article 9); the right to peace (article 10); the right to protection in armed conflicts (article 11); the right of elderly women to receive special protection (article 22); the right of women with disabilities to receive special protection (article 23) and the right of women in distress to receive special protection (article 24).

⁴⁷² These rights include the right to education and training (article 12); the rights to economic and social welfare (article 13); health and reproductive rights (article 14); the right to food security (article 15); the right to adequate housing (article 16); the right to a positive cultural context (article 17); the right to health and a sustainable environment (article 18); the right to sustainable development (article 19); rights for widows (article 20); and the right to inheritance (article 21).

⁴⁷³ Article 13(a) of the Maputo Protocol.

⁴⁷⁴ Article 13(b) of the Maputo Protocol.

⁴⁷⁵ Article 13(d) of the Maputo Protocol.

⁴⁷⁶ Article 13(e) of the Maputo Protocol.

requires States Parties to guarantee that women, irrespective of their marital status, will have the right to equal access to housing and to acceptable living conditions in a healthy environment.⁴⁷⁷

A female-headed household stands to be affected during an eviction because relocation destroys the support structures that enable a woman to care for her family⁴⁷⁸ and invariably requires her to travel further to her place of employment, at substantial cost, to retain her employment so that she can keep providing for her family. The increased time and cost of commuting means that she can spend less time with her family and has even less money available to provide food and other basic necessities for her family. Rospabe and Selod explain that the distance between places of work and places of residence drive unemployment and that this can be ascribed to the spatial organisation of cities.⁴⁷⁹ They use the “spatial mismatch hypothesis” of Kain⁴⁸⁰ to explain that the disconnection between the place of employment and place of residence increases the duration as well as the cost of commuting to work.⁴⁸¹ They note further that the disconnection is exacerbated by the congestion, quality and infrequency of public transport systems, which, except for the modes of self-propelled transportation, is often the only form of transport that people living in informal settlement can afford.⁴⁸² Women face the structural barriers of commuting from their homes to their places of employment at costs that are disproportionately high in comparison with the wages they are offered.⁴⁸³

Local government should therefore provide a court with comprehensive information on the number of female-headed households, how many dependents there are in each female-headed household, where the breadwinners are employed, the average income of these breadwinners, the current cost of commuting to work every day and how that

⁴⁷⁷ Article 16 of the Maputo Protocol.

⁴⁷⁸ See Mortensen D and Vishwanath T “Personal contacts and earnings: It is who you know!” (1994) 1 *Labour Economics* 187-201.

⁴⁷⁹ Rospabe S and Selod H “Does city structure cause unemployment? The case of Cape Town” in Borat H and Kanbur R (eds) *Poverty and Policy in Post-Apartheid South Africa* (2006) 262-287 262 (Rospabe and Selod “Does city structure cause unemployment?”).

⁴⁸⁰ Kain J “Housing segregation, negro employment and metropolitan decentralization” (1968) 82 *Quarterly Journal of Economics* 175-183.

⁴⁸¹ Rospabe and Selod “Does city structure cause unemployment?” 263.

⁴⁸² Rospabe and Selod “Does city structure cause unemployment?” 263.

⁴⁸³ Rospabe and Selod “Does city structure cause unemployment?” 263.

would change upon relocation to another area, and how the infrastructure of the relocation site will be able to ameliorate the impact of the eviction. When a court then decides to evict the community it could formulate an order that would direct the local government to alter the public transport infrastructure of or services provided in an existing environment to the extent that the breadwinner of a female-headed household should be able to remain secure in her employment, without any unreasonable disruption to her private life and family responsibilities.

5 3 3 Conclusion

This section proposed an organising framework for the consideration of alternative accommodation as part of the evaluation that courts must go through to satisfy themselves of the justice and equity of the proposed eviction. This organising framework is based on the categories of people that PIE explicitly requires courts to have regard to in section 4(6) for purpose of the justice and equity evaluation. This organising framework shows how courts can use provisions in various international and regional human rights instruments to create standards against which the suitability of alternative accommodation can be measured. This is then supplemented with an exploration of the applicable national legislation and policy instruments that courts can refer to for further guidance on how a specific site should be improved to bring it in conformity with the ultimate goal of providing people with access to adequate housing. This organising framework builds on the joinder case law where local authorities are required to submit individualised and meaningful reports to courts and the obligation to engage with communities. Courts can use the information in these reports on the demographics of the community and the current infrastructure of the proposed relocation site to evaluate whether relocation to that site will be in accordance with both international and domestic law. This information and the outcomes of the process of meaningful engagement can then be used to craft orders that are sensitive to the limits of government resources, but also ensure that government adheres to its constitutional, statutory and international obligations.

