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**LLM – PUBLIC LAW.**

**THE HORIZONTAL APPLICATION OF SOCIO-ECONOMIC RIGHTS FROM A TRANSFORMATIVE PERSPECTIVE: THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING.**

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Research dissertation presented for the approval of Senate in fulfilment of the requirements for the Master of Law degree.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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**Pretoria, 2018**

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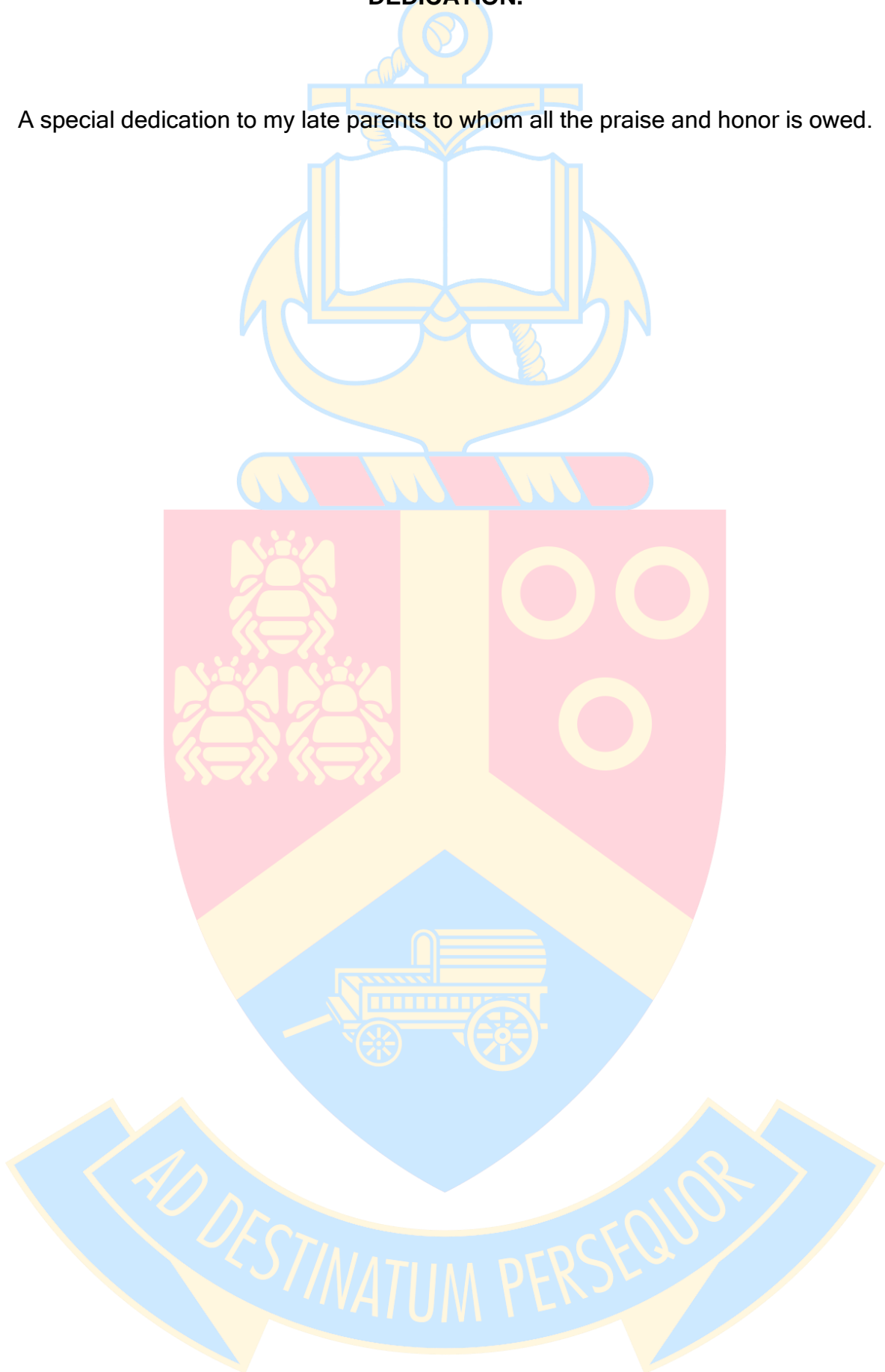
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**DEDICATION.**

A special dedication to my late parents to whom all the praise and honor is owed.



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**UMUNTU NGUMUNTU NGABANTU.**

**GOD BLESS YOU ALL.**

***'It does not matter where you go or what you study what matters most is what you share with yourself and the world.'* - Santosh Kalwar**

## SUMMARY.

This study is motivated by the judiciary's unwillingness to positively engage in the horizontal application of the right to adequate housing, thereby perpetuating a formalistic legal culture that has curtailed and continues to curtail the exponential effect of the constitution in an environment of finite resources.

The socio-economic position of the previously disadvantaged was undoubtedly a result of deliberate action by the apartheid era government and thus it can also be reversed or redressed through deliberate reforms. Furthermore, the post-apartheid government inherited a burden, with resource and capacity constraints to achieve the progressive realization of the right to adequate housing.

Therefore, the dissertation questions the predisposition of the judiciary to focus only on the state in achieving adequate housing. This not only maintains the socio-economic status quo but to a certain extent privileges negative liberty, in the process absolving those that have greatly benefited from apartheid rule from meeting their own obligations to right the wrongs of the past. A wide spectrum of societal challenges are an indirect manifestation of the chasm between the rights guaranteed by the constitution vis a vis the slow progress that has been made in their realization, to which I approximate the knock-on effect of a conservative legal culture. Relevant to this study are the recent unlawful land grabs, a microcosm of the delayed legal development on the right to adequate housing which has led to an undesired route to the satisfaction of the need being pursued. To an end to homelessness, anarchy has been loosed through unlawful occupation of privately owned land in the urban peripheries.

This dissertation investigates one of the reasons why we find ourselves in this situation and explores solutions.

## CONTENTS

CHAPTER 1.....	7
1.1 RESEARCH PROBLEM.....	7
1.2 ASSUMPTIONS.....	7
1.3 RESEARCH QUESTIONS.....	8
1.4 BACKGROUND OF THE STUDY.....	8
1.4.1 BACKGROUND.....	Error! Bookmark not defined.
1.5 METHODOLOGY AND APPROACH.....	11
1.6 OVERVIEW OF DISSERTATION:.....	13
CHAPTER 2.....	14
THE GENERAL JUDICIAL APPROACH TO HORIZONTAL APPLICATION.....	14
2.0 INTRODUCTION.....	14
2.1 DEFINITIONS.....	16
2.2 BACKGROUND.....	17
2.3 CASE BY CASE ANALYSIS.....	19
2.3.1 INTRODUCTION.....	19
2.3.2 DU PLESSIS V DE KLERK (1996).....	20
2.3.3 KHUMALO V HOLOMISA CASE (2002).....	25
2.3.4 BARON V CLAYTILE CASE (2017).....	30
2.4 CONCLUSION.....	34
CHAPTER 3.....	35
A DEVELOPMENTAL ANALYSIS ON THE HORIZONTAL APPLICATION OF THE RIGHT TO ADEQUATE HOUSING JURISPRUDENCE.....	35
3.0 INTRODUCTION.....	35
3.1 CONSTITUTIONAL AND LEGISLATIVE CONTEXT.....	37
3.2 JURISPRUDENTIAL DEVELOPMENTS.....	41
3.2.1 THE FIRST JURISPRUDENTIAL DEVELOPMENT.....	41
3.2.2 SECOND JURISPRUDENTIAL DEVELOPMENT.....	53
3.2.3 THIRD JURISPRUDENTIAL DEVELOPMENT.....	60
3.3 CONCLUSION.....	64
CHAPTER 4.....	66
A TRANSFORMATIVE CRITIQUE OF THE RIGHT TO ADEQUATE HOUSING JURISPRUDENCE.....	66

<b>4.0 INTRODUCTION</b> .....	<b>66</b>
<b>4.1 DEFINING LEGAL CULTURE</b> .....	<b>67</b>
<b>4.2 THE NOTION OF TRANSFORMATIVE CONSTITUTIONALISM</b> .....	<b>69</b>
<b>4.3 JURISPRUDENTIAL CRITIQUE FROM A TRANSFORMATIVE PERSPECTIVE</b> .....	<b>72</b>
<b>4.3.1 FIRST JURISPRUDENTIAL DEVELOPMENT</b> .....	<b>73</b>
<b>4.3.2 SECOND JURISPRUDENTIAL DEVELOPMENT</b> .....	<b>77</b>
<b>4.3.3 THIRD JURISPRUDENTIAL DEVELOPMENT</b> .....	<b>80</b>
<b>4.4 LEGAL CULTURE AS A LIMITATION TO TRANSFORMATIVE CONSTITUTIONALISM</b> .....	<b>83</b>
<b>4.5 CONCLUSION</b> .....	<b>89</b>
<b>CHAPTER 5</b> .....	<b>94</b>
<b>CONCLUSION AND RECOMMENDATIONS</b> .....	<b>94</b>
<b>BIBLIOGRAPHY</b> .....	<b>99</b>
<b>BOOKS AND JOURNALS</b> .....	<b>99</b>
<b>LEGISLATION AND CASE LAW</b> .....	<b>103</b>
<b>INTERNET SOURCES</b> .....	<b>105</b>



## CHAPTER 1.

### INTRODUCTION

#### 1.1 RESEARCH PROBLEM

In this dissertation, I examine the continued effect that the conservative apartheid era legal culture has on the horizontal application of socio-economic rights in cases that are brought before the courts and the impact which an adherence to such a culture has had on the courts' willingness to impose positive duties on private persons in pursuit of the realization of the right to adequate housing of urban dwellers in South Africa.<sup>1</sup> In particular, I investigate this issue in the context of the question to what extent the right to adequate housing has been interpreted by our courts to impose positive duties on private property owners.

#### 1.2 ASSUMPTIONS

The assumptions I make for the purposes of this study are that the legal culture of the judiciary is conceived from an apartheid era legal education background which is conservative in nature. The legal culture under apartheid rule fostered an approach which presented the law as a phenomenon that, in of itself, was entirely void of substantive interaction, development and application on case-by-case basis.<sup>2</sup> Instead it favored an approach that dictated the law as being certain, clear, and discoverable in every situation.<sup>3</sup> This culture determined the foundational basis upon which law has been taught, interpreted, and applied across later generations. As a result of this, adjudicators, lawyers and educators alike who received their education during and after the period in question tend to conform to a practiced, conservative style of approach, reasoning and interpretation of the law, in what *Klare* describes as professional sensibilities.<sup>4</sup> A deliberate attempt is required in order to depart from a culture that avoids engagement with substance and which, as a consequence, presents the law, legislation, and policies of the apartheid era and the new

<sup>1</sup> Constitution of the Republic of South Africa, 1996. Sections 25-28.

<sup>2</sup> Klare, K 'Legal Culture and Transformative Constitutionalism' South African Journal on Human Rights, 14:1, 146-188, (1998) Klare defines conservatism as a jurisprudential approach is based on formal interpretation rather than substantive interpretation and legal reasoning.

<sup>3</sup> Ibid.

<sup>4</sup> Klare (1998) SAJHR 146. Klare defines professional sensibilities as ingrained subconscious approach to legal problems.



constitutional dispensation as neutral and objective, when all it does and continues to do, is impede the true search for justice through the judiciary.<sup>5</sup>

It is further my assumption that the above school of thought has found refuge and reference in existing jurisprudence on the right to access adequate housing. The existing jurisprudence continues to impose and contemplate positive obligations singularly on the State. This is opposed to an approach which seeks to place the obligation on either the State or private property owners depending on who is in a better position to effectively fulfil the right in question. It is my assumption that the horizontal applicability of the right to adequate housing has been curtailed by a substantively conservative application of the Constitution as opposed to a substantively transformative engagement which the normative nature of the Constitution requires. It is my assumption that a positive obligation denotes an action towards commission, and a negative obligation relates to an action towards refrain. Thus, in the few instances where a negative obligation has been imposed on private property owners in relation to the right to adequate housing (refrain from carrying out evictions), it is a manifestation of conservatism in which the inclination is towards maintaining the status quo rather than progressive adjudication, a point which I elucidate in Chapter 4.

### **1.3 RESEARCH QUESTIONS.**

- I. What are formalist and transformative approaches to legal interpretation and how do they differ from one another?
- II. How has the horizontal application of socio-economic rights and in particular the right to adequate housing been understood and pursued in South African courts?
- III. How has the South African legal system and culture negatively/positively influenced the ambit of horizontal application in instances where it has been used?

### **1.4 BACKGROUND OF THE STUDY.**

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<sup>5</sup> Langa, P 'Transformative constitutionalism' (2006) 17(3) Stellenbosch Law Review 351.

There are policies, laws, and constitutional guarantees. meant to advance socio-economic justice and transformation in favor of the previously disadvantaged. Unfortunately, the way in which these laws are interpreted and given life in everyday legal situations does not entirely represent a transformative stance consistent with the practical realities.<sup>6</sup>

In a grossly disparate society, the judiciary through their varied rulings and recommendations has failed to envisage a positive duty on the 'haves' against the 'have nots,' in the fulfillment of socio-economic rights and in turn the transformation of this country. Instead, much light has been cast on the obligations of the State to realize socio-economic advancement in a vertical application (private person vs. State) while on the other hand, the same interpretation has not held in cases of horizontal application (private person vs. private person).<sup>7</sup>

At the onset of democracy in 1994, the ANC led government inherited a country in crisis with a socio-economic landscape shaped by apartheid policies and laws. The apartheid government deliberately excluded black people from direct ownership of property and land in the economically active zones, limiting investment in infrastructure and services in black communities.<sup>8</sup> The apartheid government also limited the residential rights of Africans in the economically developed areas of the country unless they had a white employer, creating a system of migrant labor and impoverished rural areas – the so-called “homelands” – that were characterized by extraordinarily high levels of poverty and joblessness.<sup>9</sup>

The advent of the new constitutional dispensation presented an opportunity for a paradigm shift from the widely held notions of property rights previously guaranteed by common law. In its supremacy the new constitution of South Africa founded on human dignity, freedom and equality recognized potentially conflicting socio-economic rights such as property ownership and access to adequate housing as

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<sup>6</sup> Klare, K (1998) SAJHR 146. Klare defines conservatism as a jurisprudential approach is based on formal interpretation rather than substantive interpretation and legal reasoning.

<sup>7</sup> Daniels v Scribante and Another (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017).

<sup>8</sup> Quantec, (2014). Data on exports by SIC category. Downloaded in January 2014 from <<http://www.quantec.co.za/>>.

<sup>9</sup> Parliament of the Republic of South Africa, (1994). “White paper on Reconstruction and Development.” Notice no. 1954 of 1994,

envisaged in sections 25(1),<sup>10</sup> 26(1),<sup>11</sup> 26(2),<sup>12</sup> and 26(3),<sup>13</sup> of the Constitution.<sup>14</sup> These constitutional provisions found refuge in subsequent legislative enactments such as the Land Reform (Labor 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,<sup>15</sup> (*ESTA*), the Housing Act 107 of 1997 and the Prevention of illegal Eviction from Unlawful Occupation of Land Act 19 of 1998,<sup>16</sup> (*PIE*), which enjoy a wide ambit extending to those who in normal circumstances have no common law right to the land.<sup>17</sup>

*ESTA* sought to limit homelessness by respecting, protecting, promoting, and fulfilling the right to access to housing.<sup>18</sup> The Act also sought to improve the conditions of occupiers on farmlands and afford them substantive protection that the common law remedies may not afford them.<sup>19</sup> Security of tenure on rural land, which is an important part of the land reform scheme and crucial to the balanced functioning of the property clause, is also provided for in *ESTA*.<sup>20</sup>

Concomitantly, *PIE* sought to address the prohibition of unlawful occupation and to put in place fair procedures for the eviction of unlawful occupiers without permission of the owner or the person in charge of such land.<sup>21</sup> Its application is in relation to all evictions of unlawful occupiers from buildings and structures utilized for dwelling purposes.<sup>22</sup> Through these Acts, the legislature sought to rise up to the challenge of housing by committing to the realization of section 26 by placing the court as the final arbiter in eviction cases.

<sup>10</sup> 'No one may be deprived of property except in terms of a law of general application.

<sup>11</sup> 'Everyone has a right to have access to adequate housing.'

<sup>12</sup> 'The state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right.'

<sup>13</sup> 'No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

<sup>14</sup> Constitution of the Republic of South Africa, 1996.

<sup>15</sup> Act 62 of 1997.

<sup>16</sup> Prevention of Illegal Eviction from and Lawful Occupation of Land Act 19 of 1998.

<sup>17</sup> Cloete, CT (2016) 'A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context' unpublished LLM thesis, University of Stellenbosch <https://scholar.sun.ac.za/handle/10019.1/14/>.

<sup>18</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6.

<sup>21</sup> [www.derebus.org.za/slice-pie-understanding-act/](http://www.derebus.org.za/slice-pie-understanding-act/).

<sup>22</sup> *Ibid.*

However, to date all these pieces of legislation have only had a minimal impact on the racially skewed distribution of land in South Africa.<sup>23</sup> The black majority are still landless and are still largely relegated to the densely populated peripheries of the cities which are colloquially referred to as townships and informal settlements.<sup>24</sup> Tenure reform continues to be influenced by a number of factors, notably apartheid era policies and laws, often resulting in conflicting land claims, overcrowding, and insecure tenure arrangements and confusing property rights.<sup>25</sup> Traditional and conservative notions of property continue to plague the interpretation of property rights leading to adjudications that maintain the status quo and works against the transformative ethos of the constitution.<sup>26</sup>

### **1.5 METHODOLOGY AND APPROACH.**

In this dissertation, I invoke the concept of transformative constitutionalism and its tenets which involve grappling with a 'conservative' legal culture recognizing the tension between freedom and constraint and most importantly retaliating against false consciousness, as a scope for addressing the research question. This approach is mainly guided by the works of authoritative authors of transformative constitutionalism in South Africa namely *Karl Klare* and *Sanele Sibanda*.

Transformative constitutionalism according to Klare is defined as entailing, a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law.<sup>27</sup>

*Sanele Sibanda*,<sup>28</sup> in his article on transformative constitutionalism defines the concept of transformative constitutionalism as the notion of a system of governance

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<sup>23</sup> Input obtained from the Industrial Development Corporation, (2013). "The South African Economy: An overview of key trends since 1994."

<sup>24</sup> <http://transformationaudit.org/blog/wp-content/uploads/2012/02/Review-Policies-for-reducing-income-inequality-and-poverty-in-SA.pdf>.

<sup>25</sup> <http://transformationaudit.org/blog/wp-content/uploads/2012/02/Review-Policies-for-reducing-income-inequality-and-poverty-in-SA.pdf>.

<sup>26</sup> Classens (2014) 40(4) JSAS 761.

<sup>27</sup> Klare (1998) SAJHR 150.

<sup>28</sup> Sibanda, S 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and The Struggle to Eradicate Poverty' STELL LR (2011) 3.

established under a constitutional document whose primary functions are to structure, delineate, distribute, and limit state power within a defined political community. Implicit in this understanding of constitutionalism is the idea that constitutional norms, values, and principles are not predetermined, but they are rather the product of the political, economic, social and cultural history (both local and global) prevailing at the time of a constitution's adoption.<sup>29</sup> Thus, while modern constitutionalism has come to be associated with particular norms, values and principles, these are no less the product of an evolutionary process that is closely associated with particular histories.<sup>30</sup>

Justice Langa points out that a significant number of South African lawyers during apartheid resisted this type of legal reasoning inevitably pitting them against the apartheid state.<sup>31</sup> It is my assertion that this group of legal minds who now form part of the judiciary are subconsciously biased against the State as an institution that once harbored the system they frantically fought to dislodge for so long and thus only see the state as being solely responsible for bringing about change and balancing the scales, intentionally leaving out those who benefitted immensely from apartheid rule from sharing that responsibility.

The above follows that in classical conditioning, the conditioned stimulus is a previously neutral stimulus that, after becoming associated with the unconditioned stimulus, eventually comes to trigger a conditioned response which in this case has become the despondency to positively obligate only the state.

The method that is used here is desktop research and it involves the accessing of information from published resources and non-published sources. It relies on secondary sources of information which has been already collected and readily available from other sources. Documentary sources, which include the newspaper articles, statutes, acts, and court cases, will be used.<sup>32</sup>

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<sup>29</sup> Devenish, G 'A Commentary on the South African Constitution' (1998) 4.