This organising framework for the consideration of alternatives ensures that courts observe the fundamental values that underpin the Constitution; respect, protect,

promote and fulfil the rights and needs of vulnerable people; and appropriately consider all the relevant circumstances that could render an eviction unjust and inequitable. This organising framework provides substantive safeguards to unlawful occupiers that have its origins in the Basic Principles and Guidelines on Development-based Evictions and Displacement of the United Nations.⁴⁸⁴ The Basic Principles state that it must be a priority to ensure housing and land allocation “to disadvantaged groups such as the elderly, children and persons with disabilities.”⁴⁸⁵ States Parties should therefore conduct and compile “comprehensive and holistic impact assessments” prior to the initiation of any project that could result in development-based eviction and displacement. These assessments must include basic statistical data about the demography of the community that stands to be affected. These assessments should further indicate whether the potential impact of development-based evictions can be mitigated through compliance with national building regulations and standards⁴⁸⁶ or best practice guidelines and by indicating the availability of alternative strategies.⁴⁸⁷

5 4 Conclusion

This chapter set out to analyse the development of the necessary joinder of local governments to eviction proceedings and the concept of meaningful engagement. These developments were considered from the perspective of the obligations that the Constitution and the Housing Act place on the government to provide access to adequate housing.

The discussion of the case law on the joinder showed that the High Courts have not adopted a uniform approach in their reasoning for the joinder of local authorities to eviction proceedings. In *Murray* the court failed to appreciate that any prejudice that would flow to the applicant bank could be ameliorated by the joinder of the local authority and any subsequent orders that required the latter party to fulfil its constitutional and statutory obligations. In *Cashbuild* and *Sailing Queen Investments* the

⁴⁸⁴ UN doc A/HRC/4/18 annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (*Guidelines for development-based evictions*). The *Guidelines for development-based evictions* is the successor of the *Comprehensive Human Rights Guidelines on Development-based Displacement* UN doc E/CN.4/sub.2/1997/7, annex.

⁴⁸⁵ *Guidelines for development-based evictions* par 31.

⁴⁸⁶ See the NBRSA and SABS Code of Good Practice 0400.

⁴⁸⁷ *Guidelines for development-based evictions* par 32.

courts placed much emphasis on the operation of sections 4(2) and 7(1) of PIE so that they lost sight of that fact that there is a more compelling, constitutional reason for joining local authorities to eviction proceedings.

The *Lingwood*, *Chieftain Real Estate* and *Blue Moonlight Properties* cases started to engage with the fact that the joinder of local authorities to eviction proceedings exceeded any reasons founded on convenience. The courts emphasised that the overarching reason for joining local authorities to eviction proceedings flows from the constitutional and statutory obligations that local authorities have to provide access to adequate housing. This elevated the rationale for the joinder of local authorities to eviction proceedings to a matter of necessity.

In *Occupiers of Short Retreat*, *Occupiers of Shulana Court* and *Blue Moonlight Properties SCA* the Supreme Court of Appeal confirmed that the joinder of local authorities flowed from their constitutional and statutory obligations. These obligations originate in section 26(2) of the Constitution and are expanded on in sections 2 and 9 of the Housing Act. The court buttressed its conclusion by identifying statutory provisions in the Local Government: Municipal Systems Act 32 of 2000 that place additional obligations on local government to promote housing development projects.

These constitutional and statutory obligations confirm that local authorities have a direct and substantial interest in the outcome and order that a court may make in all eviction cases. In the event that a court considers that it would be just and equitable to evict the unlawful occupiers without more, a local authority must render emergency assistance to the unlawful occupiers in terms of Chapter 12 of the National Housing Code. On the other hand, should the court consider it to be just and equitable to evict the unlawful occupiers subject to certain conditions, a local authority could be required to provide temporary alternative accommodation pending the acquisition of permanent housing in terms of Chapter 12 of the National Housing Code. As a result the joinder of a local authority to eviction proceedings is a matter of necessity and not of convenience.

These constitutional obligations of local authorities make it impossible to proceed with an eviction from private land without joining the relevant local authority in the eviction application. Once joined, the case law shows that local authorities incur an additional obligation to provide a court with an individualised report that contains a

comprehensive overview of the measures taken to alleviate the plight of the unlawful occupiers and to provide them with housing in their jurisdiction. These reports ensure that courts have all the relevant information about the eviction available so that they can make considered decisions about the justice and equity of any particular eviction.

In *Occupiers of 51 Olivia Road* and *Residents of Joe Slovo* the Constitutional Court emphasised that the absence of meaningful engagement would be an important factor in determining the justice and equity of an eviction. This is why it is important to view meaningful engagement as a significant manifestation of participatory democracy that affords poor people a unique opportunity to actively engage government in its attempts to improve their living conditions. Meaningful engagement affirms their inherent human dignity, their right to life and their right to equal treatment before the law. Meaningful engagement has the potential of ensuring that unlawful occupiers receive the care and concern that is becoming to all citizens in a country that set out to improve the lives of *inter alia* those living in abject poverty.

Meaningful engagement creates a space for public participation that transcends procedural fairness in terms of PAJA and mediation in terms of PIE. In this space local authorities must develop a deep understanding of the plight of the urban poor through a greater appreciation for their own obligations to provide access to adequate housing. Unlawful occupiers must similarly develop a greater appreciation for what local authorities are able to do within the narrow confines of their budgets by finding ways in which they can escape the perception of being passive, weak and subjugated recipients of government largesse. The defining nature of meaningful engagement requires the establishment of a long term relationship between a particular community and a particular local authority so that they can craft context-specific solutions to the housing crisis of the area and eviction treats. This re-appreciation of the context from which the other party in this process enters the space created by meaningful engagement opens up the potential for finding truly effective and transformative solutions for the housing problems in South Africa.