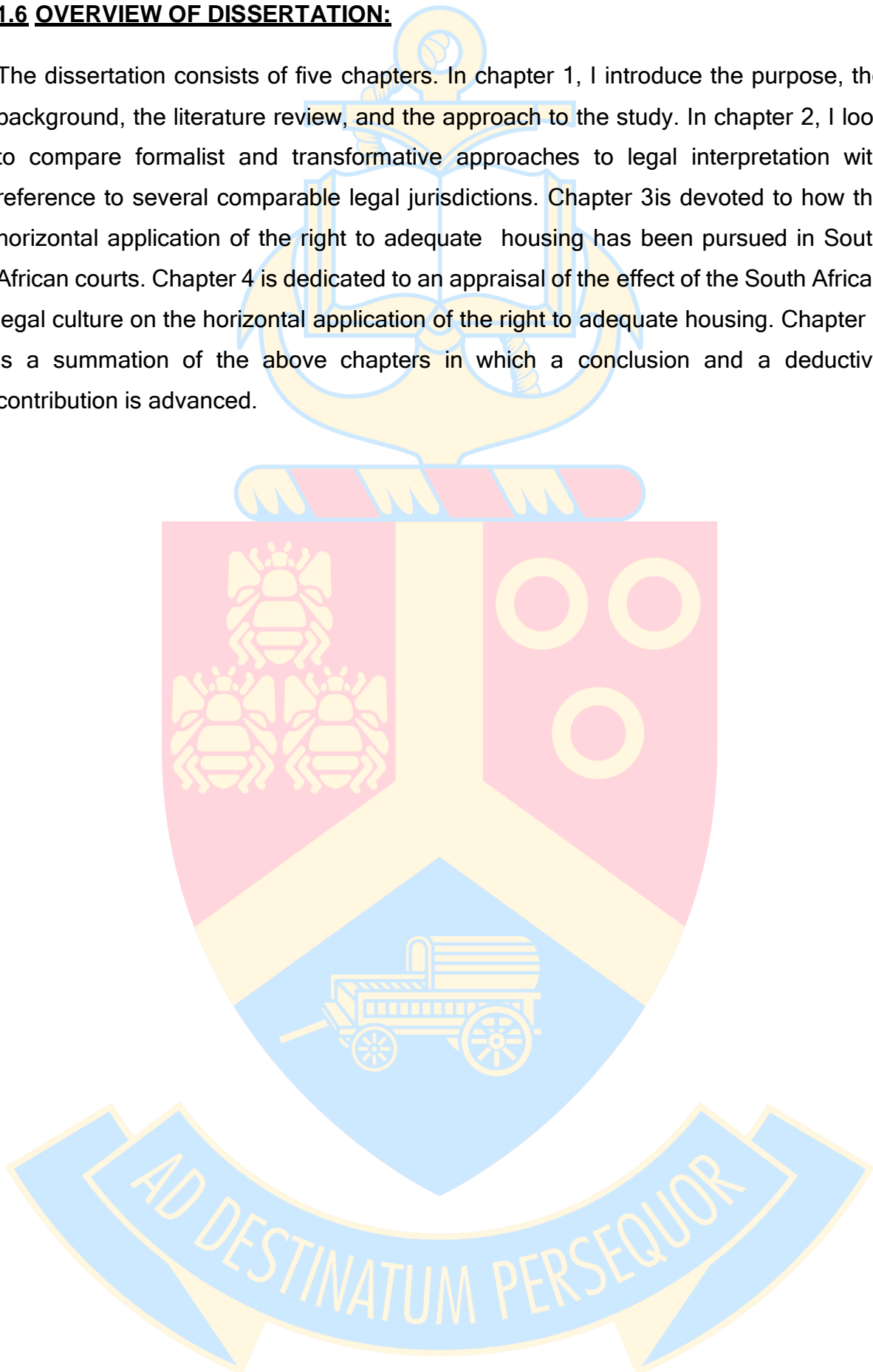
<sup>30</sup> Currie, I & De Waal, J 'The New Constitutional and Administrative Law I: Constitutional Law' (2001)10-24. See also H Klug "Constituting Democracy: Law, Globalism and South Africa's Reconstruction" (2000)1-4, 48.

<sup>31</sup> Langa, P 'Transformative constitutionalism' (2006) 17(3) Stellenbosch Law Review 351.

<sup>32</sup> ([www.delaneywoods.com](http://www.delaneywoods.com))

## **1.6 OVERVIEW OF DISSERTATION:**

The dissertation consists of five chapters. In chapter 1, I introduce the purpose, the background, the literature review, and the approach to the study. In chapter 2, I look to compare formalist and transformative approaches to legal interpretation with reference to several comparable legal jurisdictions. Chapter 3 is devoted to how the horizontal application of the right to adequate housing has been pursued in South African courts. Chapter 4 is dedicated to an appraisal of the effect of the South African legal culture on the horizontal application of the right to adequate housing. Chapter 5 is a summation of the above chapters in which a conclusion and a deductive contribution is advanced.





## CHAPTER 2

### **THE GENERAL JUDICIAL APPROACH TO HORIZONTAL APPLICATION.**

*Interpretation is therefore a ‘conversation between the current perspective of the interpreter and the textual and historical perspective of the statute.’<sup>33</sup>*

#### **2.0 INTRODUCTION.**

In this chapter, I focus on the general approach of our courts to horizontal application. In the broader scope, I reveal the role of the court’s approach to interpretation of horizontal application in entrenching a conservative legal culture in the adjudication of the right to adequate housing cases. In particular, the chapter weighs in on the approach to the interpretation of the horizontal application as it arises from the Constitution that has led to the judiciary’s reluctance to impose positive obligations to private persons in the quest to fulfil the right to adequate housing in post-apartheid South Africa. In this regard, I seek to define, attribute, contemplate and illustrate through literature and case law the developments in the approach to the interpretation of horizontal application. In this chapter, I make use of three developmental time periods to reflect on the court’s shift in approach over the past two decades. These three developmental periods will aid in the reflection of the court’s journey i.e., where we come from, where we are and where we ought to be and most importantly how we ought to get to where we ought to be in as far as the courts approach to horizontal application and indeed the whole constitution is concerned.

In this chapter, I highlight and explain the difference between the historical perspective and the current perspective towards the approach to the interpretation of horizontal application while simultaneously postulating a future perspective. This future perspective, as I impress in the chapter, is a perspective founded on the

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<sup>33</sup> De Ville, J ‘Constitutional and Statutory Interpretation’ at 4. (2002)

lessons learnt along the way and thus reflects an evolved comprehension of different aspects to legal interpretation.

In section 2.1, I define and attribute particular characteristics to the key linguistic adjectives differentiating conservative or formalistic approaches from transformative approaches to the interpretation of the horizontal application. In section 2.2, I chronicle the developments in background informing the courts initial approach at the dawn of constitutionalism. As a point of departure focus is placed on Apartheid, an institutionalized system of governance by juxtaposing the developments in the courts approach to the interpretation of horizontal application with the political developments of the time. In this section, I lay the basis for the dissertation's broader supposition that while progress relating to the courts approach to horizontal application has been made it does not measure up to the unconstrained socio-political environment we now find ourselves in.

In section 2.3, a case-by-case analysis is used to reflect the developments in the courts' general approach to horizontal application. In addition, the judiciary's grasp of the internal and external socio-political environment under which the tenets of the constitution as they relate to the interpretation clause had to be advanced will be illuminated in line with the dissertation broader theme of freedom vs constraint. The case law discussed herein captures three distinct periods. The period in which these three cases were decided is separated by time and subject matter. In chronological order these cases reveal the evolution of the court's approach to horizontal application, the progress made, and the opportunities missed at each turn. In the broader aspect these cases mirror the lag between the internal (judiciary) and the external (society) freedom vs constraint battle.

I conclude by laying a foundation for the next chapter in the dissertation which relates to how the courts have applied the interpretation of horizontal application to the right to adequate housing in so far as it relates to the imposition of private obligations to private persons.



## **2.1 DEFINITIONS.**

The terms "legal formalism" and "legal transformation" as they apply to the approach to the legal interpretation of statutes and the constitution, have had a long history in legal jurisprudence. There have been arguments advanced that over the years the usage of these terms has been taken to describe judicial restraint about the former and judicial activism about the latter.<sup>34</sup> Over and beyond, these terms have been ascribed to reflect the past, present, and future of the courts approach to legal interpretation in South Africa.<sup>35</sup>

*Posner* adjectively describes the word "Formalist" as it relates to legal interpretation as to mean,

"Narrow, conservative, hypocritical, resistant to change, casuistic, descriptively inaccurate (that is, "unrealistic" in the ordinary-language sense of the word), ivory-towered, fallacious, callow, authoritarian-but also rigorous, modest, reasoned, faithful, self-denying, and restrained."<sup>36</sup>

Similarly, he describes "Transformative" to mean,

"Cynical, reductionist, manipulative, hostile to law, political, left-wing, epistemologically naive-but also progressive, humane, candid, mature, clear-eyed."<sup>37</sup>

*Klare* describes formalism as to denote to a characteristic strong connection with legal principles, institutional constraints, politics, and economic assumptions.<sup>38</sup> *Posner* and *Klare's* description of these two concepts importantly highlights theoxymoron inherent in each approach. This reveals the reflective belief that there is a positive in every negative and vice versa. In the categorization of one approach as being formalistic and the other being transformative, it is imperative that the little positives should not be overshadowed by the insurmountable negatives to such an extent that we fail to draw valuable insights on them. Later, in this chapter, I refer to an approach whose design is the summation of all the valuable

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<sup>34</sup> Posner, RA 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' 37 *Cas. W. Res. L. Rev.* 179 (1986) Available at:

<http://scholarlycommons.law.case.edu/caselrev/vol37/iss2/3>

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Klare, K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150.

elements picked up along the way as opposed to a black or white categorization as has been the norm.

It is imperative for the purpose of this study to delimit the prescripts of both the formalistic and transformative approach to interpretation. While due academic recognition to the literary contributions on legal formalism such as those advanced by *Langdell*,<sup>39</sup> and the other nineteenth century American legal formalists is given, the term formalism in this study refers to the approach and application of deductive logic to reach a conclusion from premises accepted as fact. As such, a formalistic approach enables an outsider to judge the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be said to be correct or incorrect.<sup>40</sup>

In turn, by transformative approach, one does not seek to highlight the mere progressive nature of the courts approach, whereby the comparison between 'what was' and 'what is' is silver lined. By transformative approach, I mean deciding a case so that the resultant judgement, taking into consideration, the facts familiar to the case, is one that best promotes public welfare in non-legalistic terms such that the needs of the time take center stage.<sup>41</sup> As *Posner*,<sup>42</sup> relates a transformative approach and the consequential judgement are more likely to be judged sound or unsound than correct or incorrect, the latter pair suggests a more demonstrable, verifiable mode of analysis than will usually be possible in weighing considerations of policy.<sup>43</sup> It follows that, the approach seeks to decipher the character of real human life behind the theories of approach to legal interpretation.

## **2.2 BACKGROUND.**

In the Apartheid era, the most prevalent approach to interpretation in South Africa was the literal theory also known as the orthodox text-based approach.<sup>44</sup> The methodology was cast as follows. If the meaning of the text was clear, that was the

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<sup>39</sup> Christopher Columbus Langdell, Dean of the Faculty of Law at Harvard University from 1870 until 1895.

<sup>40</sup> Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 *Cas. W. Res. L. Rev.* 179 (1986) Available at: <http://scholarlycommons.law.case.edu/caselrev/vol37/iss2/3>.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Botha, CJ 'Statutory Interpretation- An Introduction for Students 5th edition' Juta, (2012).

meaning to be used, irrespective of the consequences.<sup>45</sup> It was rather unfortunate, that over a period of time the courts began to regard the clear, literal meaning of the words as being identical to what the legislature intended.<sup>46</sup> As a result only lip-service was paid to the principle of legislative intent because courts automatically equated the most clear and unambiguous meaning of the word to the intention of the legislature.<sup>47</sup> The inherent limitation of the literal theory approach to legal interpretation was that the courts were bound by the ordinary grammatical meaning of the word.<sup>48</sup> This approach meant that the courts in their interaction with legislation were restricted to the extra-terrestrial limited grounds of review as provided for in terms of legislation which included bad faith, bias, and irrationality.<sup>49</sup> In the broader context, this played into the political system of parliamentary sovereignty of the time. In essence, the exclusive and draconian intention of the legislature could not be misplaced or conflated by any other extra-judicial contemplation other than the words therein. It suffices to note that the literal theory was a necessary tool in the furthering of the socio-political interests of the ruling elite of the time. The apartheid government could ill afford an approach to interpretation that favored open minded conceptual underpinnings, least it exposed the discriminatory folly in many of its laws whose aim was to entrench the power and resource disparity between private parties. In addition, South Africa at the time relied on laws that were borrowed from a foreign judicial system, thus, one could argue that aside from the politics, the literal theory was of necessity as a counter to the multiplicity of interpretations which would have been born at that period. The dual foreign character of the colonialists applying a mutually exclusive foreign body law in a foreign land with an open interpretation thereof would have led to an impasse.<sup>50</sup> This is further underlined by the fact that there was no recognized established local reference point to locate the body of the law as emanating from a shared history as is the current case with the Constitution of 1996.<sup>51</sup>

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<sup>45</sup> *Ibid* at 91.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> It follows that the Dutch and the English colonized South Africa and each brought a significant foreign character markedly different to the other.

<sup>51</sup> The Constitution of the Republic of South Africa, 1996.

The advent of constitutional democracy laid the basis upon which inferences and the acceptance of more than one approach to legal interpretation could be sought, interrogated, and accepted. It is at this juncture, that I juxtapose the literal theory to the contextual, purposive, teleological theories which focus on the purpose, context, moral, and ethical scrutiny amongst other considerations for the promulgation of an Act. An in-depth analysis of these different approaches to legal interpretation as they relate to the horizontal application is undertaken. I make use of case law and running commentary from legal scholars to adduce the nature and character of these different approaches in their practical manifestations in our legal jurisprudence. Ultimately, I identify and recapture the strengths from the weaknesses in the development of our courts approach to legal interpretation. This is to identify those characteristics and remnants within the approach to legal interpretation that exude conservatism and continue to entrench the conservative legal culture as expressed by the reluctance to positively oblige private persons in fulfilling the right to adequate housing.

## **2.3 CASE BY CASE ANALYSIS.**

### **2.3.1 INTRODUCTION.**

Section 8,<sup>52</sup> requires an examination into the interpretation of the concept of horizontal application of the Bill of Rights. In this dissertation, such examination occurs in relation to the courts understanding and approach to horizontal application over a period. I discharge this requirement by reflecting on the continuum in the transition from a formalistic approach as envisaged by the judgement in *Du Plessis v De Klerk*,<sup>53</sup> decided at the dawn of constitutionalism. The *Du Plessis* judgement shall be juxtaposed to *Baron v Claytile* case,<sup>55</sup> which was decided at what can be termed as the current jurisprudential apex of this young constitutional democracy. The *Khumalo v Holomisa* case,<sup>56</sup> discussed in between, serves as a check point between two time periods polarized by their approach and is therefore regarded as the 'compromise' case.

<sup>52</sup> Constitution of the Republic of South Africa, 1996.

<sup>53</sup> 1996 (5) BCLR 658 CC.

<sup>55</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>56</sup> 2002 (5) SA 401 (CC). 2002 (8) BCLR 771.

In this chapter, I cast a light on these three cases to unravel the development in the courts approach to the legal interpretation of horizontal application.

### **2.3.2 Du Plessis v De Klerk (1996)**

#### **2.3.2.1 Case Introduction**

This case reflects the past in that it articulates the judicial approach to horizontal application held at the earliest point of relevance in our legal jurisprudence. Relevance in this instance, speaks to a period in which the constitutionalism as we know it today was in force. In this dissertation, I make use of the constitutional dispensation as point of reference, a foundational basis and background upon which concepts are to be interrogated and understood. In line with this, I take an exception to focusing on the relevant legislative acts enacted to give effect to the constitutional provisions in accordance with the subsidiarity principle. The reason why I do so is because, in following the subsidiarity principle one simply attempts to understand what is on the surface as opposed to that which is below the surface that continues to reproduce the same outcomes and hinder progress.

Section 8(1) of the final Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state. Section 8(2) provides that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, considering the nature of the right and the nature of any duty imposed by the right. Section 8(3) provides that when applying the provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court:

- (a) must apply, or where necessary develop, the common law to the extent that legislation does not give effect to that right to give effect to a right in the Bill.
- (b) May develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

The majority judgement in *Du Plessis* case,<sup>57</sup> chronicles a formalistic approach in a way that reflects the importance of a correct approach and departure in the adjudication of the constitutional rights. Its relevance to this dissertation is not

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<sup>57</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC.

subject matter of the case, as it does not deal with the right to adequate housing but rather the probative value it gives in terms of the discussion therein relating to the courts approach to horizontal application. The emphasis is this instance is on the courts approach to horizontal application. More so I relive the *Du Plessis* case,<sup>58</sup> whose subject is not that of socio-economic rights to highlight and dispel the possible misconception that the courts approach to horizontal application is influenced and is only privy to socio-economic right due to its fiscal implications.

### **2.3.2.2 FACTS OF THE CASE.**

The case follows that *De Klerk* sued the newspaper and its editors for defamation. The defendant raised a constitutional defence in terms of section 15 of the Interim Constitution.<sup>59</sup> The question of horizontal application arose from the facts. That is, could the provision of section 15 apply to a case where two private parties were involved in an action for defamation?

### **2.3.2.4 DISCUSSION.**

In his response to above question, *Kentridge AJ* adopted a formalistic interpretation when he held that, entrenched Bill of Rights are ordinarily intended to protect the private subject against legislative and executive action'.<sup>60</sup> The judge held that, the absence of a reference to the judiciary in section 7(1),<sup>61</sup> did not represent an oversight.<sup>62</sup> This approach's effect was to exclude the equation of a judgment of a court with state action and thus prevent the importation of the American doctrine developed in *Shelley v Kraemer*.<sup>63</sup> As applied in this instance the golden rule

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<sup>58</sup> Ibid.

<sup>59</sup> S15 of the Interim Constitution of South Africa 1994. Section 15 guarantees the freedom of expression.

<sup>60</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC. At para 45

<sup>61</sup> S7 of the Interim Constitution of South Africa 1993. S 7(1)- 'this Chapter shall bind all legislative and executive organs of state at all levels of government.'

(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

(4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

<sup>62</sup> S7 of the Interim Constitution of South Africa is mirrored in what has become S8 in the final constitution of South Africa. This section deals with the application of the Constitution.

<sup>63</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC. At para 47.

approach also known as the literal text-based approach had the deduced effect of excluding the possibility of horizontal application.<sup>64</sup>

The basis of legislative intent being singularly derived from word construction, or what the judge holds as explicit omissions of certain words such as 'the judiciary' and other persons, in section 7 of the *Interim Constitution*,<sup>65</sup> harbors a circumvented interpretation. This understanding finds expression in the logic that the legislature intended otherwise there would be an unequivocal expression in the form of clear and unambiguous terms in the text ought to be interpreted.<sup>66</sup> Below, I discuss the impact of this approach on the furtherance of the broader constitutional objectives and in particular the impact on the effectiveness of the constitutional provisions in addressing the needs as they arise from the right guaranteed. By so doing, I highlight the fault inherent in the courts approach by assessing its effect upon application.

In the furtherance of a literal approach to legal interpretation and the consequent vertical application reading,<sup>67</sup> *Kentridge AJ* concludes that the Constitution applies to all law but not to all persons, so that the common law is only subjected to constitutional scrutiny when governmental acts or omissions in reliance of such law are challenged. He envisages the common law to address problems with conflicting rights and interests through a system of balancing. However, what is important to note is that the contemplated balancing act speaks to the constitutional requirement of justifiability which in turn speaks to a value laden approach to legal interpretation enunciated by the gateway in Section 36 of the Constitution.<sup>68</sup> In essence, the judge

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<sup>64</sup> Botha, CJ 'Statutory Interpretation' (5th edition) at 91- if the meaning of the text was clear, that was the meaning to be used, irrespective of the consequences.

<sup>65</sup> S7 of the Interim Constitution of South Africa, 1993.

<sup>66</sup> Botha, CJ 'Statutory Interpretation' (5th edition) at 92 notes that the courts automatically equated the ordinary or the literal meaning as being identical to what the legislature intended, due to the 'pre-dominance of the word,' and the intention of the legislature was demoted to the status of the literal meaning of the text.

<sup>67</sup> Du Plessis, L & Corder, H 'The Genesis of the Operational Provisions of the Chapter on Fundamental Rights in Understanding South Africa's Transitional Bill of Rights' 1994 at 113.-The vertical conformity negates the need to recognize the applicability of the bills of rights to afford private individuals protection against not only the abuses of state power but against the exertion of superior social and economic power of other private individuals in modern-day societies.'

<sup>68</sup> Section 36-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, considering all relevant factors, including- (a) the nature of the right, (b) the importance of the purpose of the limitation

in this instance attempts to conceal the inherent limitation of the literal approach to legal interpretation by envisaging a process which is beyond the literal reading of the text without going as far as to acknowledge the limitation.

In its manifestation, the balancing act presupposes that a common law claim for defamation for instance, raises tension between the right to freedom of expression and the right to dignity. Similarly, following the approach applied, the common law claim to ownership right raises tensions between the right to property and the right to adequate housing. This tension and the contemplated balancing act play out in the compromise to limit both rights (the right to adequate housing and the right to property) to a certain extent, by allowing continued housing under a constitutionally remedied secure tenure arrangement. The remedy is imposed for what otherwise would be regarded as 'unlawful occupation' by allowing the infringement of the right to property and the right to adequate housing to a balanced extent. The right to property is infringed in so far as the owner of such property is curtailed in his use thereof. The right to adequate housing, on the other hand, continues to be infringed in so far as the remedy does not bring finality to the need which the right seeks to meet. In accordance with the balancing act, it would follow that the above literal approach to legal interpretation would pass the master of Section 36(1),<sup>69</sup> the limitation clause.<sup>70</sup>

By semantic contrast, *Kriegler J* found that, the Bill of Rights is applied in the fashion set out in section 7(2)<sup>71</sup>, which is, to all law, including any part of the common law relied upon by one party to a dispute, however the State was not involved. It is imperative to note that, the judiciary is an arm of the State and *Kriegler J's* view essentially has the similar literal approach to interpretation with the consequential effect of excluding private persons in the same way as *Kentridge AJ* above. *Kriegler J* relates that, within the zone of autonomy, law does not enter, and the Constitution is

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(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.

<sup>69</sup> The limitation of rights, as provided in terms of Section 36 of the Constitution, is an important provision to be considered. It determines whether an infringement can be justified as a permissible limitation of the right. In other words, it provides an answer to the question of whether the limitation is reasonable and justifiable. This aspect will also be considered, very briefly, in the section that follows.

<sup>70</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC At para 55.