The *Occupiers of 51 Olivia Road* case shows that concrete benefits can flow immediately from an engagement process between a local authority and unlawful occupiers. In some instances these benefits may even be better than what a

compassionately tailored court order could require. In this regard meaningful engagement is an innovative mechanism for enforcing the right of access to adequate housing because individual instances of engagement can lead to the development of a substantive understanding of the constitutional and statutory obligations of local authorities in housing development.

This chapter also proposed an organising framework for the consideration of alternative accommodation as part of the evaluation that courts must go through to satisfy themselves of the justice and equity of a proposed eviction. This organising framework is based on the categories of people that PIE explicitly requires courts to have regard to in section 4(6) for purpose of the justice and equity evaluation. This organising framework shows how courts can use provisions in various international and regional human rights instruments to create standards against which the suitability of alternative accommodation can be measured. This is then supplemented with an exploration of the applicable national legislation and policy guidance that courts can refer to for further guidance on how a specific site should be improved to bring it in conformity with the ultimate goal of providing people with access to adequate housing. This organising framework builds on the joinder case law where local authorities are required to submit individualised and meaningful reports to courts and on the obligation to engage with communities. Courts can use the information in these reports on the demographics of the community and the current infrastructure of the proposed relocation site to evaluate whether relocation to that site will be in accordance with both international and domestic law. This information and the outcomes of the process of meaningful engagement can then be used to craft orders that are sensitive to the limits of government resources, but also ensure that government adheres to its constitutional, statutory and international obligations.

This chapter has shown that recent developments in the law of eviction are inextricably linked to the constitutional and statutory obligations of the government to respect, protect, promote and fulfil the right of access to adequate housing. The necessary joinder of local authorities to eviction proceedings, the obligation to engage meaningfully with unlawful occupiers and the obligation to provide alternative accommodation afford the government an opportunity to get involved in housing matters

in a manner that is markedly different from how it got involved with housing during apartheid. During apartheid the government abused its normal police powers to evict black people under the veil of ensuring their health, safety and security while it was actively creating a land-use system that was segregated along racial lines. The necessary joinder of local authorities, meaningful engagement and the provision of alternative accommodation places an obligation on government to take a very real interest in the constitutional commitment of establishing a society where each person will benefit from an enhanced quality of life and the opportunity to attain their full potential. Conceived in this way, the impact of the necessary joinder of local authorities to eviction proceedings, obligation to engage meaningfully with unlawful occupiers and the provision of alternative accommodation has a profound impact on the law of evictions in South Africa because it foster a greater understanding of the normative purpose and substantive content of section 26 of the Constitution.

Conclusion

The *rei vindicatio* is regarded as the most important real action available to an owner and in the case of immovable property it adopted the form of an eviction application. To succeed with this real action the owner had to allege and prove that she was the owner of the property and that the property was in possession of the defendant.¹ The owner would satisfy these requirements by proving that the property was registered in her name² and that the defendant occupied it. The onus then shifted to the defendant to establish a valid and enforceable right of occupation, which could take the form of a real or personal right, acquired in terms of legislation or a right, permission or licence granted by the owner. However, if the owner acknowledged that the occupier had a right of occupation, without there being any obligation to admit this fact, the owner had to prove that the right no longer existed or was no longer enforceable. The owner would satisfy this additional requirement by proving that the right of occupation has expired or has been terminated.³ The owner would only bear this additional onus in cases where she acknowledged the existence of or relied on the termination of the right of occupation from the outset and the defendant relied on the right as a defence.⁴ Once the owner satisfied these requirements, the court would have no discretion to refuse the eviction order based on the social and economic circumstances of the unlawful occupiers or any other general policy considerations.⁵

The common law of evictions underwent a dramatic transformation throughout apartheid. During this period government abused its normal police powers to evict people in terms of ostensibly ensuring their health, safety and security. This normal

¹ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A ('*Chetty*'). See also Keightley R "The impact of the Extension of Tenure Act on an owner's right to vindicate immovable property" (1999) 15 *SAJHR* 277-307 283.

² She can prove this *inter alia* by producing the title deeds in court. See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82A and *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C) at 804F.

³ See Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* (2006) 244 and Van der Walt AJ *Constitutional Property Law* (2005) 410-411.

⁴ *Chetty* at 21.

⁵ Van der Walt AJ *Property in the Margins* (2009) 54 ('*Van der Walt Property in the Margins*').

exercise of regulatory powers was in actual fact undertaken to further its objective of racial segregation and the systemic oppression of black people.⁶ In the process a link was established between the regulatory powers of government and property law because the requirements of the *rei vindicatio* accommodated the eviction of squatters through its abstract application.⁷ This has been described as the normal position because the owner was presumed to be entitled to exclusive possession of her property and the unlawful occupier had no legal basis on which to base its continued occupation of the land.⁸

This normal state of affairs was legislatively enhanced during apartheid with rural and urban land measures that sought to limit the ways in which black people could lawfully reside on land. These rural and urban land measures were discussed in chapter 2. The aim of that chapter was to place forced evictions in their legal-historical context by analysing these measures through a limited historical study. The chapter set out to prove that the prevalence of homelessness and the scope of the housing crisis in present day South Africa originated with these measures that the government used in conjunction with the common law remedies of private owners to conduct large-scale forced evictions during apartheid.