<sup>71</sup> S7 (2) of the Interim Constitution of South Africa now S8 (2) of the final Constitution of South Africa 1996.



inapplicable save for the possible relevance of section 35.<sup>72</sup>

The Bill of Rights applies to all law, irrespective of the identity of the parties, but not to all conduct, for there is a range of conduct that is not regulated by law. *Kriegler J's* proposition follows that, unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please, as far as the fundamental rights and freedoms are concerned. The judge relays in turn that in such situations as alluded to above one cannot claim recourse albeit a founded infringement at common law and or on a Chapter 3 right,<sup>73</sup> with the compounded presupposed effect of leaving the private relationship undisturbed.<sup>74</sup> This approach excludes horizontal application by stating that the Bill of Rights does not extend to conduct not involving the State. If one is to apply this approach to the right to adequate housing. The courts approach to the legal interpretation of horizontal application has the following consequences. If the purpose of the Bill of Rights is to regulate State power in its relation to private persons, the inferred supposition is that the inclusion of the right of adequate housing in the Bill of Rights suggests that there is currently adequate housing and the purpose thereof is to prevent government conduct from acting contra to this position. In addition, this approach deliberately runs contra to the ethos and purports of the constitution which seek to promote, protect, and fulfil the rights and freedoms guaranteed by the Bill of Rights against the backdrop of institutional disenfranchisement.<sup>75</sup>

This approach of the court fails to appreciate the past, present, and future, contextual underpinnings of the Constitution. Rights as they appear in the Constitution are not enactments devoid of historical context, meaning, and a predetermined context, which ought to be considered as mirrored in the narration of the preamble and founding values of the constitution.<sup>76</sup> It follows that, were the Constitution is

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<sup>72</sup> Interim Constitution of South Africa 1993.

<sup>73</sup> South Africa's first Bill of Rights which appeared in Chapter Three of the Constitution of the Republic of South Africa, 1993 and operated as an interim Bill of Rights was conceived as a compromise between those in favor of the traditional approach, the verticalists, and those in favor of the modern approach, the horizontalists.'

<sup>74</sup> The judge in this case interestingly applies the legal maxim which absolves the courts from any agreement that would otherwise be inherently faulty at law.

<sup>75</sup> In an uneven society plagued by entrenched inequality the expression of Judge Kriegler in a later judgement resonates:

<sup>76</sup> Contextualism or the contextual approach demands that the meaning of a provision is determined either by reading its words, language, or the provision itself -

refused entry to the loci of private power on the basis that, power, in the hands of private institutions and individuals, represents a private sphere of individual autonomy and sovereignty, that not even the State could legitimately invade, much of the apartheid legacy would continue to be immune from the imperative of changing the essentials of apartheid society.<sup>77</sup>

### **2.3.3 KHUMALO V HOLOMISA CASE (2002).**

#### **2.3.3.1 CASE INTRODUCTION.**

The *Khumalo v Holomisa*,<sup>78</sup> judgement was handed down six years after the *Du Plessis* case above. This case serves a check point and affords one an opportunity to reflect on the developments in courts approach to horizontal application well within the constitutional dispensation. It could be argued that, in the *Du Plessis* case, the court was tasked with the challenging task of construing a novel text which at the time had not assumed its final shape thus lacking in specificity. Moreover, the backdrop of apartheid having had been part of the recent past, the courts approach to the *Du Plessis* case was always going to mirror the continuation of the past in the main.

#### **2.3.3.2 FACTS OF THE CASE.**

The case follows an application for leave to appeal against the dismissal of an exception by the Transvaal High Court. The respondent, a well-known South African politician, was suing the applicants, whom we may assume are responsible for the publication of a newspaper, the Sunday World, for defamation arising out of the publication of an article with their newspaper. In the article it was stated, amongst other things, that the respondent was involved in a gang of bank robbers and that he was under police investigation for this involvement. The applicants argue that, in terms of section 8(1), the Bill of Rights applies to all law and binds the judiciary. Section 16 must be interpreted to have direct application to the common law of defamation. The applicants advanced that, in this regard, the provisions of the 1996 Constitution were distinguishable from the

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in context.

<sup>77</sup> Henk Botha, Andries Johannes Van der Walt, J. C. Van der Walt 'Rights and Democracy in a Transformative Constitution' (2004).

<sup>78</sup> *Khumalo v Holomisa* 2002 8 BCLR 771 (CC).

provisions of the Interim Constitution where the provisions of the Bill of Rights were not directly binding on the judiciary.<sup>79</sup> Accordingly, they argued that the conclusion of the majority in *Du Plessis and Others v De Klerk and Another*,<sup>80</sup> namely that, the right to freedom of expression in the Constitution could have no direct application in a defamation action to which the State was not a party, was no longer applicable. In that case, the court held that although the interim constitution did not directly apply to the common law, the principles of common law would nevertheless have to be applied and developed by courts “with due regard to the spirit, purport, objects” of the Bill of Rights in that Constitution.<sup>81</sup>

### **2.3.3.3 DISCUSSION.**

In *O'Regan Js* judgement the quest for purpose is pursued.<sup>83</sup> *Le Roux* identifies the distinct steps in this purposive approach as: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that promotes its central purpose; and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.<sup>84</sup> As *Prof. Du Plessis*,<sup>85</sup> reflects on the need to depart from a formalistic interpretation of legislation and statute to a more purposive and transformative inclined interpretation by stating,

‘Legal academics have been at the helm of transforming the notion of purposive interpretation into the idea of teleological interpretation. Purposiveness nowadays seems to be becoming the substitute for clear language as the key to constitutional interpretation. This could in the course of time have (and has already had) an impact on Court’s approach to the interpretation of non-constitutional legislation too. This is especially true where legislation closely associated with socio-economic and political transformation stands to be construed and where specialists are called into existence to deal with such legislation are involved’.

<sup>79</sup> See section 7(1) of the Interim Constitution.

<sup>80</sup> *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at paras 43-7.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Khumalo v Holomisa* 2002 8 BCLR 771 (CC).

<sup>83</sup> Devenish, G ‘Interpretation of Statutes’ at 36. According to the purposive methodology, the interpreter must endeavor to infer the design or purpose which lies behind the legislation. To do so, the interpreter, must make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources.

<sup>84</sup> *Le Roux, W* ‘Undoing the Past Through Statutory Interpretation’ 2006 SAPL 382 386.

<sup>85</sup> *Du Plessis, LM* ‘Re-interpretation of Statutes’ (2002) Durban: Butterworths, pp. xii.

The Court in this instance approaches sections 8(1) and (2) of the Constitution,<sup>86</sup> from the understanding that the Constitution distinguishes between two categories of persons and institutions bound by the Bill of Rights. Section 8(1) binds the legislature, executive, judiciary, and all organs of State without qualification to the terms of the Bill of Rights.<sup>87</sup> Section 8(2), however, provides that natural and juristic persons shall be bound by provisions of the Bill of Rights to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.<sup>88</sup> Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, section 8(3) then provides that, a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right.<sup>89</sup> Moreover, it provides that the rules of the common law may be developed so as to limit a right, as long as that limitation would be consistent with the provisions of section 8(3)(b).<sup>90</sup>

The Court, in this instance, deduces that, if the applicants' argument that seeks to advance the horizontality would be correct, it would be hard to give a purpose to section 8(3) of the Constitution. For if the effect of sections 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, section 8(3) would have no apparent purpose and one cannot adopt an interpretation which would render the provision of the Constitution to be without any apparent purpose.<sup>91</sup> However, as *Chirwa* in his journal article the *Horizontal Application of Constitutional Rights In a Comparative Perspective*,<sup>92</sup> highlights this misconstrued idea by arguing that the proper construction of the text of s8(3) does not mandate that the common law must be developed every time to give direct effect to constitutional rights.<sup>93</sup> *Chirwa*,<sup>94</sup> argues

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<sup>86</sup> Constitution, 1996.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> Du Plessis, LM (2002). 'Re-interpretation of Statutes' Durban' Butterworths, pp. xii. At para 31-32.

<sup>92</sup> Chirwa, D (2006) 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' available at <http://www.saflii.org/journals/LDD/2006/9.pdf>.

<sup>93</sup> Section 8(3) refers to the development of the common law, meaning that constitutional values can be considered even when applying this section. *Khumalo v Holomisa* 2002 8 BCLR 771(CC) offers an excellent example where, in applying section 8(2) and (3). O'Regan J counterbalanced the right to freedom of expression and the values of transparency and open democracy against the constitutional values of human dignity, freedom, and equality.

<sup>94</sup> *Ibid.*

through *Woolman*,<sup>95</sup> that *O'Regan J's* decision has the effect of saying that any law or the common law can be challenged for being inconsistent with the Constitution in all circumstances where the parties, at least, include the State, but only in limited circumstances where the parties are private.<sup>96</sup>

This holding ignores the importance and neutrality of sections 8(1) and 39(2) of the Constitution regarding the relevance of constitutional values to the development of the law and common law.<sup>97</sup> These provisions cannot be said to be subject to development in accordance with the spirit and objects of the Bill of Rights only when the parties before the Court include the State.<sup>98</sup> Pursuant to this notion, *Currie and De Waal*,<sup>99</sup> note that although direct application is the preferred method, indirect application is likely to have a more profound effect. If one is to cede to this understanding that Section 8(2) and (3) only apply in instances where common law seeks to be developed or invalidated.<sup>100</sup> The Constitution and the Bill of Rights, however, establish an objective normative value system whose set of values must therefore be respected whenever the common law or legislation is interpreted, developed, or applied. The authors add that, when the right is directly applied, the Bill of Rights does not override ordinary law or generate its own remedies.<sup>101</sup> Rather, the Bill of Rights respects the rules and remedies of ordinary law, but, demands furtherance of its values mediated through operation of ordinary law.<sup>102</sup> *Gwanyanya's* appraisal of the *Nyamande v Zuva* case rightfully locates the problem with this approach that seeks to construe statutes on the basis of the existence or absence of indicative wording. If one is to accept that, that would for example render the *ESTA*,<sup>103</sup> useless in many instances, because what this means is that an employment contract is just an ordinary contract which should be governed by the

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<sup>95</sup> Woolman, S 'Application' in Chaskalson M et al (eds) *Constitutional law of South Africa* (2005) 31-54.

<sup>96</sup> Cheadle, HM 'Application' in Cheadle HM et al (eds) *South African constitutional law: The Bill of Rights* (2005) 3- t, 3- t 3 arguing that 'all law should now be subject to constitutional scrutiny irrespective of how and with whom it arises in litigation.'

<sup>97</sup> Chirwa, D 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' available at <http://www.saflii.org/journals/LDD/2006/9.pdf>.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Section 39(2)- When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.

<sup>101</sup> Currie, I &. De Waal, J 'The Bill of Rights Handbook' (2005) 32, 64.

<sup>102</sup> *Ibid.*

<sup>103</sup> Extension of Security of Tenure Act 62 of 1997.

common law rules of contract. The dictates of fairness, justice, and equity would not apply as they are not explicitly mentioned in the *ESTA*. Yet, one of the reasons why *ESTA* was enacted was to balance the relationship between the owner and the occupier so that the relationship can be guided on the principles of fairness.

It is in this same breath that S39 exhales.<sup>104</sup> In terms of section 39, the interpretation provision in the Constitution it is provided:

- (1) When interpreting the Bill of Rights, a court, tribunal, or forum
  - (a) Must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom
  - (b) Must consider international law and
  - (c) May consider foreign law.

- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.

Essentially, the *Holomisa* case's,<sup>105</sup> significance to this chapter's focus on the courts approach to legal interpretation of horizontal application is as follows. The judgement advances the purposive approach in addition to the literal reading of the text. The judge in this instance seeks to reconcile what is on paper with the purpose it's meant to advance against the backdrop of broader constitutional purports, objects, and spirit. As has been contemplated above, it is only when the approach to legal interpretation is removed from the text to be interpreted and attention is paid towards the holistic scheme of things is one able to pick apart that which can be easily misconstrued. In addition, what we envisage is that in its manifestation, is the court's recognition of the Bill of Rights applying horizontally albeit in limited circumstances. The courts construe this position to be arising from the text of S 8, even though it is not explicitly stated therein. The shift in the courts approach to horizontal application is noted in so far as the *Du Plessis* case,<sup>106</sup> did not recognize

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<sup>104</sup> Section 39 of the Constitution of the Republic of South Africa, 1996.

<sup>105</sup> *Khumalo v Holomisa* 2002 8 BCLR 771 (CC).

<sup>106</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC).

constitutional rights being applicable or being in the privy of the private-to-private relations.

Below, I discuss the *Baron v Claytile* case.<sup>107</sup> I reveal the continued progressive trajectory within our courts, in as far as the approach to horizontal application is concerned, noting the shift from a formalistic approach to transformative approach. In addition, I weigh in on where we are in our approach to horizontal application and where we ought to be as measured by the impact certain approaches to legal interpretation have had on how the courts construe the text of section 8.<sup>108</sup>

### **2.3.4 BARON V CLAYTILE CASE (2017).**

#### **2.3.4.1 CASE INTRODUCTION.**

The *Baron* case,<sup>109</sup> was decided over a decade after the *Khumalo* case,<sup>110</sup> and almost two decades after the *Du Plessis* case.<sup>111</sup> The *Baron* case serves to represent the most recent illustration of the courts approach to horizontal application. In addition, the case serves as the end point against which the development in the courts approach to horizontal application can be tested.

#### **2.3.4.2 FACTS OF THE CASE.**

The facts of the case in this instance follow that the applicants apart from one, were all former employees of the brick manufacturing business on the farm. Accordingly, this entitled them to reside in housing units on the farm for the duration of their employment although it was common cause that some of the applicants had lived on the farm for some years before they were employed by the first respondent. At the time of the commencement of the proceedings the applicants were still residing in the housing units on the farm, although they had not been employed by the first respondent for some years. On 3 November 2012, the first respondent gave them written eviction notices to leave the farm on or before 8 December 2012. The applicants failed to comply with the notices and continued residing on the farm. The first respondent instituted eviction proceedings in the Magistrate's Court in June

<sup>107</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>108</sup> Constitution of the Republic of South Africa, 1996.

<sup>109</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>110</sup> *Khumalo v Holomisa* 2002 8 BCLR 771 (CC).

<sup>111</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC.

2013. The City, at the time, indicated to the Court that no suitable alternative accommodation was available due to a long waiting list. An eviction order was granted on 7 February 2014, which was found to be just and equitable in the circumstances. The applicants were ordered to vacate the farm by 30 October 2014, some eight months after the eviction order had been granted. The applicants then filed a notice of leave to appeal against the eviction, an appeal which the court and the judgement discussed herein relates.

#### **2.3.4.3 DISCUSSION.**

The discussion of this case cedes to the fact that it is now regarded as common cause that the applicability of constitutional rights extends horizontally to private persons. What is now in question is to what extent it does so. Does it relay positive or negative obligations towards private parties as it does with the state? This line of questioning thus reflects the continuum in the courts approach and the progress made in the interpretation of horizontal application in the era of constitutional democracy. The discussion will in cognizance of the above focus only on the majority judgement handed down by *Pretorius AJ* as it relates to the approach, he takes in understanding section 8 of the Constitution.

In the *Baron* case,<sup>112</sup> the Judge concedes that, an adherence to a strict classification of horizontal or vertical application of the Bill of Rights obfuscates the true issue, whether within the relevant constitutional and statutory context a greater “give” is required from certain parties. In respect of this submission by the Court, the approach taken is that which accepts the State and private parties alike are bound and obligated by the Constitution with respect certain rights. The question that the Court seeks to clarify is the extent of the obligation. The Court, through *Pretorius AJ*, further qualifies that any ‘give’ must be in line with the Constitution, alluding to a direct as opposed to an indirect influence of the constitution’s value system.<sup>113</sup> If one is to understand this departure, the Court now makes, it seeks to propose an approach to interpretation that not only provokes the dictates and purpose of the statute in the primary as opposed to the wording but also seeks to assimilate the value laden approach together with the moral and ethical pungent of the Constitution.

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<sup>112</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>113</sup> *Ibid.*



In this regard, *Devenish*,<sup>114</sup> postulates the need for a justiciable Bill of Rights with a provision ‘authorizing’ or prescribing a teleological method or theory of interpretation,<sup>115</sup> which involves an unqualified contextual weighing up of linguistic, legal and jurisprudential consideration, and which would place the process of interpretation on a ‘sounder jurisprudential footing.’<sup>116</sup> Moreover as the work of *Singh Annette*,<sup>117</sup> intuitively furthers it, a solution to a particular legal problem will require both inductive and deductive reasoning. However, because legal reasoning requires a more complex and specialized reasoning than reasoning in general, legal reasoning in its entirety is not reducible to merely a species of inductive and deductive reasoning, but is in fact the coming together of inductive, deductive, subjectively humane logic which involves moral and ethical principles.<sup>118</sup>

*Pretorius AJ* in her majority judgement ponders a scenario in which the State fails in its obligation to provide suitable alternative accommodation.<sup>119</sup> The Court, through *Pretorius* questions what then becomes of the question of housing the weaker party.<sup>120</sup> Despite the narrow scope of relevant provision of *ESTA* in the *Baron v Claytile*,<sup>121</sup> the Court rightfully applies the deductive logic that the private owner will then be expected to assist in the finding of alternative accommodation or in the failure to provide suitable accommodation in his personal capacity as the subject of the right stands to be fulfilled regardless.<sup>122</sup> At this juncture, what is evident is the manifestation of a transformative approach to horizontal application. It is one that speaks to a compounded hybrid logic that seeks to live up to the aspirations of the Constitution. This logic represents a summation of the strengths of a contextual and purposeful comprehension of the values of a society founded on the moral spirit of ethical adjudication.

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<sup>114</sup> Devenish, G ‘A Commentary on the South African Bill of Rights’ at 618.

<sup>115</sup> Botha, CJ (2005) 59. The word “teleological” is derived from the Greek word “telos” meaning “[t]he end of a goal-oriented process” - see [www.thefreedictionary.com/telos](http://www.thefreedictionary.com/telos) (accessed 2012-07-10).

<sup>116</sup> Devenish, G ‘A Commentary on the South African Bill of Rights’ at 620.

<sup>117</sup> Annette, S. ‘The Impact of The Constitution on Transforming the Process of Statutory Interpretation in South Africa’ (2014).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>120</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

The majority judgement of the *Baron* case,<sup>123</sup> as quoted above reflects the current approach to horizontal application while the *Du Plessis* case,<sup>124</sup> reflects the approach to horizontal application at the commencement of the constitutional order. Although great strides have been made over the years in the approach of the courts to horizontal application as has been detailed in the chapter, the following is worth taking note of.

On opposite ends of the spectrum, one would expect the development in the court's approach to have been born out of the passage of time. However as far back as the *Du Plessis* case,<sup>125</sup> *Madala J's* approach in the minority judgement mirrors *Pretorius AJ's* approach in her majority judgement in the *Baron* case. I go as far as to say the two approaches and line of thinking are closer than the period that separates them.

*Madala J's* minority judgement then echoes a silent cry. In his approach, the judge takes note of the primary aspirations of the Interim Constitution. Articulating this approach, he states that the preamble and post-amble of the *Interim Constitution*, together with the values enshrined therein, are aimed at transforming the South African social and legal system into one that upholds principles of democracy and human rights, not only between an individual and the State, but also between private parties.<sup>126</sup> He held that, as a matter of interpretation, certain provisions of the Bill of Rights were capable of direct as well as indirect application, imploring the courts to consider the right in question. To decide whether it could sensibly be applied across the board including, private to private parties, taking the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs.<sup>127</sup> The approach of *Madala J* and *Pretorius AJ* of *Interim Constitution* in respect of the former, and the *Final Constitution* in regards with the latter, illuminates the following points with regards to the interpretation of the horizontal applicability of fundamental rights. The text in S7 in the *Interim Constitution* which consequently became S8 in the *Final Constitution* differs primarily on specificity.<sup>128</sup>

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<sup>123</sup> Ibid.

<sup>124</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC.

<sup>125</sup> Ibid.

<sup>126</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC. Paras 161 & 165 at 926 & 927.

<sup>127</sup> *Du Plessis v De Klerk* 1996 (5) BCLR 658 CC. Paras 161 & 165 at 926 & 927.

<sup>128</sup> Ss (1) explicitly states that the Bill of Rights applies to 'all law' and binds the 'judiciary' Section 7(I) of the Interim Constitution was drafted without these important terms. All it provided for was that

Despite this, *Madala J* and *Pretorius AJ*'s general approach to horizontal application, separated by time, mirrors a meeting of the minds in terms of their understanding of these two separate constitutional texts. Our courts general approach to horizontal application envisages a shift from a formalistic approach to transformative approach. However, one cannot describe and laud the courts as being transformative without some circumspection considering the passage of time between *Madala J*'s minority approach and *Pretorius AJ*'s majority approach two decades later. The time factor reiterates the dissertation's broader focus on the effects of a conservative legal culture on the fulfilment of the right to adequate housing.

## **2.4 CONCLUSION.**

The above transformative critique is to my mind a fair one. However, the move over the years from a formalistic approach to horizontal application, to a transformative approach as postulated above has been fingered for obscuring the law-politics divide.<sup>129</sup> The objective of attaining social or substantive justice through law inevitably compels courts to engage in policy decision making or to make orders that have significant budgetary implications on the State and private persons. This inevitably blurs the boundaries of the separation of powers within the state especially those mandated with the control of policy and government expenditure.<sup>130</sup>

In the next chapter, I look at how our courts have dealt with horizontal application by describing the jurisprudence of our courts with respect to the horizontal application of constitutional housing rights.

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'[the Bill of Rights] [bound] all legislative and executive organs of state at all levels of government' although it also stated in section 35(1) that '[i]n the interpretation of any law and the application and development of the common law and customary law, a court [was bound to have regard to the spirit, purport and objects of [the Bill of Rights]'

<sup>129</sup> K Klare 'Legal culture and transformative constitutionalism' (1998) 14 South African Journal on Human Rights 146 150.

<sup>130</sup> T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 2 Stellenbosch Law Review 260.