The purpose of the Black Land Act 27 of 1913⁹ was to identify “traditional” black land and to reserve this land for exclusive use and occupation by black people. The Act ensured that the movement of black people was limited to these traditional areas and that their ownership of land could not increase in those rare instances where they owned land outside the traditional areas. Any person found to be occupying land in contravention of this Act would be guilty of an offence. However, black people could avoid these fines and possible imprisonment if they worked as labour tenants on white

⁶ Van der Walt *Property in the Margins* 60.

⁷ Van der Walt *Property in the Margins* 63.

⁸ See section 2 1 in chapter 1 for a discussion of the assumption that it is normal for a landowner to be allowed exclusive and undisturbed possession of her property. See Van der Walt AJ “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land-reform legislation” 2002 *TSAR* 254-289 256-258 where he notes that Rosemary Coombe uses the term “normality” assumption in her important article - “Same as it ever was”: Rethinking the politics of legal interpretation” (1989) 34 *McGill Law Journal* 603-652 - to point out that convention does not present us with a ready-made, neutral and objective source of stable meaning.

⁹ See section 2 2 in chapter 2 for a discussion of this Act.

farms. The Black Service Contract Act 24 of 1932¹⁰ was the first comprehensive attempt to regulate labour tenancy in the Union. The Act defined a labour tenant, created reciprocal obligations for the parties to the labour tenancy contract and limited the duration of the contract to three years. The Development Trust and Land Act 18 of 1936¹¹ was the legislative embodiment of the government's growing concern with the large number of black people who were living and working on white farms as labour tenants. Chapter 4 of the Act contained a number of provisions that sought to regulate the tenure of black people who resided on land other than the traditional and "released" areas. The strengthened measures for regulating rural land tenure of black people intensified the need for land in the traditional and released areas as the employment conditions worsened on white farms. Industrial growth and the promise of employment opportunities in urban areas created a way for black people to avoid the nearly impossible task of acquiring suitable accommodation in the traditional or released areas and to escape the prospect of criminal prosecution for not being a registered labour tenant or squatter.

The process of urbanisation that ensued created a severe shortage in the availability of formal housing¹² in urban areas, which led to the creation of informal settlements and urban squatting. The purpose of the Black (Urban Areas) Act 21 of 1923¹³ was to ensure that black people had adequate accommodation in or near urban areas. Only black people were allowed to acquire a right to, interest in or servitude over a piece of land in a location or native village that was created in terms of this Act. Any person who was party to any agreement that attempted to circumvent the operation of this Act would be guilty of an offence. The Act furthermore prohibited owners, lessees and lawful occupiers of land to allow the congregation of black people on their land if that land was situated within three miles of the urban authorities' jurisdiction. Any person who allowed black people to congregate on their land in contravention of the Act would be guilty of an offence. This ensured that black people congregated in certain defined areas for domestic employment purposes where they could be carefully managed and could have

¹⁰ See section 2 2 in chapter 2 for a discussion of this Act.

¹¹ See section 2 2 in chapter 2 for a discussion of this Act.

¹² See section 2 3 in chapter 1 for statistics on the backlog in formal housing, informal housing, hostels and "squatter housing" in 1994.

¹³ See section 2 3 in chapter 2 for a discussion of this Act.

their living conditions inspected on a regular basis. The Black (Urban Areas) Consolidation Act 25 of 1945¹⁴ copied many provisions from the Black (Urban Areas) Act 21 of 1923 and tailored it to the needs of those black people that sought to work in mines. The provisions of this Act led to the proclamation of the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters.¹⁵ Chapter 2 of these regulations provided for various forms of urban tenure for black people that conformed to the policy whereby the presence of black people in urban areas was considered to be of a temporary nature. However, black people started occupying vacant land and buildings closer to work because they could not afford the daily commute from the periphery, nor could they risk the possibility of losing their jobs on account of being late for work on a regular basis. Government subsequently criminalised the tenure of black people in white areas in terms of the Group Areas Act 36 of 1966.¹⁶

This Act was used in conjunction with the Prevention of Illegal Squatting Act 52 of 1951 to conduct large-scale forced evictions. The purpose of this Act was to prevent and control illegal squatting on public or private land. This was achieved by criminalising the entering onto and remaining on land or in buildings/structures without any lawful reason.¹⁷ PISA further contained provisions that firstly, enabled a court to order the eviction of squatters and authorised the demolition of any buildings/structures that were erected on the land without the permission of the owner/lawful occupier;¹⁸ secondly, afforded administrative powers to magistrates and native commissioners to effect the removal of squatters;¹⁹ and finally, afforded local authorities the power to establish emergency camps.²⁰ The peremptory nature of these provisions obliged owners to evict unlawful occupiers and therefore significantly extended the scope of evictions based on the stronger right to possession under apartheid land law.

¹⁴ See section 2 3 in chapter 2 for a discussion of this Act.

¹⁵ See section 2 3 in chapter 2 for a discussion of this Act.

¹⁶ See section 2 3 in chapter 2 for a discussion of this Act.

¹⁷ See section 3 2 1 in chapter 2 for a discussion of this power.

¹⁸ See section 3 3 in chapter 2 for a discussion of this power.

¹⁹ See sections 3 2 2 and 3 2 3 for a discussion of these powers.

²⁰ See section 3 4 in chapter 2 for a discussion of this power.

However, a change in the national urbanisation strategy led to the enactment of the Black Communities Development Act 4 of 1984.²¹ The purpose of this Act was to provide for the development of black communities outside the national states. The Act empowered the Minister of Co-operation and Development to declare certain areas to be development board areas and to establish a development board for each of those areas. These development boards were bestowed with certain local government, housing and development, and agency functions. Significantly, the Act empowered the board and the local authority or the township developer to grant a competent person a leasehold for a period of 99 years. These provisions paved the way for the enactment of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 as part of the range of legislative provisions, enacted during President FW de Klerk's term in office, which started dismantling apartheid land law.²²

Chapter 2 showed that a renewed appreciation of the legal-historical context²³ of forced evictions must form the background against which the exploration of the process to “transform our society into one in which there will be human dignity, freedom and equality”²⁴ must begin. This renewed appreciation of the legal-historical context of forced evictions has enabled courts to understand the social and historical context of section 26 of the Constitution of the Republic of South Africa (‘the Constitution’).

The aim of chapter 3 was to provide an analysis of the impact of section 26 of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’) in an attempt show how the common law of evictions has changed since the advent of democracy. This chapter set out to show that the coming into force of the right of access to adequate housing and the enactment of PIE marked a decisive break from the apartheid past where evictions occurred without any regard for the personal circumstances of unlawful occupiers to the current position under the democratic dispensation where each eviction application requires a careful appreciation of all the relevant circumstances surrounding the eviction.

²¹ See section 2.3 in chapter 2 for a discussion of this Act.

²² See section 2.3 in chapter 2 for a discussion of this Act.

²³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) par 21, Yacoob J stated that section 26 of the Constitution must be construed in its social and historical context.

²⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) par 8.

In *Port Elizabeth Municipality v Various Occupiers*²⁵ the Constitutional Court confirmed that the traditional enquiry into evictions had been recast into a new “constitutional matrix” of relationships that flow from the intersection of sections 25 and 26 of the Constitution. Put differently, the rights of the owner could no longer be presumed to be superior to the housing rights of the unlawful occupiers. In this constitutional matrix the question of eviction will not be approached from the position where the property rights of the owner and the housing rights of the unlawful occupiers are characterised as diametrically opposed interests. Instead the question of eviction will be approached in a manner that tries to reconcile the interests of the landowner and the unlawful occupiers by engaging with the specific circumstances of the case so as to reach a just and equitable solution.²⁶

During apartheid the government used its police power to evict people for health, safety and public interest reasons because it wanted to establish and maintain a land-use system that was segregated along racial lines.²⁷ Section 26 of the Constitution envisages that the government will become involved in housing and eviction cases in a manner that is markedly different. Section 26(2) of the Constitution imposes positive obligations on the government to adopt reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of access to adequate housing.²⁸ In *Grootboom* the Constitutional Court developed the model of reasonableness review which it uses to determine whether the measures taken by the government to realise section 26 of the Constitution are reasonable. The Court emphasised that it was not its prerogative to question whether better measures could have been adopted or whether public funds could have been better spent. The Court would focus on whether the measures that the government adopted could contribute to the realisation of the right of access to adequate housing.

However, the government also has negative obligations to desist from impairing or preventing the right of access to adequate housing.²⁹ In *Jaftha v Schoeman and Others*;

²⁵ 2005 (1) SA 217 (CC).

²⁶ See section 1 in chapter 3 for a discussion of this constitutional matrix.

²⁷ See section 1 in chapter 2 for a brief discussion of the Slums Act 53 of 1934, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977.

²⁸ See section 2.2.2 in chapter 3 for a discussion of the model of reasonableness review.

²⁹ See section 2.3.1 in chapter 3 for a discussion of this negative obligation.

*Van Rooyen v Stoltz and Others*³⁰ and *Gundwana v Steko Development and Others*³¹ the Constitutional Court confirmed that judicial oversight was required of all sales in execution proceedings if the property to be executed against is the home of the judgment debtor. These judgments enjoin judicial officers to weigh the interests of the creditor in securing payment of the judgment debt against the interests of the debtor in retaining the tenure security that her home provides her. This balancing requires more than the mechanical application of legal rules to objective facts. It requires engagement with all the relevant circumstances of the case.³² The fact that the rights and interests of poor and otherwise destitute people must be taken into consideration in legal proceedings that threaten to deprive them of their current access to adequate housing, however basic, is a substantial addition to the law of evictions.

PIE was enacted to give effect to section 26(3) of the Constitution. With its enactment there was a shift in the focus of evictions - away from preventing squatting to preventing illegal eviction. This shift in focus coincided with the provision of procedural protections and substantive safeguards against illegal evictions. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*³³ ('*Residents of Joe Slovo*') the Constitutional Court emphasised that courts cannot resort to the common law definition of consent to determine the meaning of consent for purposes of PIE because the common law definition of consent limits the definition of unlawful occupation and through that the application of PIE.³⁴ Once it is clear that unlawful occupiers meet this threshold requirement they must receive notice of eviction proceedings that have been instituted against them.³⁵ This notice must identify them as unlawful occupiers of the property, be properly served upon them and be in a language that they will be able to understand. Furthermore, this notice must contain information regarding the nature of the proceedings; the date and time of the hearing; the grounds for the proposed eviction; their right to appear and defend the case; and that they may request legal aid. Once a court is satisfied that the proposed eviction is just and equitable it must

³⁰ 2005 (2) SA 140 (CC).