## CHAPTER 3.

### A DEVELOPMENTAL ANALYSIS ON THE HORIZONTAL APPLICATION OF THE RIGHT TO ADEQUATE HOUSING JURISPRUDENCE.

#### 3.0 INTRODUCTION.

At its inception, the concept of the Bill of Rights was regarded, and is still to a certain extent regarded, as a regulatory safety net against the abuse and excessive nature of State power vis-a-vis the subjects of the State.<sup>131</sup> This natural fit is commonly referred to as the vertical application of the Bill of Rights. Over time, the need for the Bill of Rights to recognize and afford private individuals protection against not only the abuses of State power but against the exertion of superior social and economic power of other private individuals in modern-day societies, has been the focus of the present day struggle for socio-economic justice.<sup>132</sup> As a result, the South African Bill of Rights has been read to apply in matters pitting private individuals against the State and in matters pitting private individuals against private individuals.<sup>133</sup> This latter contemplated application of the Bill of Rights is referred to as a horizontal application.

The horizontal application in its manifestation proposes negative and positive obligations towards private individuals, in the fulfilment of constitutional rights. This seeks to address not only the need to afford private individuals protection against the socio-economic power of other private individuals but more so, to locate and redress the inequities prevalent within private relations, against the backdrop of historical socio-economic injustices.<sup>134</sup>

The previous chapter dealt with how the courts have generally approached the notion of horizontal application. In this chapter, I deal with the horizontal application of the right to adequate housing. In this chapter, I describe how the

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<sup>131</sup>Lorenzo, T 'A Macrocosmic Perspective of the Human Rights Movement in The Struggle for Human Rights an International and South African Perspective' (1994).

<sup>132</sup> Du Plessis, L & Corder, H 'The Genesis of the Operational Provisions of the Chapter on Fundamental Rights in Understanding South Africa's Transitional Bill of Rights' (1994) at 113.

<sup>133</sup> See Cachalia et al 'Fundamental Rights in the New Constitution' (1994) at 19-21; and Du Plessis & Corder op cit n3 at 110-114.

<sup>134</sup> Ibid.

courts have adjudicated constitutional housing right cases demanding horizontal application. In so doing, I highlight the dissertation's main object by laying the basis upon which, the extent to which the courts have been willing or unwilling to impose positive duties on private persons, is analyzed and critiqued.

I approach the description of the jurisprudence on horizontal constitutional housing rights, by zeroing in on three lines of development within the jurisprudence. These three lines of development speak to the three significant obligating orders granted by the courts in their horizontal application of constitutional housing rights. The first of these three lines of jurisprudential development are orders positively obligating private property owners to allow unlawful occupiers to remain on the private property/land indefinitely. The second line of jurisprudential development follows those cases where the courts have ordered private property owners to allow unlawful occupiers to remain on their land/property while alternative accommodation is being sought by the state. The third line of jurisprudential development details those cases where the courts have not only ordered private property owners to allow unlawful occupiers to remain on their land/property but in addition, to make any structural improvements deemed necessary on such property.

A case-by-case description and analysis is undertaken to highlight the reasons and the interpretive thought formulation process that has informed the courts to make these judgements in pursuit of fulfilling the constitutional right to adequate housing. In this description and analysis both transformative and conservative traits as defined above interchangeably resurface nomine for further critique in the next chapter.

In its structural set out, this chapter is comprised of three sections. In section 3.1, I relay the constitutional and legislative context as it relates to the horizontal application of constitutional housing rights. In this section, I discuss the constitutional provisions of property and housing as they appear against the broader objects of the constitution. In addition to this, I describe and discuss the legislation giving provision to the horizontal application of the rights to property and housing, namely the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (*PIE*).<sup>135</sup>

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<sup>135</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

and the Extension of Security of Tenure Act (*ESTA*).<sup>136</sup> The significance of this section is to acquaint the research with the law governing the subject matter of the dissertation, laying the basis for the analysis of the jurisprudence described herein and the critique to follow in the next chapter. In section 3.2, I re-examine our courts constitutional housing rights jurisprudence on a case-by-case basis along the three lines of development as I have alluded above. In section 3.3, I reflect on the jurisprudence discussed above and conclude this chapter.

This chapter locates itself as a precursor to the next chapter which critiques the jurisprudence discussed herein from a transformative perspective. In doing so, I aim to reflect on the impact the South African conservative legal culture has had on the development of the constitutional housing rights jurisprudence.

### **3.1 CONSTITUTIONAL AND LEGISLATIVE CONTEXT.**

The analysis of the jurisprudence turns on the interpretation to be given to various provisions in the Constitution, as well as to the statutes adopted to give effect to constitutional housing rights. It is necessary to briefly detail the constitutional, legislative, and policy framework as a basis for the analysis that follows

Since all law including the common law, is now subject to constitutional scrutiny, the Constitution is the starting point. The preamble to the Constitution states that, one of the purposes for its adoption is to establish a society based, not only on the democratic values of human dignity, equality, freedom, and fundamental human rights, but also on social justice.<sup>137</sup> In this regard, the Constitution envisages a morally bound abstract contemplation, that inherently has the effect of viewing a judgment as it relates to the facts, as being sound or unsound, as opposed to being correct or incorrect.<sup>138</sup>

The constitutional right to housing is espoused in section 26 which states that; (1) everyone has a right to have access to adequate housing, (2) The state must take reasonable legislative and other measures within its available resources to achieve

<sup>136</sup> The Extension of Security of Tenure Act 62 of 1997.

<sup>137</sup> Constitution of the Republic of South Africa, 1996.

<sup>138</sup> Posner, RA 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' 37 *Cas. W. Res. L. Rev.* 179 (1986) Available at: <http://scholarlycommons.law.case.edu/caselrev/vol37/iss2/3>.

<sup>139</sup> Constitution of the Republic of South Africa, 1996.

the progressive realization of this right. Moreover, section 26(3) of the Constitution protects everyone from being evicted from their home, or having their home demolished, without an order of court made after considering all the relevant circumstances and provides that no legislation may permit arbitrary evictions.<sup>140</sup>

To ensure the realization of section 26(3), Parliament enacted *ESTA* to limit homelessness by respecting, protecting, promoting, and fulfilling the right to access to housing.<sup>141</sup> This legislation was enacted, amongst other things, to improve the conditions of occupiers of premises on farm land and to afford them substantive protections that the common law remedies could not afford them.<sup>142</sup> *ESTA*, in part, seeks to ensure that a previously lawful occupier whose rights of tenure have lawfully been terminated in a just and equitable manner is only evicted if a court has had regard to all relevant circumstances.<sup>143</sup> The Act grants the courts a broad discretion in determining the justness of an eviction order. It does so by prescribing certain factors the courts must have regard for, which include the fairness of the agreement, the conduct of the parties, the commercial interests of the parties, and the reason for the eviction.<sup>144</sup> *ESTA* also allows for mediation procedures, and requires efforts be directed at securing suitable accommodation before an eviction order is granted.<sup>145</sup> In essence, the judicial enquiry requires the courts to

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<sup>140</sup> Ibid.

<sup>141</sup> The preamble to *ESTA* provides: "To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith."

<sup>142</sup> Ibid.

<sup>143</sup> The relevant circumstances pondered here are espoused in Section 8(1) which make it clear that fairness plays an important role. They are: "(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies; (b) the conduct of the parties giving rise to the termination; (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated; (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."

<sup>144</sup> The Extension of Security of Tenure Act 62 of 1997. Subsection 10, 11 & 12.

<sup>145</sup> Section 10(3) of *ESTA* provides: "If

(a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8  
(b) the owner or person in charge provided the dwelling occupied by the occupier; and  
(c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,

balance the interests of the occupier, the landowner, and other possible occupiers. *ESTA* also grants certain rights and entitlements to occupiers which property owners must respect.<sup>146</sup>

The *PIE* Act was adopted with the manifest objective of overcoming abuses and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation. *PIE* applies to all evictions from buildings or structures utilized for dwelling purposes.<sup>147</sup> *PIE* provides protection to unlawful occupiers who have settled on either State or privately owned property without the requisite permission of the owner.<sup>148</sup> Just like *ESTA*, *PIE* prohibits evictions without a judicial assessment of relevant circumstances and courts may only grant an eviction order if it is 'just and equitable' to do so.<sup>149</sup> This has implored the courts to opt for a contextual balancing approach where competing rights are placed on a neutral footing and the relevant interests and specific factors are evaluated to determine the specific obligations imposed.

As with all determinations about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human

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a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—

- (i) the efforts which the owner or person in charge and the occupier have respectively made to secure suitable alternative accommodation for the occupier; and
- (ii) The interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.”

<sup>146</sup> Section 11(3) of *ESTA*,” In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to—

- (a) the period that the occupier has resided on the land in question
- (b) the fairness of the terms of any agreement between the parties
- (c) whether suitable alternative accommodation is available to the occupier
- (d) the reason for the proposed eviction; and
- (e) The balance of the interests of the owner . . . the occupier . . . on the land.”

<sup>147</sup> The Preamble of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>148</sup> [www.derebus.org.za/slice-pie-understanding-act/](http://www.derebus.org.za/slice-pie-understanding-act/).

<sup>149</sup> S4(6) of the *PIE* Act 19 Of 1998, “If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women. (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.



dignity, equality, and freedom.<sup>150</sup> One of the provisions of the Bill of Rights that has to be interpreted with these values in mind, is section 25, which reads: '(1)No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'<sup>151</sup> It is in the reading and horizontal application of section 26 with all its negative and positive contemplations on private persons, that the right for one not to be deprived of their property in section 25, is to be given strong consideration.<sup>152</sup> Ultimately, the balancing act presupposed by the legislation articulated above speaks to the consideration and protection of competing rights such as those espoused in section 25.<sup>153</sup>

The legislation provides for all the three jurisprudential developments proposed above. The first jurisprudential development is of those with life-long rights to remain on someone else's property as envisaged in *ESTA's* long term category occupiers.<sup>154</sup> Similarly, the second jurisprudential development is of those with the right to remain on private property while suitable alternative accommodation is being sought.

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<sup>150</sup> Section 7(1) and (2) of the Bill of Rights.

<sup>151</sup> The Constitution of the Republic of South Africa, 1996.

<sup>152</sup> S25(2) Constitution of the Republic of South Africa, 1996 - The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

<sup>153</sup> S 25(2) of the Constitution, 1996 states that: Property may be expropriated only in terms of law of general application (a) For a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. (4) For the purposes of this section (a) the public interest includes thenation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources; and b) property is not limited to land. (5) 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.

<sup>154</sup> Long terms occupiers are those persons who have resided on a farm for more than 10 years and are over 60 years of age or cannot provide labor to a landowner because of ill health, disability, or injury. Long term occupiers' rights may only be terminated if they have:

- (a) intentionally and unlawfully harmed any other person occupying the land
- (b) intentionally damaged property of the farm
- (c) engaged in behavior which threatened others who occupy the land
- (d) assisted other unauthorized people to establish new dwellings on the farm
- (e) breached a condition or term of their residence with which they can comply, but have failed to do so despite being given one month's notice to comply
- (f) Committed such a fundamental breach of the relationship between the parties that restoration is impossible.

While the third jurisprudential development which speaks to the right to effect improvement on a dwelling, is a constitutionally motivated enquiry premised on human dignity, which both the *PIE* and *ESTA* make gateway for.

In view of the above, the courts have sought to apply the various considerations contemplated to different sets of facts in the form of cases presented to the courts. Invariably, this horizontal application has led to three significant obligating developments which I now discuss below.

## **3.2 JURISPRUDENTIAL DEVELOPMENTS.**

### **3.2.1 THE FIRST JURISPRUDENTIAL DEVELOPMENT.**

#### **INTRODUCTION.**

In this first jurisprudential development, I re-examine three cases in which the court's horizontal application of the right to adequate housing resulted the court's refusing to grant an eviction in favor of an order obligating private property owners to allow the unlawful occupiers to remain on their land indefinitely. The cases I rely on to highlight this jurisprudential development are the *PE Municipality case*,<sup>156</sup> the *Molusi Case*,<sup>157</sup> and the *All Builders and Cleaners case*.<sup>158</sup> The *PE Municipality* and *All Builders* cases relate to the *PIE* Act,<sup>159</sup> while the *Molusi* case relates to the *ESTA* Act.<sup>160</sup> In these cases the court's decision reflect the understanding the judiciary has attributed to the horizontal application of housing rights. The court judgements discussed herein have for various reasons resorted to imposing obligations on private property owners which have had the effect of preserving

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<sup>155</sup> Section 1 of *ESTA* defines "suitable alternative accommodation" as—  
"alternative accommodation, which is safe and overall, not less favorable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to—  
(a) the reasonable needs and requirements of all the occupiers in the household in question for residential accommodation, land for agricultural use, and services  
(b) their joint earning abilities and  
(c) The need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active."

<sup>156</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>157</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6.

<sup>158</sup> *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

<sup>159</sup> Act 19 of 1998.

<sup>160</sup> Act 62 of 1997.

unlawful occupation. Below, I navigate through the relevant case law. I highlight the facts with the aim of impressing on the reader, the abstract moral justice determination aspect that the Constitution proposes. I then proceed divulge this aspect at length in the following chapter. I also examine the judgements in their categorical jurisprudential development parameters to approximate and analyze the reasons that necessitated each development.

## **CASE LAW.**

### **PE MUNICIPALITY CASE.**<sup>161</sup>

#### **FACTS.**

The applicant in this matter was the Port Elizabeth Municipality acting on behalf of private property owners within its jurisdiction. The respondents were some 68 people, including 23 children, who occupied twenty nine shacks erected on privately owned land within the Municipality for periods ranging from two to eight years.<sup>162</sup> The property was zoned for residential purposes and the shacks were erected without the consent of the Municipality.<sup>163</sup> The occupiers indicated they were willing to leave the property if they were given reasonable notice and provided with suitable alternative land on to which they could move.<sup>164</sup> The Municipality offered to move the respondents to a place referred to as Walmer. The respondents rejected this proposal saying that Walmer was unsuitable and plagued with social ills and that in any event they feared they would have no security of occupation there and find themselves liable to yet another eviction.<sup>165</sup> Taking into account all the statutory considerations and the fact that the occupiers had not applied to the Municipality for housing, the High Court held that the occupiers were unlawfully occupying the property and that it was in the public interest that their unlawful occupation be

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<sup>161</sup> Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>162</sup> Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>163</sup> Ibid.

<sup>164</sup> Ibid

<sup>165</sup> Ibid.

terminated.<sup>166</sup> The High Court accordingly ordered the occupiers to vacate the land and authorized the Sheriff to demolish the structures if necessary, with the assistance of the police if required.<sup>167</sup>

On appeal to the Supreme Court of Appeal, the *SCA* held that, the occupiers were not seeking preferential treatment in the sense that they were asking for housing to be made available to them in preference to people in the housing queue.<sup>168</sup> Instead, the occupiers were merely requesting that land be identified where they could put up their shacks and where they would have some measure of security of tenure.<sup>169</sup> The *SCA* further held that, the important consideration in the present case was the availability of suitable alternative land.<sup>170</sup> This was so because of the length of time that the occupiers had occupied the land, and more importantly, because the eviction order was not sought by the owners of the property but by an organ of State on the owners' behalf.<sup>171</sup> The *SCA* held that, given that on the papers it was unclear whether *Walmer* was land owned by the Municipality or privately owned, the High Court should not have granted the order sought without assurance that the occupiers would have some measure of security of tenure at *Walmer*. It accordingly upheld the appeal and set aside the eviction order.<sup>172</sup>

The Municipality still acting on behalf of the private property owners now applied to the Constitutional Court for leave to appeal against the decision of the *SCA* and to have the eviction order restored. It indicated that it is particularly concerned to get a ruling from this Court that, when it seeks eviction of unlawful occupiers it is not constitutionally bound to provide alternative accommodation or land.<sup>173</sup> In opposing the application, the occupiers contended that in essence the application was based on a challenge to findings of fact made by the *SCA* and did not raise any constitutional matters, thus the matter ought to be dismissed.<sup>174</sup>

### **SUMMARY OF THE JUDGEMENT.**

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<sup>166</sup> Ibid.  
<sup>167</sup> Ibid.  
<sup>168</sup> Ibid.  
<sup>169</sup> Ibid.  
<sup>170</sup> Ibid.  
<sup>171</sup> Ibid.  
<sup>172</sup> Ibid.  
<sup>173</sup> Ibid.  
<sup>174</sup> Ibid.

These set of facts deal with a case presented by the City on behalf of private persons. Thus, most of the judgement delivered in this case deals equally with the duty of the State and the courts express disdain of the State organ (City) bringing such an application. For the purposes of the jurisprudential development in question, I do not delve into that part of the judgement in so far as it deals with the precarious nature of the City's locus standi (vertical application). The courts view in that regard will be regarded as common cause and undisputed. The purpose remains that of locating the substantive reasoning that could lead to obligating private persons to allow the unlawful occupiers to remain.

In that respect, the Constitutional Court found that the eviction could not go ahead. In justifying this decision, *Sachs J* referred to the judiciary's new task, which was to manage,

"the counter positioning of conventional rights of ownership against the new, equally relevant, right not to be arbitrarily deprived of a home, without creating hierarchies of privilege."<sup>175</sup>

The statute relied upon by the municipality, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (*PIE*), was found to require the courts to infuse elements of grace and compassion into the formal structures of the law. It was held that the courts are called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighborliness and shared concern.<sup>176</sup> Commenting on the Bill of Rights in particular, it was held that, it is in response to the interrelation of competing rights, it is nothing if not a structured, institutionalized, and operational declaration in our evolving new society, of a need for human interdependence, respect and concern.<sup>177</sup>

The full text as it relates to the refusal of the eviction is discussed in the jurisprudential analysis below.

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<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

## MOLUSI CASE.<sup>178</sup>

### FACTS.

The core issue is whether the termination of the right of residence and eviction of the applicants followed the relevant provisions of *ESTA*. The applicants were occupants under *ESTA* at the *Boschfontein* farm.<sup>179</sup> Most of the applicants had been in occupation since about 2001, under oral and written lease agreements.<sup>180</sup> On 19 May 2009, the sheriff allegedly served the applicants with notices dated 14 May 2009 terminating their rights of residence on the farm.<sup>181</sup> The reason for termination is stated as breach of the terms of the agreement by not paying rent despite demand. The litigation in the Land Claims Court was a sequel to the termination of the applicants' rights of residence in May 2009.<sup>182</sup> The case of the respondents was that the applicants were in breach of a material term of the lease in that they failed or refused to pay rental, hence the cancellation. The Land Claims Court recognized that the granting of eviction would ineluctably render the applicants homeless.<sup>183</sup> It accorded the respondents' right of ownership greater weight than the rights of the applicants as occupiers. The *SCA* held that, failure by the lessee to pay the agreed rental on the due date is a lawful ground for the termination of a right of residence.<sup>184</sup> It held that, section 8(1)(d) was not relevant to this matter. With regards to section 8(1)(e), the *SCA* said that the procedure followed in giving written notices of the termination of the right of residence and affording the occupiers two months to vacate the premises was fair.<sup>185</sup> The *SCA* agreed with the Land Claims Court that there was compliance with section 8(1) of *ESTA*.<sup>186</sup> Consequently, the Court ruled that the termination of the right of residence was just and equitable. The case was then brought to the Constitutional Court.

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<sup>178</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6.

<sup>179</sup> *Molusi* at par 6.

<sup>180</sup> *Molusi* at par 7.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Molusi* at par 12.

<sup>183</sup> *Molusi* at par 17.

<sup>184</sup> *Molusi* at par 30.

<sup>185</sup> S8 (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence."

<sup>186</sup> Fn 12 above.

## SUMMARY OF THE JUDGEMENT.

The Constitutional Court first sought to dispel the requirement that the termination of the right of residence on a 'lawful ground' is the main consideration of section 8(1). Instead, the Court highlighted certain factors set out in section 8(1)(a)-(e), in the search for a just and equitable outcome.<sup>187</sup> These include the fairness of the ground on which the owner or person in charge relies, the conduct of the parties giving rise to the termination, the interests of the parties including comparable hardship to the parties, and the fairness of the procedure followed by the owner or person in charge, including whether the occupiers were given an effective opportunity to make representations before the failure by the occupiers to pay rental.<sup>188</sup>

In dissent, of the *SCA* order which held that section 8(1) was complied with for the purpose of granting an order for eviction, *Nkabinde J* notes that, the *SCA*'s attention was diverted from the interests of the occupiers.<sup>189</sup> The *SCA* chose to place reliance on the common law principle of *rei-vindicatio*, an action for the protection of ownership whereby the reasonableness of the 'notice' of termination is up-scaled.<sup>190</sup> In other words, the Court did not strike a balance between the interests of the owner of the land and those of the occupiers so as to infuse justice and equity or fairness into the enquiry.<sup>191</sup> The *SCA* did not consider the fairness of the termination of the applicants' rights of residence nor did it give sufficient weight to the hardship that would eventuate from the termination of the

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<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6 at par 45.

<sup>190</sup> Section 8 should be read with Section 9 which concerns the 'Limitation on eviction'. It provides:

"(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if—

(a) the occupier's right of residence has been terminated in terms of section 8

(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge

(c) the conditions for an order for eviction in terms of sections 10 or 11 have been complied with; and

(d) the owner or person in charge has, after the termination of the right of residence, given—

(i) the occupier (ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with."

<sup>191</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6 at par 45.

rights of residence and eviction.<sup>192</sup> This was despite the undisputed evidence that the eviction would render the occupiers homeless as there was no suitable alternative accommodation.

However, the Constitutional Court was quick to caution that, where the terms of *ESTA* have been properly complied with an owner is entitled to an eviction order. While on the other hand, the eviction of the applicants on the procedural basis will not only render the applicants homeless but also frustrate their security of tenure and the aims of *ESTA*.<sup>193</sup> In light of this, the Constitutional Court held that, the *SCA* should not have dismissed the appeal. It erred in doing so and thus the order for eviction was revoked.