³¹ 2011 (3) SA 608 (CC).

³² See section 2 3 2 in chapter 3 for a discussion of the requirement that courts must consider all relevant circumstances.

³³ 2010 (3) SA 454 (CC).

³⁴ See section 3 2 2 in chapter 3 for a discussion of consent for purposes of PIE.

³⁵ See section 3 3 in chapter 3 for a discussion of the notice requirement.

determine a date upon which the unlawful occupiers must vacate the property and a date upon which the eviction order can be executed should the unlawful occupiers not vacate the property voluntarily.³⁶ These procedural protections are significant because during apartheid the local authority officials did not give the squatters notice of pending eviction proceedings, nor did they wait for a just and equitable day or time to execute the eviction order in a humane and dignified manner.

The substantive safeguards that PIE affords unlawful occupiers are animated by the overarching requirement that all evictions must be just and equitable³⁷ - to both the unlawful occupiers and the landowner. This requires careful consideration of the rights and needs of the unlawful occupiers in general, but specifically the rights and needs of the elderly, people with disabilities, children and female-headed households. Courts are further required to ascertain whether land or alternative accommodation is available or can reasonably be made available to the unlawful occupiers upon their eviction. Finally, courts are also required to consider whether the local authority with jurisdiction over the area in which the property is situated made any mediation attempts to resolve disputes between the unlawful occupiers and the private landowners. These substantive safeguards to the eviction of unlawful occupiers arguably represent the most significant development in the law of evictions.

In general, courts have discharged their obligation to grapple with the conflicting interests of unlawful occupiers and landowners in an effort to find case specific solutions admirably well. The analysis of the constitutional and statutory context of evictions in post-apartheid South Africa has enabled courts to understand both the social-historical and textual context as well the values and purpose of section 26 of the Constitution and PIE. Courts have immersed themselves in the intricacies of applications for evictions from private land,³⁸ urgent evictions³⁹ and evictions from public land⁴⁰ by way of creative reasoning and crafting of responsive remedies.

However, to date the Constitutional Court has refused to build on the normative foundations of the right of access to adequate housing which it laid in *Grootboom* when

³⁶ See section 3 3 4 in chapter 3 for a discussion of the eviction order and its execution.

³⁷ See section 3 4 in chapter 3 for a discussion of this overarching requirement.

³⁸ See section 3 4 2 in chapter 3 for a discussion of this type of eviction.

³⁹ See section 3 4 3 in chapter 3 for a discussion of this type of eviction.

⁴⁰ See section 3 4 4 in chapter 3 for a discussion of this type of eviction.

it stated that the right amounted to “more than bricks and mortar”. Chapter 3 therefore also sought to develop the normative content of section 26(1) of the Constitution by drawing on literature about the affective value of the “home” and its relevance in the law.⁴¹ This section in chapter 3 showed that it is possible to develop the normative content of the right to housing with reference to the home interests of the unlawful occupiers. Developing the substantive content of section 26(1) of the Constitution with reference to the affective value of ‘home’ will give better effect to the purposes of the right of access to adequate housing within the broader transformative goals of the Constitution and enable the courts to craft more responsive remedies.

However, this is not the end of the development that is required to give content to the right of access to adequate housing. Courts find it difficult to decide whether or not a violation of the right has occurred in the absence of a developed independent and substantive content of what it means to have access to adequate housing. The aim of chapter 4 was to identify international instruments that can be considered by South African courts in their effort to develop a substantive understanding of the scope and content of the concept of “adequacy”. The chapter set out to identify treaties and regional human rights instruments that can be used by South African courts to interpret the scope and content of adequacy given the peremptory constitutional obligation in section 39(1)(b) of the Constitution to interpret the rights in the Bill of Rights with regard to international law.

The most important provision is article 11(1) of the International Covenant on Economic, Social and Cultural Rights,⁴² which provides that everyone has a right to an adequate standard of living. The United Nations Committee on Economic, Social and Cultural Rights issued General Comment No 4 *The right to adequate housing*⁴³ to provide clarity on the obligations of States Parties in terms of article 11(1) of the Convention. General Comment 4’s description of the right to housing as living “somewhere in security, peace and dignity” accords with the Constitutional Court’s assessment that section 26 amounts to “more than bricks and mortar”. General Comment 4 further states that the right to housing is more complex than simply having a

⁴¹ See section 2 1 2 in chapter 3 for a discussion of the home interests of unlawful occupiers.

⁴² 993 UNTS 3. See section 2 1 1 in chapter 4 for a discussion of this Convention.

⁴³ UN Doc E/1992/23. See section 2 1 2 in chapter 4 for a discussion of this General Comment.

roof over one's head. This is in accordance with how the Constitutional Court has described the right of access to adequate housing. The similarities between General Comment 4 and the jurisprudence of the Constitutional Court is indicative of the fact that South Africa is on the correct path to giving substantive content to the right of access to adequate housing. South Africa simply requires an organising framework within which to consider the right of access to adequate housing.⁴⁴

South African courts can also receive interpretive guidance from article 8 of Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁵ which provides everyone with a right to respect for their private and family life, their home and correspondence. An analysis of the jurisprudence of the European Court of Human Rights on article 8 shows that there is a dimension to the awarding of planning permission that goes beyond the environmental and other concerns listed in article 8(2) of the Convention. The analysis showed that it is possible to engage to some extent with the substantive content of the right to housing in the second stage of constitutional analysis if the first stage is avoided.

The European Committee of Social Rights has interpreted articles 16, 30, 31 and E of the Revised European Social Charter⁴⁶ in a manner that gives concrete substantive meaning to the rights of social, legal and economic protection for the family; the right of protection against poverty and social exclusion; the right to housing and the provision of non-discrimination. The resulting independent content that has been afforded to these rights has enabled the Committee to scrutinise the justifications advanced by Greece, Italy, Bulgaria and France with greater rigour and jurisprudential discipline than what the ECtHR has done under the ECHR. This is in accordance with the approach that the Committee on Economic, Social and Cultural Rights prescribes in General Comment No. 7: *The right to adequate housing: forced evictions*⁴⁷ when it requires States Parties to establish adequate procedural and substantive safeguards against forced evictions.

Finally, the South African courts can receive guidance on the interpretation of section 26(1) of the Constitution from the jurisprudence that the Inter-American Commission on

⁴⁴ See section 2.2 in chapter 4 for a discussion of the development of this organising framework.

⁴⁵ 213 UNTS 221. See section 3.1 in chapter 4 for a discussion of this Convention.

⁴⁶ CETS no 163. See section 3.2 in chapter 4 for a discussion of this Charter.

⁴⁷ UN Doc E/1998/22. See section 2.1.2 in chapter 4 for a discussion of this General Comment.

Human Rights, the Inter-American Court on Human Rights and the African Commission on Human and Peoples' Rights have generated in terms of the American Convention on Human Rights⁴⁸ and the African Charter on Human and People's Rights.⁴⁹ While neither of these regional human rights systems have an explicit right to housing, the supervisory bodies in both systems have relied on classic civil and political rights to adjudicate housing interests. This is in accordance with the internationally accepted view that all human rights are interdependent and mutually supporting. However, this approach to the adjudication of housing interests is problematic because it is difficult to give content to a right to housing from the broad rights to life, dignity, political participation and privacy. South African courts, most notably the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*,⁵⁰ have regularly stated that the right of access to housing must be interpreted and understood in relation to the other rights in the Bill of Rights. However, the reliance on the broad norms of equality, human dignity and life has only allowed the Constitutional Court to interpret the right of access to adequate housing as amounting to "more than bricks and mortar". This interpretation of the content of section 26(1) of the Constitution is by no means insignificant because it indicates that there is more to housing than a physical structure. An overview of the jurisprudence generated at the United Nations and at regional human rights level in terms of the housing and related provisions in these international law sources will assist South African courts in developing the substantive content of section 26(1) of the Constitution.

However, the development of the substantive content will depend a great deal on the interpretation of the constitutional obligations of the government. Chapter 5 sought to analyse this aspect, tracing the recent jurisprudential developments in the law of evictions that have provided clarity on the obligations of the state for purposes of section 26 of the Constitution. This chapter set out to see whether these developments have the potential of ushering in a new phase in the adjudication of the right to housing.

There is a burgeoning jurisprudence on the joinder of local government as a party to the eviction proceedings on account of its direct and substantial interest in the outcome

⁴⁸ OASTS No 36. See section 3 3 in chapter 4 for a discussion of this Convention.

⁴⁹ 1520 UNTS 217. See section 3 4 in chapter 4 for a discussion of this Charter.

⁵⁰ 2001 (1) SA 46 (CC).

of eviction proceedings, flowing from its constitutional and statutory obligations to provide access to adequate housing. This joinder of necessity enables a court to consider whether the legislative and other measures that government has taken to fulfil its obligations are reasonable in the specific case. The case law on joinder shows that the High Court has not been consistent on the reasons advanced for ordering the joinder of local authorities to eviction proceedings.⁵¹ Recently the Supreme Court of Appeal in *Occupiers of Erf 101, 102, 104 and 112 Short Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*,⁵² *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*⁵³ and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*⁵⁴ clarified the position by holding that the overarching rationale for ordering the joinder of local authorities to eviction proceedings was the obligations of local authorities that flow from section 26(3), read with sections 26(1) and (2), of the Constitution and section 9 of the Housing Act. These constitutional obligations of local authorities make it impossible to proceed without its joinder in applications for evictions from private land.

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others*⁵⁵ and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*⁵⁶ the Constitutional Court similarly held that the absence of meaningful engagement would be an important factor in determining the justice and equity of an eviction.⁵⁷ This is why it is important to view meaningful engagement as a significant manifestation of participatory democracy that affords poor people a unique opportunity to engage government actively in its attempts to improve their living conditions. Meaningful engagement affirms their inherent human dignity, their right to life and their right to equal treatment before the law. Meaningful engagement has the potential of ensuring that unlawful occupiers receive the care and concern that is becoming to all citizens in a country that set out to improve the lives of *inter alia* those

⁵¹ See section 2 1 in chapter 5 for a discussion of the case law on the necessary joinder of local authorities to eviction proceedings.

⁵² 2010 (4) BCLR 354 (SCA) par 14.

⁵³ 2010 (9) BCLR 911 (SCA) par 14.

⁵⁴ 2011 (4) SA 337 (SCA).