### **ALL BUILDERS AND CLEANERS CASE.**<sup>194</sup>

#### **FACTS.**

In this instance, the applicant sought to evict the first, second, third, and fourth respondents from erf 881 in the township of Fairlands, situated at 236 Wilson Street, Fairlands, Johannesburg.<sup>195</sup> It is common cause that the first to third respondents were only occupiers of the property in question and the applicant was the lawful owner of the property.<sup>196</sup> The facts follow the first respondent, a 71 year old man who had lived on the property for in excess of 40 years, probably 44 years.<sup>197</sup> The first respondent was initially employed by *Mr. Twaalfhoven*, the then owner of the property, who used the property as a small holding on which he cultivated fruit and raised livestock.<sup>198</sup> On his death, it transpired that *Twaalfhoven* had bequeathed the property to *Swanepoel* and since then, ownership of the property had been transferred three times.<sup>199</sup> Through all of this, the first, second, and third respondents remained in occupation of the property aforementioned. The current owners now sought to evict the respondents.

<sup>192</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6 at par 47.

<sup>193</sup> *Ibid.*

<sup>194</sup> *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*



The applicant's submitted that despite the respondents claim that they would be left homeless, this was not the case.<sup>200</sup> As such, the applicant contended that the first respondent had a duty to elaborate and discharge the onus on this aspect, in addition to elaborating on the shortage of housing in their income bracket, and why they cannot live with the first respondent's daughter in Limpopo.<sup>201</sup>

### **SUMMARY OF THE JUDGEMENT.**

The High Court in this instance chose not to agree with the applicant's basis for seeking the eviction order. The applicant's argument was based on the onus being on the respondent to show reasons why they must remain on the property. A failure to do so would render the applicant liable to eviction. The High Court held this to be in fact an improper understanding of *ESTA*.<sup>202</sup> The onus was held to be on the applicant to show that the respondents' eviction would be just and equitable.<sup>203</sup> The High Court further highlighted in this instance that, it is not sufficient to prove that the applicant is the owner of the property and the respondents are in unlawful occupation if the causal effect is to leave the respondents homeless.<sup>204</sup> Consequently, taking into account the circumstances and factors set out in Section 4(7) of *PIE Act*, including the length of time which the first respondent had occupied the premises, the circumstances under which he moved on to the premises, the fact that he is an old age pensioner, has a lack of alternative accommodation, these all clearly tilted the scales of justice in favor of the respondents.<sup>205</sup>

In addition, the High Court, weighed in on the way the applicant had sought to remove, the respondents and indeed, the applicant's attitude, as evident from the papers, towards the constitutional rights of the respondents. The judge in this instance, contemplated and put into consideration that, the applicant would have suffered very little prejudice if, as part of the development, the applicant

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<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> *City of Johannesburg v Changing Tides Properties*. 2012 (6) SA 294 (SCA).

<sup>204</sup> *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

<sup>205</sup> S4(7) of the *PIE Act* 19, 1998 : (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

had offered to build the respondents a suitable home.<sup>206</sup> The application was dismissed with the effect of leaving the respondents on the property indefinitely.

### **CASE ANALYSIS OF FIRST JURISPRUDENTIAL DEVELOPMENT.**

The case law discussed herein shares more commonalities than differences that have led the Courts to arrive at the decision to grant unlawful occupiers the right to remain on the property which they are unlawfully occupying. While in *PE Municipality*,<sup>207</sup> the Court had to adjudicate an application brought to it by the State on behalf of private individuals, the Court contemplated several factors that drew it to make the decision to reject the application for eviction of the unlawful occupiers. These factors apply interchangeably to the other cases discussed in the first line of jurisprudential development.

In *Port Elizabeth Municipality*,<sup>208</sup> the Constitutional Court begins by inferring the inherent social hardship in the concept of housing by stating 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 tranquility in what is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.”

In rising to this challenge, the Court in that instance sought to marry S26(3) of the Constitution with the provisions in the *PIE Act*.<sup>209</sup> The Court in the *PE Municipality* case had to rise to the question whether the private property owners were entitled to the eviction of the unlawful occupants. This was the fundamental question of relevance to this discussion. In response to this, the Court sought to read the contemplated circumstances proposed by the *PIE Act*, considering the broader constitutional values. The same holds true for the *Molusi* case and the *All-Builders* case. The courts in that instance sought to explain the relation of the constitutional provisions to statute. Interchangeably, the Court held that, partly to give effect to section 26(3) of the Constitution, the South African Parliament

<sup>206</sup> All Building and Cleaning Services CC v Matlaila and Others (2015) 42349/13.

<sup>207</sup> Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>208</sup> PE Municipality at par 17.

<sup>209</sup> S26(3) of the Constitution of South Africa, 1996 reads, “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”.

in 1998 passed the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (*PIE*) and the Extension of Security of Tenure Act (*ESTA*). In its promulgation of these Acts, the Parliament sought to reconcile the tension between competing constitutional rights.<sup>210</sup> The legislators sought to bring applications for eviction within the courts ambit to necessitate that due regard is paid to competing rights such as those envisaged in S25 by a preponderance of a variation of factors which adequately reflect both the owners and the unlawful occupier's interests.

While both Acts, regulating evictions recognize lawful grounds for instituting eviction proceedings, the courts in the cases discussed herein noted that, the existence of a lawful ground for the termination of occupation should not summarily lead to such termination. Quoting, the *PE Municipality* case, the Constitutional Court in *All Builders* case clarifies that, although the owners' common law right to exclusive possession of the property is not disputed in this matter, it is only one of the aspects which the court must consider.<sup>211</sup> The Courts instead, mutually highlighted the importance of weighing up and balancing various factors in a bid to infuse justice and equitability into the enquiry. Section 4(7) of *PIE* lists the factors a court must consider before granting an eviction order in cases where the person sought to be evicted has occupied the land for more than six months. This section states that, a court may only grant an order for eviction in such a case if, it is of the opinion that it is just and equitable to do so, considering all the relevant circumstances, except where the land is sold in a sale of execution pursuant to a mortgage. Furthermore, whether land has been made available or can reasonably be made available by a municipality or other organ of State or another landowner, for the relocation of the unlawful occupier. In all this, the rights and needs of the elderly, children, disabled persons, and households headed by women must be factored.<sup>212</sup> S8(1) of the *ESTA* lists the factors a court must consider before granting an eviction; (a) the fairness of any agreement,

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<sup>210</sup> Van der Walt (1997) aptly explains the tensions that exist within section 25: 'The meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognizance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities must be the guiding principle in terms of which the section is analyzed, interpreted and applied in every individual case.' The purpose of section 25 must be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and as striking a proportionate balance between these two functions

<sup>211</sup> *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

<sup>212</sup> S4(7) of the *PIE* Act 19, 1998.

provision in an agreement, or provision of law on which the owner or person in charge relies; (b) the conduct of the parties giving rise to the termination; (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated; (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and (e) the fairness of the procedure followed by the owner or person in charge, including whether the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence. However, as the courts have envisaged, these factors contemplated above are not to be read in a vacuum least the procedural value supersedes the substantive value thereof. As *Sachs J* explained in *PE Municipality*, that *PIE* expressly requires the court ‘to infuse elements of grace and compassion into the formal structures of the law.’ *Sachs* went on to explain that, when considering whether to order an eviction in terms of section 4(7) of *PIE* by stating that a court,

“Is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighborliness and shared concern. The Constitution and *PIE* confirm that we are not islands unto ourselves. The spirit of Ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy.”<sup>213</sup>

In the *Molusi* case,<sup>214</sup> the Constitutional Court shared these sentiments by stating that, the pith of the phrase ‘just and equitable’ in sections 8 and 11 of *ESTA* invokes the constitutional values of human dignity, equality, and freedom, informed by a quest for social justice that is cognizant of past injustice.<sup>215</sup> The phrase makes it plain that the criteria to be applied is not purely of a technical kind that flows ordinarily from the provisions of land law. The Court remarked,

“The emphasis on justice and equity underlines the central philosophical and strategic objective of *PIE*. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, *PIE* treats these values as interactive, complementary, and mutually reinforcing, The Court is thus called upon to go beyond its normal

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<sup>213</sup> Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>214</sup> Molusi and Others v Voges N.O. and Others [2016] ZACC 6.

<sup>215</sup> Molusi case at par 48.

functions and to engage in active judicial management according to equitable principles of an on - going, stressful and law-governed social process.”<sup>216</sup>

While these remarks were made in a case relating to *PIE*, they are equally apposite to cases relating to *ESTA*.

In all the judgements delivered in this jurisprudential development, the courts envisaged the above sentiments. Interchangeably, in *PE Municipality*,<sup>217</sup> the Court considered the lengthy period which the occupiers had lived on the land in question, the current and future use of the property and the availability suitable accommodation. Most importantly, the Court paid due regard to the vulnerability of the 23 children and the elderly vis a vis the inherent ownership right. The Court had to consider in the absence of an alternative, whether the two to eight year settled occupation by a vulnerable demographic group of society was worth protecting at the expense of the owners right to use and do as they please with their property which at the time had no developmental use.

In *Molusi*,<sup>218</sup> the Court paid due regard to the comparable hardships that would eventuate in a case of an eviction, exacerbated by the fact that there was no suitable alternative accommodation vis a vis the conduct of the occupiers giving rise the termination of the lease agreements which was the non-payment of rent. The Court ruled that, the constitutional imperatives in section 26(3) and the special constitutional regard for the occupiers’ place of residence, which they regarded as their home, were in this instance inescapable despite the counter factor or ground that the termination of the lease was lawful.<sup>219</sup> In addition, the non-compliance with *ESTA* by relying on ‘reasonable notice’ being afforded to the occupier was mistaken and of no effect to the actual cause of action.<sup>220</sup> In the *All Builders case*,<sup>221</sup> the Court

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<sup>216</sup> Molusi at par 49.

<sup>217</sup> Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>218</sup> Molusi and Others v Voges N.O. and Others [2016] ZACC 6 at par 45.

<sup>219</sup> Ibid.

<sup>220</sup> Section 9 is entitled ‘Limitation on eviction’. It provides:

“(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if—

(a) the occupier’s right of residence has been terminated in terms of section 8

(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge

weighed the decisive factors such as the length of time the occupiers had been occupying the property, their elderly composition, lack of suitable alternative accommodation and the current and future use of the property vis a vis the fact that the occupation was unlawful, and the owners sought to express their rights in that capacity. The oldest occupant was 71 years old having lived on the property for 44 years plagued by health complications found himself and three others vulnerable to eviction so as to make way for a new residential project.<sup>222</sup> On reflection of the above the Court called for the balancing of the social hardships which were likely to be encountered if the eviction is granted vis a vis the inconvenience it would cause the land owner to provide accommodation as part of the proposed future use of the property.<sup>223</sup>

The *All Builders* case aptly depicts the attitude of the Courts in the first jurisprudential development. The Courts have dissentingly had to reiterate the importance of meaningful engagement between the owners and the unlawful occupiers as a necessary element of the controlled minimum threshold of justice and equitability founded on the abstract notion of Ubuntu.

### **3.2.2 SECOND JURISPRUDENTIAL DEVELOPMENT.**

#### **INTRODUCTION.**

In the second line of jurisprudential development, I discuss two cases where the Courts have obligated private property owners to allow unlawful occupiers to remain on their property/land while the state makes the necessary arrangements to secure alternative accommodation. The cases I rely on to highlight this second

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<sup>221</sup> All Building and Cleaning Services CC v Matlaila and Others (2015) 42349/13.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

jurisprudential development in the horizontal application of constitutional housing rights is the Blue Moonlight case,<sup>224</sup> and the Baron case.<sup>225</sup>

## **CASE LAW.**

### **BLUE MOONLIGHT CASE.**<sup>226</sup>

#### **FACTS.**

This matter concerns the fate of 86 poor people who unlawfully occupied a property called “Saratoga Avenue” in Berea in the City of Johannesburg.<sup>227</sup> The property comprised of old and dilapidated commercial premises with office space, a factory building and garages.<sup>228</sup> The case dealt with the rights of the owner of the property, Blue Moonlight Properties and with the obligation of the City of Johannesburg Metropolitan Municipality to provide housing for the occupiers in the case of an eviction.<sup>229</sup> The practical questions to be answered in this case were whether the unlawful occupiers had to be evicted to allow the owner to fully exercise its rights regarding its property and, if so, whether their eviction must be linked to an order that the City provide them with accommodation.<sup>230</sup> The City’s position was that it is neither obliged nor able to provide accommodation in these circumstances.<sup>231</sup> The owner on the other hand wished to exercise its right to develop its property and wanted no part in the dispute about the City’s responsibilities or the plight of the occupiers.<sup>232</sup> The occupiers on the other hand did not want to end up homeless on the street.

The High Court and the Supreme Court of Appeal held that *Blue Moonlight* had complied with the requirements of *PIE* and was entitled to an eviction.<sup>233</sup> The crucial

<sup>224</sup> City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

<sup>225</sup> Baron and Others v Claytile (Pty) Limited and Another [2017] ZACC 24.

<sup>226</sup> City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

<sup>227</sup> Blue Moonlight case par 1-15.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

question before this Court was therefore whether it was just and equitable to evict the occupiers, considering all the circumstances, including the availability of other land, as well as the date on which the eviction must take place. *Blue Moonlight* submitted that an eviction may be delayed on equitable grounds, but that an indefinite delay would amount to an arbitrary deprivation of property in violation of section 25(1) of the Constitution.<sup>234</sup> *Blue Moonlight* further added that the provisions of *PIE* are not designed to allow for the expropriation of land as a private owner had no obligation to provide free housing.<sup>235</sup>

The occupiers submitted that it would not be just and equitable to grant an eviction order if the order would result in homelessness.<sup>236</sup> The City submitted that *Blue Moonlight* is entitled to eviction if *PIE* is complied with but emphasized that the City could not be held responsible for providing accommodation to all people who are evicted by private landowners.<sup>237</sup>

### **SUMMARY OF THE JUDGEMENT.**

The Court in this instance acknowledged that to the extent that *Blue Moonlight* is the owner of the property in question and the occupation is unlawful, *Blue Moonlight* is entitled to an eviction order.<sup>238</sup> However, the Court also acknowledged that such an eviction was subject to the consideration of all relevant circumstances to arrive at a decision that reflects, under which conditions and by which date, eviction would be just and equitable. The Court underlined the City's obligation to provide suitable alternative accommodation by highlighting that in weighing all the relevant factors, the Court should consider the availability of alternative accommodation.<sup>239</sup> Pursuant to this the Court found that the finding of the Supreme Court of Appeal, that the City had not persuaded the Court that it was not capable of providing alternative accommodation, had not been shown to be incorrect and must stand.<sup>240</sup> In relating this finding the Court held that the City's housing policy is unconstitutional in that it excluded people evicted by a private landowner from its temporary housing

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<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> *Blue Moonlight* case par 16-103.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.



programme, as opposed to those relocated by the City.<sup>241</sup> In that light, the Court deduced that it would be untoward to expect *Blue Moonlight* to indefinitely provide free housing to the unlawful occupiers however its rights as property owners had to be construed within the context of the requirement that the eviction must be just and equitable.<sup>242</sup> In this instance, the court's inquiry into the requirement of justness and equitability is inextricably linked to the provision of alternative accommodation by the City.

In reflection, the Court judgement held that the acceptance of the occupiers' cross-appeal was premised on the consideration of an order not to render the occupiers homeless.<sup>243</sup> In mitigation of this scenario, the Court sought to synchronize the date of eviction to the date on which the City had to provide an alternative. The Court thus delivered that by requiring the City to provide accommodation 14 days before the future date of eviction this would allow the occupiers some time and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for their relocation.<sup>244</sup>

### **BARON CASE.**<sup>245</sup>

#### **FACTS**

The facts in this instance follow that the applicants (occupiers) apart from one, were all former employees of the brick manufacturing business on the farm.<sup>246</sup> Accordingly this entitled them to reside in housing units on the farm for the duration of their employment although it was common cause that some of the applicants had lived on the farm for some years before they were employed by the first respondent.<sup>247</sup> On 3 November 2012 the first respondent gave them written eviction notices to leave the farm on or before 8 December 2012 and the applicants failed to comply with the notices and continued residing on the farm.<sup>248</sup> The City, at the time of commencement of the proceedings, indicated to the Court that no suitable

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<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>246</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>247</sup> *Baron case* par 1-22.

<sup>248</sup> Ibid.

alternative accommodation was available due to a long waiting list.<sup>249</sup> The first eviction order was granted on 7 February 2014, which was found to be just and equitable in the circumstances with the effect that the applicants were ordered to vacate the farm by 30 October 2014, some eight months after the eviction order had been granted.<sup>250</sup> The applicants rejected moving to Delft TRA (eventually provided for by the City during 2013) and in addition submitted that the latest offer by the City, that of 23 February 2017, was not an offer which they were willing to accept.<sup>251</sup> An important aspect at this juncture however, was that there was no dispute on any issue between the parties that the requirements of *ESTA* regarding the eviction had been fulfilled. The question was thus whether the private property owners had an obligation to continue offering accommodation until the applicants were satisfied with the City's offer.<sup>252</sup>

### **SUMMARY OF THE JUDGEMENT.**

In dealing with the prerequisite of suitable alternative accommodation the Court began by acknowledging the City's constitutional obligation, not only in terms of the provisions of *ESTA*, but even more so in terms of section 26 of the Constitution that upon the eviction of the applicants and their families as occupiers, the City must provide the applicants with suitable alternative accommodation.<sup>253</sup>

As was the case in the PE Municipality,<sup>254</sup> the City in this instance was dragged into this private dispute by virtue of being liable to provide alternative accommodation upon eviction. In view of the above the Court emphasized that the preamble to *ESTA* does not deal only with the rights of occupiers, but similarly recognizes the rights of landowners to apply for eviction under certain conditions and circumstances.<sup>255</sup> The applicants enjoyed free accommodation since 8 December 2012, when their right of occupation was terminated, until 2017, almost five years pending the provision of suitable accommodation by the State. The Court thus ruled in favor of the first respondent who had carried the positive obligation in so far as a temporary

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<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Baron case par 21-50.

<sup>254</sup> Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>255</sup> Baron Case par 49.

restriction on its property rights had been placed for that period. The Court applied the same considerations as the *Blue Moonlight* case.<sup>256</sup> Although *Blue Moonlight* dealt with provisions of *PIE* in similar conditions as the present, the Court held,

“Of course, a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient and accept that the right to occupation may be temporarily restricted.”<sup>257</sup>

Having regard to all the facts, the Court ordered that, it is just and equitable that all the applicants be evicted, save for Ms. Jonkers, after three months from the date of judgment in cognizant of the second offer made by the City.<sup>258</sup>

### **CASE ANALYSIS OF THE SECOND JURISPRUDENTIAL DEVELOPMENT.**

The cases discussed herein relate to those instances where the courts have ordered that unlawful occupiers who otherwise would be liable to eviction, must remain on the property until alternative suitable accommodation has been provided by the State. The case law herein highlights various considerations that need to be considered before the suspension on eviction is uplifted. Out of all the considerations mentioned, the Courts are consistent in their utmost overbearing consideration of not rendering the unlawful occupier homeless. This is to say that the courts while taking into consideration the factors listed in *ESTA* and in *PIE*, these considerations are taken considering preventing an otherwise looming possibility of homelessness. Thus, what is worthy of noting in the cases second line of jurisprudential development, is that by accepting that the State is the only avenue to meeting the right to adequate housing by providing suitable alternative accommodation, the court negates the importance of any of the other considerations proposed. It follows that in the absence of suitable alternative accommodation, the courts' default order would be to temporarily suspend any eviction order up until the City has availed the pre required alternative accommodation regardless of the existence of other factors. The contemplation of a positive obligation on private persons flows from this overbearing consideration, in that the Courts have sought to protect the home by delaying the eviction until such a time alternative

<sup>256</sup> City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

<sup>257</sup> City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

<sup>258</sup> Baron case par 50.

accommodation has been made available. In this regard the Courts order in both cases discussed herein have deliberately sought to align the date of the eviction with the date when alternative accommodation is to be made available, allowing lag time. The Court phrases the overbearing consideration as whether it would be just and equitable to evict the Occupiers, considering all the circumstances, including the availability of other land, as well as the date on which the eviction must take place.<sup>259</sup> Thus the Courts discretion is anchored on the balancing of the private owners rights as envisaged in section 25(1),<sup>260</sup> and those of the would be unlawful occupier as envisaged by section 26(2).<sup>261</sup> This is to say, the Courts in the second line of jurisprudential development have sought to find the balance between the States duty to progressively facilitate the right to adequate as evidenced by its obligation to provide suitable alternative accommodation on the one hand and the private property owners right not to be arbitrary deprived of their property on the other hand by granting suspended evictions pending the satisfaction of the States duty.

Expressly in the *Blue Moonlight* case,<sup>262</sup> with reference to the *Changing Tides* case,<sup>263</sup> the court decided that private owners might in some instances have to be patient when their usual ownership entitlements, including the right to use and dispose, are restricted temporarily to accommodate the pressing needs of the occupiers. The needs of the occupiers can have an influence on the date of the eviction order, but not the question of whether the eviction order should be granted or not.<sup>264</sup> The consequential effect of this is that any order short of a permanent stay on eviction would pass the constitutional muster. The *Blue Moonlight* case,<sup>265</sup> was also referred to by the majority of the Court in ruling that a positive obligation did rest

<sup>259</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>260</sup> S25 (1) Constitution of the Republic of South Africa, 1996- No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

<sup>261</sup> S26 Constitution of the Republic of South Africa, 1996- (1). Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

<sup>262</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

<sup>263</sup> *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).

<sup>264</sup> *Changing Tides* para 18.

<sup>265</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

on private persons, if no relief in the form of suitable alternative accommodation had come to fruition.<sup>266</sup>

### **3.2.3 THIRD JURISPRUDENTIAL DEVELOPMENT.**

#### **INTRODUCTION.**

In the third line of jurisprudential development, I highlight a case in which the courts have obligated private property owners to allow unlawful occupiers to not only remain on the property/land but to also effect improvements on the property. I make use of the *Daniels* case,<sup>267</sup> to capture this development in our jurisprudence.

#### **DANIELS CASE.**<sup>268</sup>

#### **FACTS.**

*Ms. Daniels* (the applicant) lived in a dwelling on Chardonne Farm (farm) owned by Chardonne Properties CC (the Second Respondent), for 16 years.<sup>269</sup> The first respondent, *Mr. Scribante*, managed the farm and was thus the “person in charge” as detailed in the Extension of Security of Tenure Act 62 of 1997 (*ESTA*).

The applicant at her own expense wanted to effect basic improvements which included levelling the floors, paving part of the outside area and the installation of an indoor water supply, a wash basin, a second window and a ceiling. She duly notified the respondents, who said nothing in response to her written notification. After works had commenced, the applicant received a letter from the respondents

<sup>266</sup> Section 10(3) of *ESTA* provides: “If–

(a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8

(b) the owner or person in charge provided the dwelling occupied by the occupier and

(c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge, a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to–

(i) the efforts which the owner or person in charge and the occupier have respectively made to secure suitable alternative accommodation for the occupier; and

(ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.”

<sup>267</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

<sup>268</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

<sup>269</sup> *Ibid.*

demanding their immediate cessation as, according to them, they had not given consent that the improvements be made. The applicant brought proceedings before the Stellenbosch Magistrate's Court where she sought an order declaring that she was entitled to make the improvements. Both the Magistrates Court and the Land Claims Court (LCC) dismissed her claim that under sections 5, 6 and 13 of *ESTA*, she is entitled to effect the improvements to her dwelling, ruling that she needed consent from the respondents.<sup>270</sup> The LCC and subsequently the Supreme Court of Appeal refused her request for leave to appeal and she then appealed to the Constitutional Court.<sup>271</sup> The issues for determination before the CC were whether *ESTA* allows for an occupier to improve his/her dwelling; if it does, then is the consent of the owner required and if not can the occupier proceed to effect improvements without the owner's consent.

### **SUMMARY OF THE JUDGEMENT AND CASE ANALYSIS.**

In addressing the questions, it faced, the court in this instance narrowed the inquiry to two rights, the right to security of tenure and the right to human dignity. The Court's departure in this instance was formulated in cognizance of the right to human dignity. The right to human dignity is encapsulated in section 5(a) of *ESTA* which provides that,

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<sup>270</sup> Section 5 deals with the fundamental rights of an occupier, an owner, and a person in charge. Of relevance for present purposes is section 5(a) which provides that "subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to . . . human dignity". Section 6 provides that "(2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right—

(a) to security of tenure; (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997

(dA) to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists; (e) not to be denied or deprived of access to water; and

(f) not to be denied or deprived of access to educational or health services.

(3) An occupier may not—

(a) intentionally and unlawfully harm any other person occupying the land

(b) intentionally and unlawfully cause material damage to the property of the owner or person in charge

(c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or (d) enable or assist unauthorized persons to establish new dwellings on the land in question.

<sup>271</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

“subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to... human dignity.”<sup>272</sup>

Through this, the Court sought to illustrate the importance of the constitutional value context in the application of statutes. The first issue in contention was whether *ESTA* allowed for an occupier to improve his/her dwelling. The Court in this regard held that the respondent’s argument that *ESTA* does not grant the occupier rights to effect improvements to her dwelling was a narrow interpretation of *ESTA*.<sup>273</sup> That is to say when one takes into consideration as one is implored to always do, the purpose and context of *ESTA*,<sup>274</sup> and that of s 39(2) of the Constitution,<sup>275</sup> the provisions as they appear in *ESTA* should be read together instead of individually to necessitate a broader understanding of that which is not expressly stated. In this instance the rights of occupiers as listed in s6 of *ESTA* do not expressly list the right to effect improvements however when s6 is read in conjunction with s5, the reading advances the element of human dignity.<sup>276</sup> Through this element of human dignity, the courts sought to infuse justness and equitability consideration in into the enquiry, the court had to consider the statue against the broader objects and foundational values of the Constitution.

The court articulated the relation of adequate housing to human dignity by stating that, a home is not just about a roof over one’s head but also about the dwelling being conducive for habitation that does not infringe the human dignity of the would-be occupier.<sup>277</sup> It also follows that the right to security of tenure speaks to the restoration of the human dignity that was stripped away from the previously disenfranchised. Thus, the condition of one’s living conditions is intricately linked to his/her level of dignity. Furthermore, this Court noted the right to security of tenure aims to curb the constant relocation of the most vulnerable and disadvantaged members of our society from pillar to post with no finality. As such the Court sought to ponder those instances as envisaged in the set of facts presented, were the

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<sup>272</sup> The Extension of Security of Tenure Act 62 of 1997 (*ESTA*).

<sup>273</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

<sup>274</sup> To regulate the conditions of residence on certain land against the backdrop of previous injustices.

<sup>275</sup> S39 (1) Constitution of South Africa, 1996.- When interpreting the Bill of Rights, a court, tribunal, or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.

<sup>276</sup> See fn 138 above.

<sup>277</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

probable forced abandonment of occupation as result of inhabitable conditions of the dwelling was a reality. The idea of 'adequacy' in the 'right to adequate housing' called for a constitutional threshold prescribing the standard of habitability to be expected from the provision. Considering the above, the Court held that judges should embrace interpretations of legislation that fall within constitutional bounds over those that do not, provided that the interpretation so used can be reasonably ascribed to the section.<sup>278</sup>

In addressing the second issue at hand, whether the owner's consent was required before the occupier would be allowed to affect the improvement, the Court considered the following. If the Court were to accept that the consent was not expressly required, the assumption would be that the Court sought to impose positive obligations on the owners of the property. The Court held that it has never through case law ruled that private persons, in terms of s8(2) of the Constitution, may not bear positive obligations under the Bill of Rights and the issue of positive obligations was of less of importance in comparison to human dignity and security of tenure.<sup>279</sup> Further, the Court held that the enquiry into whether the Appellant has the right to effect improvements to her dwelling cannot end merely because allowing same will create a positive obligation on the respondents. The *Daniels* judgment went further by stating that farm owners may be required to take positive steps to realize the rights of occupiers living on farms. This could include reimbursing an occupier for improvements made to the dwelling if they leave the farm as envisaged section 13 of *ESTA*.<sup>280</sup> While simultaneously the occupier's right to human dignity as

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<sup>278</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

<sup>279</sup> *Ibid.*

<sup>280</sup> S13 of The Extension of Security of Tenure Act 62 of 1997; Section 13(1) provides:

"(1) If a court makes an order for eviction in terms of this Act—

(a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether—

(i) the improvements were made, or the crops planted with the consent of the owner or person in charge; (ii) the improvements were necessary or useful to the occupier; and

(iii) a written agreement between the occupier and the owner or person in charge, entered prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement

(b) the court shall order the owner or person in charge to pay any outstanding wages and related amounts that are due in terms of the Basic Conditions of Employment Act, 1983 (Act No. 3 of 1983) the Labor Relations Act or a determination made in terms of the Wage Act, 1957 (Act No. 5 of 1957); and (c) the court may order the owner or person in charge to grant the occupier a fair opportunity to—

(i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; and



envisaged by the conditions of living/habitation could not be negotiated, the Court held that the owner's consent cannot be a prerequisite when an occupier wants to bring his/her dwelling to a standard that conforms to conditions of human dignity.<sup>281</sup> In addition to the Court had to consider the fact that the property owners had not sought to engage with the occupier in that instance. This is cognizant of the need for a harmonious relation and balance between the right of the owner and those of the occupier which the purpose *ESTA* seeks to implore in all tenure relationships.<sup>282</sup>

### **3.3 CONCLUSION.**

The jurisprudence chronicled in this chapter has had the effect of changing the way the horizontal application of the right to adequate housing is to be adjudicated. The one assailant feature of the jurisprudence is aptly captured in the dictum of *Sachs J* in *Port Elizabeth Municipality* describing the role of the constitution in the interpretation of the statutes governing the right to adequate housing,<sup>283</sup>

"The Constitution imposes new obligations on the courts concerning rights relating to property not previously recognized by the common law. It counter poses the normal ownership rights of possession, use and occupation a new and equally relevant right not arbitrarily to be deprived of a home ... 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."

Through the jurisprudential developments, what has been envisaged is the express inclination towards a substantive application of the regulations giving effect to the right to adequate housing as opposed to a procedural/technical application. Thus, the courts have to a larger extent sought to replace the dogmatic and strenuous procedural approach to housing cases with a fluid, constitutionally substantiated, valued approach. This approach has led to the three jurisprudential developments in which the Courts have either suspended or refused to grant eviction

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(ii) tend to standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them."

<sup>281</sup> Daniels v Scribante and Another 2017 ZACC 13.

<sup>282</sup> Ibid.

<sup>283</sup> Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC) at para 23.

in the absence of a multi-stakeholder guaranteed alternative. Nevertheless, the power of the Court's to address the right in question with finality remains untested. The nature of an unlawful occupiers' tenure for all terms and purposes remains unsecure and hanging by the proverbial thread. While the new demand for the right to have adequate housing is met, the original need of secure tenure is often left unsatisfied.

The next chapter builds on this analysis, by providing a critique of the jurisprudence from a transformative perspective. In providing a critical appraisal of the jurisprudence, I aim to bring to the fore the missed opportunities inherent in this jurisprudence and thus forecast the courts potential in adjudicating the right to adequate housing in an environment of limited resources. Finally, I examine the impact, the conservative legal culture has had and continues to have towards the unwillingness of the courts to impose positive obligations on private persons.



## CHAPTER 4.

### **A TRANSFORMATIVE CRITIQUE OF THE RIGHT TO ADEQUATE HOUSING JURISPRUDENCE.**

#### **4.0 INTRODUCTION.**

In this chapter, I give an overview and appraisal of the effect, the on-going conservative South African legal culture has on the horizontal application of the right to adequate housing. In this chapter, I invoke the concept of transformative constitutionalism and its tenet's which include that of grappling with a 'conservative' legal culture recognizing the tension between freedom and constraint and most importantly retaliating against false consciousness, as a scope for addressing the research question. The chapter will also highlight some important debates and inefficiencies of a conservative legal culture inherited from apartheid. Locating this phenomenon in the unwillingness of the judiciary to impose positive obligations on private persons and its consequential impact on the overall transformative object of the constitution. This approach will be guided by the work of authoritative voices of transformative constitutionalism in South Africa namely Karl Klare and Sanele Sibanda.

The chapter is comprised of four sections. In section 4.1, I start by defining the concept of legal culture in the abstract sense highlighting all its facets and contemplations to enable a comprehensive understanding of the phenomenon. In addition to this, I locate the defined understanding of the legal culture in the South African narrative. In section 4.2, I discuss the concept of transformative constitutionalism in the general sense in so far as it is the proposed scope for the reading of the South African Constitution. In section 4.3 I provide a comprehensive critique of the horizontal application of constitutional housing rights jurisprudence discussed in chapter in chapter 3, from a transformative perspective. In so doing the supposition of a conservative legal culture as a limitation to transformative constitutionalism will be interrogated. In section 4.4, I conclude the chapter by reflecting on the positions advanced.

#### **4.1 DEFINING LEGAL CULTURE.**

Legal culture as a facet of the general culture that is associated with law refers to the ideas, values, attitudes, behaviors and practices of legal institutions and legal actors.<sup>284</sup> Klare contends that it can also be described as patterns, trends and tendencies in which law and legal concepts are approached by legal actors.<sup>285</sup>

Identifying legal culture involves an analysis of the parameters, i.e., the nature, source, and operation of that culture. The content of a legal culture according to Klare may find formal expression in judicial decisions or in the opinions of judges and lawyers through which that law is interpreted and applied which can sometimes lead to culturally determined decisions.<sup>286</sup>

According to *Friedman* there are two categories of legal culture; the internal and external legal culture.<sup>287</sup> The Internal legal culture as he contends describes the attitude of legal actors such as judges and lawyers towards law whilst the external legal culture describes the attitude of the general population towards law.<sup>288</sup>

Legal sociologists consider the external legal culture as more important. This is so because laws and the impartiality and reliability of legal institutions have a different meaning to the various groups in each society.<sup>289</sup> However, doctrinal lawyers by contrast focus more on internal legal culture. They believe the more autonomous law is within the society, the more important internal legal culture becomes important in comparison to external legal culture.<sup>290</sup> In contention however, this distinctive narrative expose legal culture to a false positive result.

It follows by way of deduction in this scenario as will be envisaged throughout this chapter, that the external cannot be separated from the internal. The attitude of general population towards the law harbors the attitudes of future lawyers and adjudicators alike, towards the law. The study of law and legal principles does not

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<sup>284</sup> Nelken, D 'Using the Concept of Legal Culture' 29 Austl. J. Leg. Phil. 1 2004 Content downloaded/printed from Hein Online (<http://heinonline.org>).

<sup>285</sup> Klare, K 'Legal Culture and Transformative Constitutionalism' (1998) South African Journal on Human Rights 146-188.

<sup>286</sup> Klare 1998 14 SAJHR 146 at 162.

<sup>287</sup> Friedman, LM 'The Legal System: A Social Science Perspective' (1975).

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

entirely entail the deconstruction of that which is inherent in a human being's belief system rather it seeks to incorporate a degree of this human aspect.

A defining property of legal cultures, particularly relatively homogeneous and stable legal cultures, is that its participants tend to accept its intellectual sensibilities as normal.<sup>291</sup> That is, participants often do not perceive the cultural specificity of their ideas about legal argument.<sup>292</sup> This continued reliance on the same legal rules and legal sensibilities of the pre-constitutional era<sup>293</sup> has somewhat created a false consciousness in South Africa's legal culture as it's seen as being normal and necessary thereby making it more resistant to change and achieving the transformative goals of the constitution.

This dissertation's claim is not that there is a single distinct legal culture and that all participants in South Africa approach or think about law or "do" law in the same way. However, I do identify some main foundational attributes that point towards a conservative legal culture envisaged through a contextual appraisal of the judiciary's unwillingness to impose positive obligations on private persons in the realization of the right to adequate housing. Important to reiterate at this juncture is that the appraisal mentioned herein is illuminated by a transformative reflection of the jurisprudence discussed in the previous chapter.

It is much easier to address content as the content of law can be changed easily, but the context remains the same.<sup>294</sup> Just like cultures in general, legal culture takes longer to change.<sup>295</sup> This systemic momentum is also true for the South African legal culture, a tendency that can be investigated through a notion coined 'continuation' in which progress is attributed to piecemeal advances to a preconceived equality.<sup>296</sup> It seeks to suggest by way of necessity that the situation is meant to adapt to the approach as opposed to the approach adapting to the situation.

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<sup>291</sup> Klare (1998) SAJHR 151.

<sup>292</sup> Klare (1998) SAJHR 151.

<sup>293</sup> Legal formalism amounts in fact to a paradigm in which legal decisions are made according to legal rules and doctrines. Rights and entitlements made according to these rules are seen in turn as different from substantive decisions in which political and other considerations govern.

<sup>294</sup> De Villiers, I 'South African Legal Culture in a Transformative Context' (2009).

<sup>295</sup> Ibid.

<sup>296</sup> Ibid

This raises a recurring question in this chapter. If we know where we ought to go why has it and still taking so much time to get to that point? Given that the crux of the realization of the adequate housing is the lack of sufficient land or resources to acquire such land by government vis-a-vis the demand on the one hand. The acknowledgement of infinite resources in society vis-a-vis their concentration in private hands, on the other, it follows that the path to obligating private persons is that of necessity.

As Brand,<sup>297</sup> argues in relation to the content that although the development of constitutional socio-economic rights to establish new and unique constitutionally based remedies is an important endeavor on its own, to explore the full transformative potential of socio-economic rights, sustained critical engagement also with these common law background rules is crucial. The same applies in relation to the contextual aspect. Critical engagement with the sub-conscious inertia that inform the judicial approach and understanding of socio-economic rights, in particular the right to adequate housing is critical not only to the effective realization of the right but also the equal redistribution and access to resources and equality.

A search and critical examination of the legal culture and its multifaceted and diffuse influences on interpretive practices would therefore seem to be a constitutional duty in the new dispensation.<sup>298</sup>

#### **4.2 THE NOTION OF TRANSFORMATIVE CONSTITUTIONALISM.**

The 1996 South African Constitution is widely regarded as a successful example of transformative constitutionalism, not least because it includes justiciable socio-economic rights that have enabled the Constitutional Court to transform views about the enforceability of these rights. The Preamble declares transformation to be an explicit aim of the Constitution, which is also designed to redress the historical wrongs of apartheid and to facilitate the construction of a new economic, political and social dispensation 'based on democratic values, social justice and fundamental

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<sup>297</sup> Brand, D 'Introduction to Socio-economic Rights in the South African Constitution' (2005) 39.

<sup>298</sup> Klare, K (1998) SAJHR.

human rights.’ It envisages a deliberative participatory democracy<sup>299</sup>. It is within this context that the continued conservative legal culture is explored.

Transformative Constitutionalism according to Klare is defined as entailing, a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law.<sup>300</sup>

Sanele Sibanda,<sup>301</sup> defines the concept of transformative constitutionalism as the notion of a system of governance established under a constitutional document whose primary functions are to structure, delineate, distribute, and limit state power within a defined political community. Implicit in this understanding of constitutionalism is the idea that constitutional norms, values, and principles are not predetermined, but they are rather the product of the political, economic, social, and cultural history (both local and global) prevailing at the time of a constitution’s adoption.<sup>302</sup>

Thus, while modern constitutionalism has come to be linked to norms, values, and principles, these are no less the product of an evolutionary process that is intently related with specific histories.<sup>303</sup> Sibanda,<sup>304</sup> provides two approaches to constitutionalism when looking at the South African constitution: The first of these perspectives is the orthodox or liberal democratic approach to constitutionalism. Emphasis here is placed on the gains of political transformation, limitations placed on state power, an independent judiciary that enjoys powers of substantive judicial review and a general respect for the rule of

<sup>300</sup> Klare, K (1998) SAJHR 150.

<sup>301</sup> Sibanda, S. ‘Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and The Struggle to Eradicate Poverty.’ *Stell Lr* (2011) 3.

<sup>302</sup> Devenish, G ‘A Commentary On The South African Constitution.’ (1998) 4.

<sup>303</sup> Sibanda, S ‘Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and The Struggle to Eradicate Poverty.’ *Stell Lr* (2011) 3.

<sup>304</sup> *Ibid.*

law.<sup>305</sup> Its proponents tend to view South Africa since the adoption of the post-apartheid constitution as steadily transforming from autocratic rule to a stable liberal democracy.<sup>306</sup>

The second perspective which speaks to this research is one that she describes as a transformative approach to constitutionalism. Proponents will point out that despite having achieved political transformation and the constitution's preamble commitment to "improve the lives of all citizens" and the inclusion of socio-economic rights in the Bill of Rights,<sup>307</sup> living conditions in South Africa remain fundamentally unchanged for many black citizens for whom apartheid's multiple legacies continue to be a living and lived reality.<sup>308</sup>

Of major concern to those subscribing to this approach is the fact that despite political transformation, South Africa continues to suffer from increasing income inequality; deeply entrenched structural poverty; sharp increases in rural-urban migration and a growing educational crisis.<sup>309</sup> But what is the transformation envisioned by the Constitution and the Bill of Rights in particular? Albertyn and Goldblatt's answer to this vexed question is instructive,<sup>310</sup>

"We understand transformation to require a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class, and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships."<sup>311</sup>

Deputy Chief Justice Moseneke equally opined that "the Constitution is avowedly transformative as it retains from the past only the good and defensible and turns its back firmly on the rest. Many constitutions of the world merely regulate the dispersal and exercise of public power. Others also record justiciable fundamental rights and

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<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Moseneke, D 'The Fourth Braam Fischer Memorial Lecture on Transformative Adjudication' 18 S. Afr. J. on Hum. Rts. 309 2002.

<sup>311</sup> Albertyn, C & Goldblatt, B 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 248, 249.



freedoms. Our Constitution does these things too. But it goes much further than any other Constitution I know.

Transformation according to the Chief Justice Pius Langa is an open-ended process rather than a temporary phenomenon that ends when everyone has equal access to resources and basic services and when lawyers and judges embrace a culture of justification.<sup>312</sup> Transformation he contends is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible and new ways to bring about change being constantly explored, created, accepted, rejected and in which change is unpredictable but the idea of change is constant.<sup>313</sup> This to him is perhaps the ultimate vision of a transformative, rather than a transitional constitution as it envisions a society that will always be open to change, contestation and defined by transformation.<sup>314</sup>

The above appraisals of the transformative tenet of the South African constitution speak to the freedom and liberties for all, however in the main, these appraisals go over and beyond and raise by way of necessity the need to deconstruct systemic forms of domination which previously entrenched inequality and continue to slow down the transformative process in modern society. When one considers the context of the South African discourse on apartheid and in the main the right to housing as cornerstone of that racial policy, a conservative legal culture only serves to 'conserve' that which we seek to depart from.

The supposition of transformative constitutionalism does not suggest transformative constitutionalism as the realization of the exponential potential of the constitution of South Africa but rather as a checkpoint whose bearing is that of direction as opposed to the destination. The transformative constitutionalism paradigm should not be viewed as the means to an end but rather a pathway to which proper diligence is due. Like any pathway, the road to equality remains littered with uneven terrains hence the need to level the terrain before the road can be smooth.

#### **4.3 JURISPRUDENTIAL CRITIQUE FROM A TRANSFORMATIVE PERSPECTIVE.**

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<sup>312</sup> Langa, P 'Transformative constitutionalism' (2006) 17(3) Stellenbosch Law Review 351.

<sup>313</sup> Ibid.

<sup>314</sup> Ibid.