⁵⁵ 2008 (3) SA 208 (CC).

⁵⁶ 2010 (3) SA 454 (CC).

⁵⁷ See section 2 2 in chapter 5 for a discussion of meaningful engagement.

living in abject poverty. Meaningful engagement creates a space for public participation that transcends procedural fairness in terms of the Promotion of Administrative Justice Act 3 of 2000 and mediation in terms of PIE. In this space local authorities must develop a deep understanding of the plight of the urban poor through a greater appreciation for its own obligations to provide access to adequate housing. Unlawful occupiers must similarly develop a greater appreciation for what local authorities are able to do within the narrow confines of its budget by finding ways in which it can escape the perception of being passive, weak and subjugated recipients of government largesse. The defining nature of meaningful engagement requires the establishment of a long term relationship between a particular community and a particular local authority so that they can craft context-specific solutions to the housing crisis of the area and eviction treats. This re-appreciation of the context from which the other party in this process enters the space created by meaningful engagement opens up the potential for finding truly effective and transformative solutions for the housing problems in South Africa. This chapter showed that the necessary joinder of a local authority to eviction proceedings within its jurisdiction and the development of meaningful engagement flow from a proper understanding of the normative purpose and substantive content of the right of access to adequate housing.

In chapter 5 I further proposed an organising framework for the consideration of alternative accommodation as part of the evaluation that courts must go through to satisfy themselves of the justice and equity of the proposed eviction.⁵⁸ The organising framework shows how courts can use provisions in various international and regional human rights instruments to create standards against which the suitability of alternative accommodation can be measured. The organising framework builds on the joinder case law where local authorities are required to submit individualised and meaningful reports to courts and the obligation to engage with communities. Courts can use the information in these reports on the demographics of the community and the current infrastructure of the proposed relocation site to evaluate whether relocation to that site will be in accordance with both international and domestic law. This information and the outcomes of the process of meaningful engagement can then be used to craft orders

⁵⁸ See section 3 in chapter 5.

that are sensitive to the limits of government resources, but also ensure that government adheres to its constitutional, statutory and international law obligations.

The summary of the chapters in this dissertation and the conclusions that I reached reveal the new normality for the law of evictions pertaining to unlawful occupiers. The law of evictions has moved from a position under apartheid where courts had no discretion to refuse an eviction order based on the personal circumstances of the squatters to a position under the new constitutional dispensation where courts are equipped with a discretion to determine what would be just and equitable to both the land owner and the unlawful occupiers. In this new normality courts are required to adjudicate eviction disputes with regard to the personal circumstances of the unlawful occupiers. Unlawful occupiers now have procedural protections and substantive safeguards against illegal evictions that were either absent or removed during apartheid. The normality requires courts to evaluate eviction disputes in a new constitutional matrix where the rights of the landowner are not presumed to be superior to the interests of the unlawful occupiers. This new normality further requires the government to become involved in eviction disputes where the land owner established his rights in terms of section 25 of the Constitution and the unlawful occupiers established their right to have access to adequate housing. Courts have therefore joined local authorities to eviction proceedings and instructed them to file reports on the housing situation within their areas of jurisdiction. Recently the Constitutional Court placed a further obligation on local government to engage meaningfully with the unlawful occupiers living in its area of jurisdiction. This is a dramatic shift away from the abstract adjudication of evictions in terms of the common law of evictions and apartheid legislation.

This dissertation set out to consider whether unlawful occupiers will be afforded greater protection through a substantive interpretation of section 26 of the Constitution that is influenced by a contextual understanding of evictions and international law. The adjudication of the eviction of unlawful occupiers now requires a context-sensitive analysis that seeks to find concrete and case-specific solutions for each individual case. Courts therefore require more information than what the land owner and the unlawful occupiers may be able to provide them. The government is called on to provide

information on the housing situation within its area of jurisdiction when it is joined as a necessary party to the eviction proceedings. All this contextual information enables courts to discharge their constitutional obligation to have regard to all relevant circumstances of the particular case to satisfy themselves of the justice and equity of the eviction. The abundance of contextual information allows courts to explore the range of possibilities that exist between eviction without more and no eviction. In between these opposite ends of the continuum there lies the possibility to evict the unlawful occupiers, but to firstly, allow them to stay on the property until the local government can provide them with alternative accommodation and to then award the land owner damages for the loss of the temporary use of her property; or secondly, mitigate the impact of the eviction by ordering the local authority to engage meaningfully with the unlawful occupiers and provide emergency or temporary alternative accommodation and to also issue an order that would make the execution of the eviction just and equitable. In sum, the impact of section 26 of the Constitution on the eviction of unlawful occupiers in South African law is, quite simply, profound.

Abbreviations

Chap L Review	Chapman Law Review
Conn J Int'l	Connecticut Journal of International Law
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
ESR Review	Economic and Social Rights Review
Geo LJ	The Georgetown Law Journal
HRLR	Human Rights Law Review
I Con	International Journal of Constitutional Law
JAIP	Journal of the American Institute of Planners
JQR	Juta's Quarterly Review
Rev Const Stud	Review of Constitutional Studies
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR/PL	Suid-Afrikaanse Publiekreg / South African Public Law
SAYIL	South African Yearbook of International Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
YJLF	Yale Journal of Law and Feminism

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