The critique in this section follows the willingness/unwillingness of the courts to impose positive obligations on private property owners in tandem with transformative precepts of the Constitution as envisaged above. The critique of this jurisprudence flows from the critique highlighted in *Pieterse's* commentary on the *Grootboom* case in which he explores *Gabel's* theory,<sup>315</sup>

“Gabel's theory reveals an obvious fault line in the narrative those critics of the Constitutional Court's socio-economic rights jurisprudence all too easily overlook - the hollowness of the rights at the centre of the jurisprudence. For while myself and other commentators typically blame the empty victory of the drama on the Constitutional Court's ingrained ideological sensibilities, its formalistic approach to adjudication and its remedial timidity, Gabel reminds us that the Court comes into play only after the battle has, for all practical purposes, already been lost. Instead, Gabel directs our attention more specifically, to the moment that a member/citizen is misled to demand the right to have her need satisfied rather than to insist on the actual satisfaction of that need. When state/society eventually responds to this new demand, it does so in terms that, while ostensibly meeting the new demand, allow for the non-fulfilment of the original need. By requiring observers to shift their focus thus, Gabel's account reveals socioeconomic rights (at least in the manner they have been articulated in sections 26 and 27 of the South African Constitution) to be accomplices to, rather than casualties of, the judicial and political side-lining of the needs they represent”.<sup>316</sup>

That is to say, the nature of the obligation being ascribed to as positive, relates to the extent to which the obligation seeks to have a positive effect on the original need as opposed to the new demand. Relatively, a negative obligation espouses the duty to refrain from doing something i.e., refrain from carrying out pending evictions. Contrary, a positive obligation espouses the duty to engage in the perpetual action to secure the effective enjoyment of the right to adequate housing.

#### **4.3.1 FIRST JURISPRUDENTIAL DEVELOPMENT.**

The jurisprudence in this development, as enunciated in Chapter 3, speaks to those judgements where the courts' horizontal application of the right to adequate housing resulted in the court setting aside an eviction, in favor of an order obligating private property owners to allow the unlawful occupiers to remain on their land indefinitely.

<sup>315</sup> Pieterse (n 37 below) 808-809. For the *Grootboom* case, see *The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC). For the TAC case, see *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC).

<sup>316</sup> Pieterse, M 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796-822.

In *PE Municipality*,<sup>317</sup> *Sachs J* rightfully sets the tone by expressing the role of the judiciary in eviction cases where the right to housing and the right to property (private ownership rights) are not only at odds but also where the issue of suitable alternative accommodation has manifested as an obligating requirement for the granting of such evictions in terms of the both the *PIE* and *ESTA*.<sup>318</sup> *Sachs J* resonates with the intrinsic underpinnings of this dissertation loudly when he candidly reveals what is starting to be the rhetoric of many critics that,

"The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systematic unfairness to be found in our society. Yet it can at least soften and minimize the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails."<sup>319</sup>

Although *Sachs J* was able to articulate the role of the judiciary in minimizing the degrees of injustice and inequity, one can point out that, the Court in *Port Elizabeth Municipality*,<sup>320</sup> failed in that regard. The Supreme Court of Appeal (*SCA*) in that instance, emphasized that, to elevate the factor of alternative accommodation to a precondition for an eviction order would have far reaching and chaotic consequences which could never have been envisaged by the legislature. The *SCA* submitted that, this would amount to an unlawful, arbitrary deprivation of property. By so doing, the case raised the question whether the legislature sought to suggest the non-derogable nature of private property rights in contrast to the right to adequate housing by disposing of the subject of that right which ultimately comes down to shelter over one's head.

The Constitutional Court held that, despite the recognition that a positive duty can be placed on a private individual, the constitutional obligation to ensure access to

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<sup>317</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>318</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>319</sup> *PE Municipality* case par 38.

<sup>320</sup> *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759.

adequate housing lies solely on the State and not on private citizens.<sup>321</sup> As a result, the Constitutional Court reversed the SCA decision to grant the eviction order on the unlawful occupiers, until such a time the Municipality could guarantee security of tenure in another location within their jurisdiction.<sup>322</sup> In *Molusi*,<sup>323</sup> the Constitutional Court set aside the eviction primarily on the basis that the property owners had relied on commonlaw instead of the constitutionally reflective legislation, in the process diverting interests of the occupiers. That is to say, the Constitutional Court was of the belief that, not only were the grounds upon which the eviction was being sought incorrect, but that they were incorrect because they negated the balance that the correct avenue would have impressed on the enquiry. The Constitutional Court in this instance proffered the balance between the interests of the owner of the land and those of the occupiers so as to infuse justice and equity or fairness into the enquiry.<sup>324</sup> However, as the analysis in Chapter 3 revealed, the consideration of the fairness of the termination of the applicants' rights of residence, the hardship that would eventuate from the termination of the rights of residence, and the subsequent eviction, will always hinge on the availability of State provided suitable alternative accommodation. In *All Builders* case,<sup>325</sup> the judgement followed the same path as those discussed above. The High Court sought to infuse the elements of justice and equitability into the enquiry by considering, the length of time which the first respondent had occupied the premises, the circumstances under which he first occupied the premises, the fact that he is an old age pensioner, and the lack of alternative accommodation, in arriving at the decision to set aside the eviction. Significantly in *All-Builders*,<sup>326</sup> the judge considered the inconvenience it would cause the landowner to provide accommodation as part of the proposed future use of the property.<sup>327</sup>

The cases discussed above, all sought to set aside the eviction applications on the basis that they did not fully comply with the substantive provisions of the legislation governing the

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<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6.

<sup>324</sup> Ibid.

<sup>325</sup> *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

<sup>326</sup> *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

<sup>327</sup> Ibid.

right to adequate housing.<sup>328</sup> While that is laudable, the effect of the courts' decision on the right to adequate housing, 'the original need', remains a stirring point. It follows that, by setting aside the evictions in these cases, the court action does not prevent future eviction applications from being brought forward by private property owners. The courts in these instances never truly sought to tackle the nature of the right the occupiers are seeking to protect or rather enforce if one is to say (security of tenure). I proffer that one protects what has been gained and enforces that which is owed and hopes to get. This semantic differentiation highlights what the courts in this development sought to do as opposed to what they ought to have done. In these cases, what had been gained was the legacy of unsecure tenure and in turn what was protected in the end was exactly that, the protection of an unfavorable status quo. The occupier's tenure remains as insecure as when they first approached the courts.

What is important to draw from these cases, however, is how the courts have been adamant in their approach to the horizontal application of the right to housing despite the folly expressed above. While the court in this jurisprudential development differentiates itself from the second jurisprudential development as discussed above in terms of the final order given, the effect on the 'original need' as it were, is identical. The requirement of suitable alternative accommodation for the unlawful occupiers still glaringly stands out as the ultimate question posed by the right to adequate housing. However, what the court in this jurisprudential development shy's away from is the question as to who must provide that accommodation in the absence of the State's capability. Conservatively, and true to form, the court proposes a mediation of interests between the property owners and unlawful occupiers in a bid to find an agreeable solution. This, however, does not advance certainty and finality in any way but rather signifies an attempt to avoid and delay the satisfaction of the 'original need' by reverting the responsibility back to the private parties who approached the court for reprieve. This has been the court's character in hotly contested cases.

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<sup>328</sup> The Extension of Security of Tenure Act 62 of 1997 and Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

### **4.3.2 SECOND JURISPRUDENTIAL DEVELOPMENT.**

In this development, the court sought to address the imposing question on who is to assume the duty to provide adequate housing in the absence of the State's capability to do so. In response, the court negatively obligated private property owners to allow unlawful occupiers to remain on their property/land while the state makes the necessary arrangements to secure alternative accommodation.

In *Blue Moonlight*,<sup>329</sup> the Constitutional Court affirmed the position that no direct positive obligation to house unlawful occupants could be imputed to private landowners. The Court held such an obligation would amount to deprivation of property.<sup>330</sup> The Court articulated the owners' entitlement to an order of eviction, but subject to it indulging the unlawful occupiers while the State finds alternative/emergency accommodation.<sup>331</sup> The *Blue Moonlight* case highlights the courts inclination to an indirect general application of constitutional rights as opposed to a direct application which this study seeks to advance.<sup>332</sup>

The *Blue Moonlight* judgment requiring the *City of Johannesburg* to provide alternative accommodation in the wake of an eviction by *Blue Moonlight Properties* is faulty on principle. Firstly, the basis upon which the court implored the imposition of a negative obligation which took the form of a stay on eviction while the suitable alternative accommodation was sought by the State suggests the following deductive logic. If the imposition of obligations, albeit negative, is a justifiable limitation of s25 in which private landowners may in certain circumstance be called upon to temporarily house unlawful occupiers as part of non-State actor's duty not to impede the access to adequate housing, how does it justify the advancement of other socio-economic rights?

<sup>329</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

<sup>330</sup> *Id* at para 37.

<sup>331</sup> *Id* at para 40.

<sup>332</sup> Sprigman, C and Osborne, M 'Du Plessis is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *South African Journal on Human Rights* 25.- Indirect application is, importantly, different from direct application in that the result the court's decision - is not a constitutional ruling with the rigidity and finality attendant upon such a decision, but a common law ruling made in light of constitutional values; i.e. a ruling that is amenable to repeal or modification by ordinary legislation.

Secondly, the nature of a negative obligation as articulated in the *Grootboom* case above, when applied to the *Blue Moonlight* judgement results in a double negative which infers the positive. In essence, it is a holding that a negative obligation on all persons to desist from impairing the rights to housing can be envisaged to imply a stay on all actions which have the potential to render an otherwise unlawful occupier homeless i.e., instituting eviction proceedings. The consequential effect would then be a scenario in which, the private property owners find themselves in a situation where they satisfy the need, albeit unintendedly.

This finds more relevance amid a perennial failure on the part of the City of Johannesburg and indeed other extensions of the State to uphold various court orders (that had stacked up while waiting for the *Blue Moonlight* judgment to be handed down by the Constitutional Court) for the provision of alternative accommodation pending eviction of low-income residents by private landlords. These cases include *Chung Hua Mansions*,<sup>333</sup> and *Hlophe*,<sup>334</sup> all cases which were being litigated by legal non-governmental organizations (NGOs) to obligate the City of Johannesburg to at least provide court-ordered alternative accommodation to desperately poor residents of Johannesburg's inner city being evicted by private landlords. In each case, the City had delayed processes, missed court deadlines to file papers and manifestly failed to meaningfully engage with the residents to discuss the alternatives, admitting on record that it had no accommodation available.<sup>335</sup> This had necessitated lengthy, repeat litigation, and has recently resulted in a new tactic among litigating NGOs, of holding municipal authorities directly responsible for the non-compliance with court orders. However, the solution does not lie with the municipalities or the State in the larger sense. It follows that, in world of finite resources, the State is inherently incapable of meeting

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<sup>333</sup> City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) (Tikwelo or Chung Hua case). For more on the ongoing litigation in this case, see the website of the Socio-Economic Rights Institute (SERI): [www.serisa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hooseinmahomed-and-others-chung-hua](http://www.serisa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hooseinmahomed-and-others-chung-hua).

<sup>334</sup> Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others 2013 (4) SA 212 (GSJ) (Chung Hua). For more on the on-going litigation in this case, see the website of the Socio-Economic Rights Institute (SERI): [www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua](http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua).

<sup>335</sup> See, for example, LRC press release 'LRC welcomes High Court judgment in housing matter' (15 May 2013): [www.lrc.org.za/press-releases/2724-2013-05-15-presstatement-lrc-welcomes-high-court-judgment-inhousing-matter-](http://www.lrc.org.za/press-releases/2724-2013-05-15-presstatement-lrc-welcomes-high-court-judgment-inhousing-matter-)

the demand for suitable housing. This is further accentuated by South Africa's own aggravating factors such as the racially construed Acts.<sup>336</sup>

This trend signals the need for human rights lawyers and adjudicators alike, to move away from a largely reactive approach to housing litigation and to actively strategize around proactive viable legal options, which this dissertation accepts to be innate within the constitutional framework in a bid to achieve the aspirations of an equal society.

In the *Baron case*,<sup>337</sup> this Constitutional Court had to consider the provisions of *ESTA* to determine when an eviction will be just and equitable and what it means that occupiers are granted 'suitable alternative accommodation' under certain circumstances.<sup>338</sup> The *LCC*, placing reliance on *Changing Tides 74*,<sup>339</sup> found that the first respondent undeniably had the immediate need to use the housing units to house its current employees. The *LCC* relied on *Theewaterskloof Holdings*,<sup>340</sup> in concluding that the first respondent had shouldered the State's responsibility to house the applicants for many years, an anomaly given the private owner's entitlement to property rights.<sup>341</sup>

The Judge conceded that an adherence to a strict classification of horizontal or vertical application of the Bill of Rights obfuscates the true issue, whether within the relevant constitutional and statutory context a greater 'give' is required from certain parties. The Constitutional Court through *Pretorius AJ* further qualifies that any 'give' must be in line with the Constitution, alluding to a direct as opposed to an indirect influence of the constitution's value system.<sup>342</sup> Furthermore, the Judge ponders a scenario in which the State fails in its obligation to provide suitable alternative accommodation, what then becomes of the question of housing the weaker party. Despite the

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<sup>336</sup> Rugege, S 'Land Reform in South Africa: An Overview' (2004) 32 *International Journal Legal Information* 283 at 286

<sup>337</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.

<sup>338</sup> *Ibid.*

<sup>339</sup> In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA) (*Changing Tides 74*) at fn 23, the Court held the following—"If the landowner had no immediate or even medium-term need to use the property and it would simply be sterilised by an eviction order, the court could legitimately hold the view that it was not just and equitable at that time to grant an eviction order."

<sup>340</sup> *Theewaterskloof Holdings (Edms) Bpk, Glazer Afdeling v Jacobs* 2002 (3) SA 401 (LCC). Para 18.

<sup>341</sup> Section 25(1) of the Constitution provides: "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

<sup>342</sup> *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24.



narrow scope of relevant provision of *ESTA*, the Judge rightfully applied the deductive logic that, the private owner will then be expected to assist in the finding of alternative accommodation and if that fails, to provide suitable accommodation in his personal capacity as the subject of the right stands to be fulfilled regardless.<sup>344</sup> Although this was a mere reflection by the judge, it is important to draw attention to the line of reasoning in this regard.<sup>345</sup> In the principle of substantive equality it is demanded that a greater give is required from the haves. It follows that in a country of finite resources there can only be so much that can be given without the deliberate contribution of the haves.

#### **4.3.3 THIRD JURISPRUDENTIAL DEVELOPMENT.**

In the *Daniels* case,<sup>346</sup> the Constitutional Court deliberated on the contribution of the haves. The case as enunciated in Chapter 3 of this dissertation dealt with the question whether an occupier could make improvements to her home without the landowner's permission, to render it habitable. For the purposes of this discussion, the critique of this case will be used to illuminate the transformative departure and to discern the inherent inaptitude in the articulation of the legislation and provisions governing the right to adequate housing as expressed through *Gabel's* theory.<sup>347</sup>

In arriving at the judgement, that indeed the *Ms. Daniels* had the right to effect improvements on private property without the consent of the private, the Constitutional Court sought to marry the right to security of tenure and the right to human dignity.<sup>348</sup> The Court's departure in this instance was formulated in cognizance of the right to human dignity. The right to human dignity albeit in the slightest of terms is encapsulated in section 5(a) of *ESTA* which provides that,

"subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to... human dignity."<sup>349</sup>

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<sup>344</sup> Ibid.

<sup>345</sup> Section 10(2) *ESTA* has a narrow scope: it only applies in circumstances where an owner wishes to evict an occupier where there has been no breach or breakdown of the employment relationship.

<sup>346</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

<sup>347</sup> Id at para 32.

<sup>348</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

<sup>349</sup> The Extension of Security of Tenure Act 62 of 1997 (*ESTA*).

The argument as to whether the final judgement had the effect of imposing a positive obligation is neither here nor there. Although the common law rule against unjustified enrichment provides that property owners should compensate the occupier upon eviction, for the patrimonial benefit that will accrue to them as result of the improvement. The fact that the occupier in this instance had sought to take on the costs personally to effect the changes negated the loss/give element of a positive obligation on either party.

Important, however, is the contemplation leading up to the judgement. The Constitutional Court through *Madlanga J* held that, there is no basis for reading the reference in section 8(2), ‘the nature of the duty imposed by the right’, to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person (private persons). Whether private persons will be bound depends on several factors. What is paramount includes, what is the nature of the right;<sup>350</sup> what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the ‘potential of invasion of that right by persons other than the State or organs of state’,<sup>351</sup> and, would letting private persons off the net not negate the essential content of the right?<sup>352</sup> If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it. Section 8(2) does envisage that. In application to the right to adequate housing, its nature serves to guarantee the provision of housing through the facilitation and strengthening of security of tenure against the backdrop of a colonial legacy of systematic land dispossession of the majority of this country.<sup>353</sup> The right to adequate housing serves to reconfigure the past through renegotiating the colonial characteristic of the property distribution system in South Africa. Categorically, the question posed by this dissertation relates to how the right can be best achieved amidst the potential invasion of that

<sup>350</sup> In *Khumalo v Holomisa* 2002 [ZACC] 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 33 this Court was partly moved by what it called “the intensity of the constitutional right in question” to hold that “the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2)”. That case concerned the media’s right to freedom of expression under section 16 of the Constitution.

<sup>351</sup> *Id.*

<sup>352</sup> *Daniels v Scribante and Another* 2017 ZACC 13.

<sup>353</sup> *Ibid.*

right by private persons and whether letting private persons off the net, negates the essential content of the right.

The Constitution in S39(2) enjoins the court to promote the spirit, purport, and object of the Bill of Rights when interpreting legislation.<sup>354</sup> The foundational values of freedom, equality, and human dignity are envisaged as the guiding principles in the application of all law and in the development of the common law.<sup>355</sup> Pursuant to this departure, *Madlanga J* in *Daniels*, expresses the hollowness of the legislation governing the right to adequate housing as identified in *Gabel's* theory. The Constitutional Court in that instance relies on human dignity as the remedy to *Ms. Daniels* plea to make improvements.<sup>356</sup> The Court held that, a purposive interpretation must be followed when construing *ESTA* and s 25(6) of the Constitution.<sup>357</sup> One must look to purposefully synchronize the legislation (*ESTA*) with the purpose of the constitutional provision giving effect to the legislation. In so doing, what consequently became apparent to *Madlanga J*, however, is the limitation of the legislation in its articulation, to effectively capture the purpose of the constitutional right. In turn, the Court through *Madlanga*, cognizant of this deficiency in the legislation, conservatively attempts to fill in the exposed lacuna in the most convenient of ways by relying on the broader constitutional object of human dignity as a direct and enforceable remedy. While the judgement passes the transformative muster in its reflection of the aspirations of the letter. It suffices to note that, the influence of a conservative legal culture ever so presently played its hand in the Constitutional Court's reluctance to open the proverbial 'can of worms' that would have come to light had the *ESTA* been found unconstitutional and sent back to the legislature. Instead, the judgement had the effect of creating an

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<sup>354</sup> *Daniels* supra note 1 par 25.

<sup>355</sup> S25(6) of the Constitution of the Republic of South Africa, 1996 - A person or community whose tenure of land is legally insecure because of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

<sup>356</sup> S39 of the Constitution of the Republic of South Africa, 1996. When interpreting the Bill of Rights, a court, tribunal, or forum • (a). must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;(2). When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.

<sup>357</sup> *Daniels* supra note 1 par 23ff, citing *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) par 53. The long title of *ESTA inter alia* stipulates that the Act is meant 'to provide for measures with State assistance to facilitate long-term security of land tenure.'

additional system of law (each harboring conservative interests) to complement the common law and legislation, a phenomenon that runs contra to the constitutional scheme.

#### **4.4 LEGAL CULTURE AS A LIMITATION TO TRANSFORMATIVE CONSTITUTIONALISM.**

As a device of settlement, the constitution can perform its function only if the judiciary, who have what *Gardner* termed reforming powers, remains objective in its interpretation and application.<sup>359</sup> However, the judiciary are moved and influenced by different experiences, prejudices, interests, and culture rendering the constitution either strong or weak in achieving real transformation.

The apartheid era legal system was not confined to public law, but equally to private party relations. The system somewhat guaranteed a sphere of private autonomy where the State itself could not legitimately invade. This was evidenced by the nature of the private property ownership rights regime of the time which rested upon the conception of private property ownership as pre-political.

As such, much of the apartheid legacy in that realm continues unabated to this day due to this generational private power. According to *Friedman*, un-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation, weighing it down, limiting its ambition and achievements in democratic transformation.<sup>360</sup> In Chapter 2 of this dissertation, the picture could not have been depicted any clearer.

I assert that the nuances in the jurisprudential debate, on the scope of judicial avoidance, compound the issue even further as there seems to be a reluctance to engage in the debate of what eventually leads to the avoidance of imposing positive obligations on private persons with regards to the realization of the right to adequate housing.

<sup>359</sup> Loughlin, M 'The Silences of Constitutions' (2018), *International Journal of Constitutional Law* 16(3)922-935.

<sup>360</sup> Friedman, LM 'The Legal System: A Social Science Perspective' (1975).

Legal culture, as *Young* notes, can greatly influence the judiciary to avoid dealing with what she terms as quintessentially ‘political’ or quintessentially ‘contested’, economic and social rights cases. In a socio-economic rights context, this active posture of avoidance in dealing with socio-economic rights issues in the private sphere can be misconstrued as them advancing or colluding with other entrenched interests.<sup>361</sup> This significantly limits and marginalizes the judiciary in playing a substantive role in adjudicating in a manner that would provide authoritative answers to contentious private law cases that have the potential to put an end to inequality, hardship, and deprivation.

*Pieterse* implores adjudicators within the South African legal framework to desist from the traditional practices that have preserved the common law tradition in its pristine condition by the exclusion of politics in legal interpretations.<sup>362</sup> The real drawback with the judiciary's professedly apolitical stance is that, by feigning and not deciding the tough, substantive, moral and political questions that are unavoidably inherent in the adjudication of socio-economic rights in the private law space, the judiciary insulates such cases from rigorous evaluation, debate or dialogue.<sup>363</sup>

This I contend will undeniably continue to stifle the transformation agenda envisioned by the Constitution. At a deeper level, the profound effects of a culture often result in missed opportunities in judicial law making and the passing off socially significant decisions, as judges fail to engage with ideas, policy matters, moral, and political values in their adjudications, posing a significant constraint on the realization of the Constitution's transformative demands.

In its contextual translation, this means that, coming from colonial invasions of the 19<sup>th</sup> century onwards, common law principles of ownership for instance, were applied to the dispossessed and the dispossessor alike. Further accentuated by the discriminatory policies of the apartheid era in which certain races were outlawed to own properties in title, the judiciary continues in its dogmatic application of the law.

<sup>361</sup> Kawadza, H ‘Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma?’ PELJ 2018(21).

<sup>362</sup> Pieterse, M ‘Coming to Terms with Judicial Enforcement of Socio-Economic Rights’ 2004 SAJHR 383-388

<sup>363</sup> Kawadza, H ‘Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma?’ PELJ 2018(21).

Adjudicators and legal scholars alike were trained to apply and not to question the rule of law, as it was. This legal methodology relies solely on legal texts, viewing them as being neutral and interpreting them in a structured, technical, literal, and rule-bound manner.<sup>364</sup> Leaving little or no emphasis on other factors outside the text such as context, policy, political and moral values to be taken into consideration.<sup>365</sup>

During apartheid a significant number of lawyers resisted this type of legal reasoning inevitably pitting them against the apartheid State.<sup>366</sup> Some of those lawyers who now form part of the present-day judiciary became subconsciously conditioned to be against the State. The preceding assertion follows that, in classical conditioning, the conditioned stimulus is a previously neutral stimulus that, after becoming associated with the unconditioned stimulus, eventually comes to trigger a conditioned response which in this case has become the despondency to positively obligate only the state.

Classical conditioning translates to a learning process that occurs when two stimuli are repeatedly paired. A response which is at first elicited by the second stimulus is eventually elicited by the first stimulus alone.<sup>367</sup> That classical conditioning has made them somewhat to have an innate predisposition to be biased against the current State despite it being a post-apartheid State.<sup>368</sup>

A legal actor trained and socialized to find a certain type of argument compelling and another type to be utterly unconvincing will tend to think those are innate properties of the types of argument, rather than perceiving what is in fact the case, namely that the impressions lawyers have of convincingness and unconvincingness are cultural

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<sup>364</sup> Klare 1998 14 SAJHR 146 at 162.

<sup>365</sup> Friedman, LM 'The Legal System: A Social Science Perspective' (1975).

<sup>366</sup> Langa, P 'Transformative constitutionalism' (2006) 17(3) Stellenbosch Law Review 351.

<sup>367</sup> The psychological phenomenon follows an experiment by Watson and Rayner (1920) now known as the Little Albert Experiment. Little Albert was a 9-month-old infant who was tested on his reactions to various stimuli. He was shown a white rat, a rabbit, a monkey, and various masks. Albert described as "on the whole stolid and unemotional" showed no fear of any of these stimuli. However, what did startle him and cause him to be afraid was if a hammer was struck against a steel bar behind his head. The sudden loud noise would cause "little Albert to burst into tears. When Little Albert was just over 11 months old, the white rat was presented, and seconds later the hammer was struck against the steel bar. This was done seven times over the next seven weeks, and each time Little Albert burst into tears. By now little Albert only had to see the rat and he immediately showed every sign of fear. He would cry (whether the hammer was hit against the steel bar) and he would attempt to crawl away.

<sup>368</sup> In addition to this point, it is at this juncture that we envisage the interchangeable nature of the internal and external components of legal culture as distinguished by Friedman.

artefacts.<sup>369</sup> It is thus often quite difficult from within a particular legal culture to appreciate its uniqueness and contingency or to bring to bear on legal problems alternative conceptions of convincingness.<sup>370</sup>

*Klare* asserts that a conservative mode of thought continues to pervade adjudication in South Africa. The 'classical legalist method' as she terms it, is very prevalent in the South African legal culture. It is more structural rather than substantive and limits the potential for the creative use of litigation that can lead to the progressive realization of the transformative goals of the Constitution and effect social change.<sup>371</sup>

*Davis* criticizes the judiciary's reliance, in cases dealing with the horizontal application of the Bill of Rights, on the conceptual tools of the past which are formalistic in nature.<sup>372</sup> Participants in a legal culture like the inherited apartheid-era formalistic legal culture in South Africa are often unaware or only partially attentive to their power to shape their ideas and reactions to legal problems.<sup>373</sup>

*Jaco Barnard-Naudé*,<sup>374</sup> also contends that the post-apartheid legal culture is still pervaded by an apartheid mentality and expressed no more eloquently by those lawyers who argue that, somehow, the Roman-Dutch and English common law from the apartheid-era, has an existence apart or autonomous from the Constitution, independent of its demands and aspirations and quite regardless of the 'supremacy clause', which explicitly states that law and conduct inconsistent with the Constitution is invalid.<sup>375</sup> This dogmatic conservative logic he opines, suggests that the colonial product has the quality of a magical object that holds superior and mystical powers that only certain well-educated 'summa cum laude' graduates can divine. The argument for

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<sup>369</sup> Ibid.

<sup>370</sup> Ibid.

<sup>371</sup> Klare 1998 14 SAJHR 146 at 162.

<sup>372</sup> Davis, D 'Elegy to Transformative Constitutionalism' in Botha H, Van der Walt A and Van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (Sun Press Stellenbosch 2003) 57-66<sup>373</sup> Klare 1998 14 SAJHR 146 at 162.

<sup>374</sup> Jaco Barnard-Naudé is Professor of Jurisprudence in the Department of Private Law and Acting Director of Research in the Faculty of Law at the University of Cape Town.

<sup>375</sup> <https://constitutionallyspeaking.co.za/resources/apartheid-mentalities-and-the-transformation-of-legal-culture/>.

the common law's 'autonomy' is not directly racist, but it is doubtless seated in an ideology of colonial supremacy.<sup>376</sup>

This continued reliance on the same legal rules and legal sensibilities of the pre-constitutional era has somewhat also created a false consciousness towards this legal culture. It is seen as being normal and necessary thereby making it more resistant to change and to achieving the transformative goals of the Constitution.<sup>377</sup>

On the basis of my argument, the judiciary should not be restricted in their adjudications by pre-constitutional interpretations or procedural influences but in appropriate circumstances, must investigate as to whether the principles as presented in each case are congruent with the foundational commitments, values, and goals of the Constitution and don't prevent the collective good of democracy nor subject others to indignities.<sup>378</sup> The true shift from apartheid to post-apartheid South Africa is a move from "a culture of authority" to "a culture of justification", a culture in which every exercise of power is expected to be justified, in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion.<sup>379</sup>

Judges allowing what *Davis*,<sup>380</sup> terms as traditional laissez faire norms of a minimalist State and traditional legal techniques to prevail in their adjudications, the transformative objective is not given the much-needed impetus. Instead, the common law rules borrowed from other countries which do not share the unique history that brought about the current climate, take center stage.

The above will result in instances where provisions such as property rights trump over the transformative rights such as right to security of tenure. The description of the latter right as transformative stems from a long-standing history of black people barred

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<sup>377</sup> Legal formalism amounts in fact to a paradigm in which legal decisions are made according to legal rules and doctrines. Rights and entitlements made according to these rules are seen in turn as different from substantive decisions in which political and other considerations govern.

<sup>378</sup> Davis, D "Elegy to Transformative Constitutionalism" in Botha H, Van der Walt A and Van der Walt J(eds) *Rights and Democracy in a Transformative Constitution* (Sun Press Stellenbosch 2003) 57-66

<sup>379</sup> Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 10 SAJHR 31 32.

<sup>380</sup> Davis 489. Lenta 2004 SAJHR 29.



from owning property/land as envisaged in the *Bopape* case,<sup>381</sup> amongst many other. This is a classic example of the horrors that to the marginalized are still a living reality despite the South African constitutional letter being heralded as the beacon of hope in post-independence Africa due to its innate characteristics and promises.

In a society of infinite resources, amid a growing populace, against the backdrop of South Africa's history of land dispossession, does it suffice for the judiciary to dig in and conserve the position of the haves against the have not, the dispossessor against the dispossessed? Ultimately, this dissertation ponders on the ability and viability of the State, to progressively realize the right to adequate housing when most of the land is in private hands.

*Klare* offers several different iterations, starting with the comment that,

“The essential features of the South African experiment include but not limited to the extension of democratic credentials into the ‘private sphere’. The South African Constitution intends a not fully defined but nonetheless unmistakable departure from liberalism toward an ‘empowered’ Model of democracy.”<sup>382</sup>

In support of this statement, *Klare* cites a passage from *Mahomed DP's* judgment in *S v Makwanyane*,<sup>383</sup> that characterizes the Constitution of the Republic of South Africa Act 200 Of 1993 (the Interim Constitution) as signaling a ‘decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirational egalitarian ethos.’<sup>384</sup> This signifies a movement from liberalism to post-liberalism interpretation of the law.

However, as we have come to see that, besides the rhetoric of the potentially dead letter that is the Constitution, an egalitarian society would not be possible unless there is a total deconstruction and reconstruction of the power relations in society 'with the consequence

<sup>381</sup> Hans Merensky Holdings (Pty) Ltd v Bopape 127 (2012) LCC.

<sup>382</sup> Klare 1998 (SAJHR) 152.

<sup>383</sup> S v Makwanyane 1995 (3) SA 391 CC.

<sup>384</sup> Klare 1998 (SAJHR) para 262.

that human development is maximized, and material imbalances redressed.<sup>385</sup> In *President of the RSA v Hugo*, Kriegler J stated,

“The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights, but in the light of our history and our vision for the future, a Constitution was written with equality at its center. Equality is our Constitution's focus and its organizing principle.”<sup>386</sup>

#### **4.5 CONCLUSION.**

While the active duty of the judiciary is to promote and maintain a strict sense of legality, judges' role as guardians of constitutional values is to conserve what continues to work while progressively changing that which is no longer of practical value, and to shift legal thinking and order under changing conditions. Judges have the capacity to provide authoritative answers to contentious political constitutional questions that seek to redress past wrongs which can be done by not avoiding the horizontal application on matters of private law and the imposition of positive obligations on private individuals, as is the current situation.

Legal culture restricts and inhibits, but also provides the possibility of transformation. The importance of expressing law as a culture disrupts this formalist claim that law is objective and neutral.<sup>389</sup> It stresses the point that the law, legal system, and legal

<sup>385</sup> Albertyn & Goldblatt (note 27 above) 272.

<sup>386</sup> Moseneke, D. The Fourth Braam Fischer Memorial Lecture on Transformative Adjudication. 18 S. Afr. J. on Hum. Rts. 309 2002.

<sup>387</sup> PE Municipality case par 38.

<sup>388</sup> PE Municipality case par 38.

<sup>389</sup> Laster K, Law as culture 1997.

culture, is best understood and described as a product of political, economic, social forces,<sup>390</sup> contingencies of history,<sup>391</sup> and itself a conduit of those same forces.<sup>392</sup>

Against the backdrop of South Africa's apartheid history, the transformation agenda has become a contentious issue. Although the Constitution provides the framework for the transformation agenda, hence we see the term 'transformative constitutionalism' being used as a synonym to describe the South Africa Constitution, questions are still being raised as to the viability of this so-called transformation vehicle.

One ponders whether this transformation vehicle has indeed impacted and has had the desired effects on the previously disadvantaged since its conception almost two decades ago. Particularly so, with regards to the extension of democratic credentials into the 'private sphere' as pondered by imposing positive obligations on private persons in the realization of the right to adequate housing.

The latter perspective resonates amongst the majority of South Africans which also happens to be the previously disadvantaged. The horrors of apartheid continue to be a living reality and the cycle of poverty continues hamper the potential of many black households. In this light, it is imperative that equality is defined in a manner that truly serves the needs and rights of all against the backdrop of South Africa's history.

Currently, the legislative and policy framework as informed by the Constitution provides for a precarious society in which the wealth and resource landscape has been cemented through the immunity envisaged by the law's limited realm of reach into private relations. On the other hand, affirmative measures are rolled out, although with good intentions, to the peril of its recipients. The rolling out of programs such as social grants reflect an end to the means rather than a means to an end on the part of the government and its intended recipients. The programs further entrench the undignified, polarized social statuses synonymous with apartheid and also results in a vicious cycle of dependency on government hand-outs.

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<sup>390</sup> Friedman, L 'The Legal System: A Social Science Perspective' (1975).

<sup>391</sup> NELKEN, D 'Using the Concept of Legal Culture' 29 *Austl. J. Leg. Phil.* 1 2004 Content downloaded/printed from Hein Online (<http://heinonline.org>).

<sup>392</sup> Friedman, L 'The Legal System: A Social Science Perspective' (1975).

As *Langa ACJ* (as he then was) noted in the *Modderklip* case,<sup>393</sup>

"The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."<sup>394</sup>

If the urgent calls to address the challenges impeding the success of the transformative letter which is the Constitution, are not heeded, as CJ Mohammed wisely notes,

"both the victims and the culprits [of apartheid] who walk on the 'historic bridge' described by the epilogue [to the interim Constitution] will hobble more than walk to the future with heavy and dragged steps, delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge."<sup>395</sup>

Importantly, this calls upon the need for an open, clean slate, and the need to, once and for all address the elephant in the room so to speak, which is poverty and inequality in South Africa. As *Van der Walt* correctly pointed out that, in the vision of transformation there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the two places between which we have chosen to journey.<sup>396</sup>

Two decades after the apartheid era, the fight against inequality is no longer a fight for the black masses (race) nor is it about gender, it is a fight for all citizens. The relic of the decay in society is that which impacts on every citizen's daily life and as such it demands the participation of all and sundry. This signifies a movement from liberalism to post-liberalism interpretation of the law.

Although one must concede that the distance between the regrettable past and the desired future is a journey of a thousand miles, I hasten to point the unintended

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<sup>393</sup> President of the Republic of South Africa and Anor v *Modderklip Boerdery (Pty) Ltd* 40 2005 (5) SA 3 (CC).

<sup>394</sup> Par 36 (footnotes omitted).

<sup>395</sup> *Azania Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par 18.

<sup>396</sup> *Van der Walt*, A 'Dancing with Codes Protecting, Developing and Deconstructing Property Rights in a Constitutional State' 2001 118 SALJ 258 296.

consequences of a prolonged approach. *Van Marle*,<sup>397</sup> captures the idea of “slowness” from *Milan Kundera* to illustrate the importance of time, but also approach to time, in post-apartheid jurisprudence.<sup>398</sup> She highlights the time aspect inherent to deconstruction and explains that a deconstructive approach embraces both a disruption of chronological time and accordingly multiple notions of truth and fluidity of meanings and a slowness or dwelling (strategy of delay) to which in this study, I except.<sup>399</sup>

For how long shall the affirmative action measures transgress future generational boundaries until such a time it constitutes retribution? If at all the Constitution in its current state envisions and provides in adequacy for the right to housing and corroborative redistribution of land where is the appetite to enforce such rights? The words of *Sydney Kentridge*, in the appraisal of the Nationalist governments use of the law to ironically bolster apartheid foretells an adage of the circle of life as it continues to resonate to the current structures albeit its proclamation almost three decades ago. In his caution Kentridge opined,

“One day there will be change in South Africa. Those who then come to rule may have seen the process of law in their country not as protection against power but as no more than its convenient instrument, to be manipulated at will. It would not then be surprising if they failed to appreciate the value of an independent judiciary and of due process of law. If so, then it may be said of those who now govern (judiciary included) that they destroyed better than they knew.”<sup>400</sup>

It would be inaccurate to suggest that the judiciary is by commission complicit in the injustices of the past that continue to be in existence in present day South Africa. However, it still is by omission in their failure to recognize and apply that which is beyond the text of the statutes and adopt principles best suited for the people and context under which they adjudicate. The point in this instance is driven by a famous Napoleon quote which reads,

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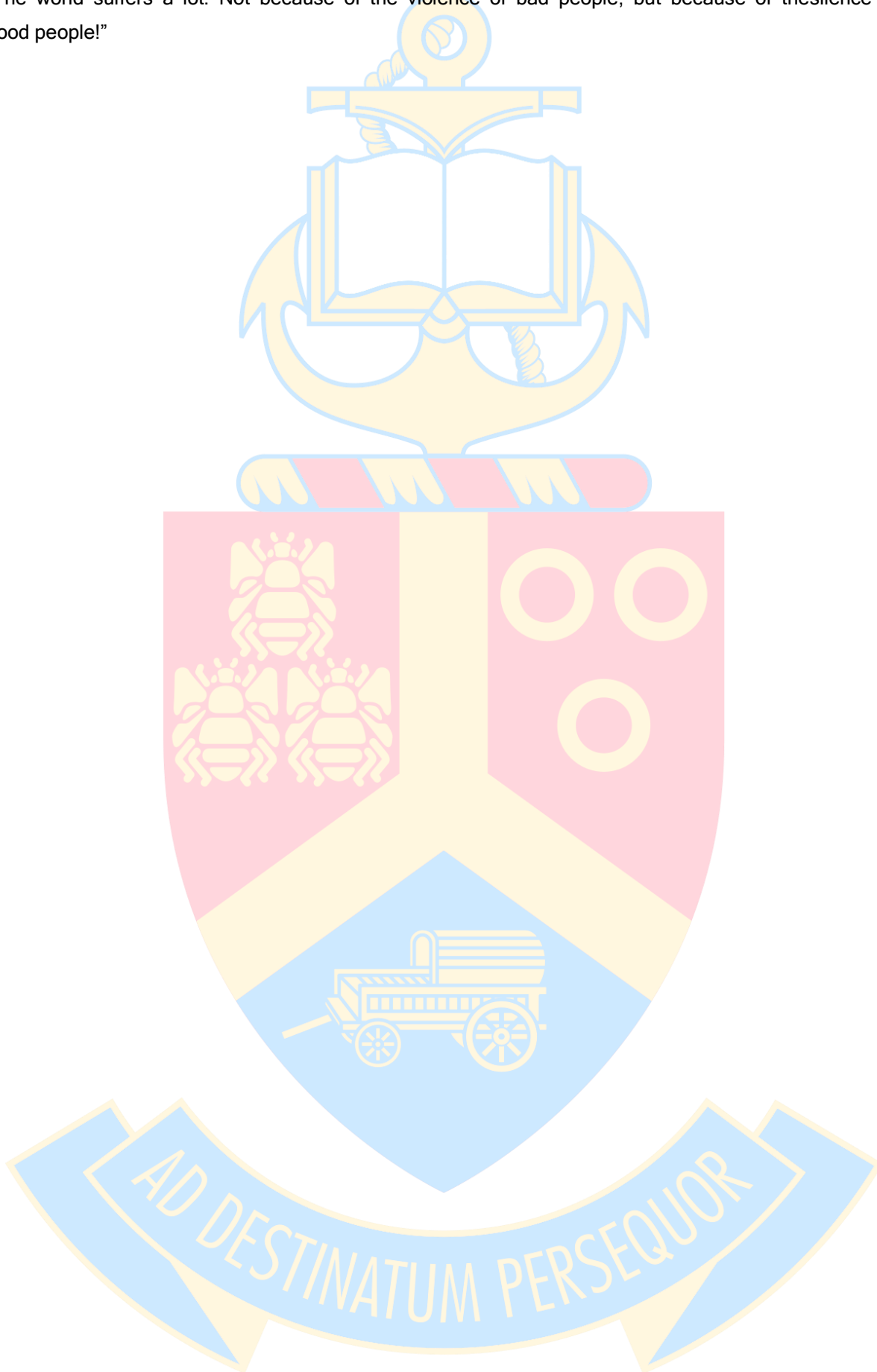
<sup>397</sup> Van Marle, K ‘Law’s Time, Particularity and Slowness’ (2003) 19 SAJHR 239.

<sup>398</sup> De Villiers, I ‘South African Legal Culture in a Transformative Context’ (2009).

<sup>399</sup> Ibid.

<sup>400</sup> Kentridge, S ‘The pathology of a legal system: criminal justice in South Africa’ (1980) 128 University of Pennsylvania L.R 62

“The world suffers a lot. Not because of the violence of bad people, but because of the silence of good people!”



## CHAPTER 5.

### CONCLUSION AND RECOMMENDATIONS.

The founding values of the 1996 Constitution of South Africa as animated by its preamble state that, the purpose of the democratic transition is to establish a society based on social justice. The Constitution places a duty on the state to respect, promote, protect, and fulfil the rights contained in the Bill of Rights. Furthermore, it regulates the extension of the applicability of the Bill to private relations with emphasis on the right to equality and the inclusion of social and economic rights. Lastly, the Bill of Rights contains a limitations clause which provides for limitations of certain individual rights in the course of general application or in light of greater superseding circumstances such as those of achieving equality and benefit to the greater population after all possible avenues have been exhausted.<sup>401</sup> *Klare* denotes the meaning of equality as equality in lived, social, economic circumstances and opportunities needed to experience human self-realisation.<sup>402</sup> S9(2) of the Constitution provides for equality which includes the full and equal enjoyment of all rights and freedoms.<sup>403</sup> The *Interim Constitution's* post-amble speaks of a future founded on developmental opportunities for all South Africans. More so, the foundational assumptions on the Constitution provide that equality and human dignity before the law contemplates laws, programs, and activities designed to ameliorate the conditions of the disadvantaged.<sup>404</sup> In reflection, *Justice Kriegler* has written,

"We do not operate under a Constitution in which the avowed purpose of the drafters was to place limitations on governmental control, our Constitution aims at establishing freedom and equality in a grossly disparate society."<sup>405</sup>

Although the Constitution of South Africa holds such great promises exemplified by its articulate and reflective stature, conflicts still arise. Often law makers and adjudicators alike are confronted with the enormous task of tackling conflicting provisions within the same bill of rights. As has been the case in this dissertation, the

<sup>401</sup> The Constitution of the Republic of South Africa, 1996.

<sup>402</sup> *Klare*, K (1998) SAJHR 154.

<sup>403</sup> The Constitution of the Republic of South Africa, 1996.

<sup>404</sup> *Klare*, K (1998) SAJHR 154.

<sup>405</sup> *Ibid*.

individualistic right to property envisaged in S25 of the Constitution coupled with the right to just administrative action, has found itself at logger heads with the right to housing.<sup>406</sup> It is at this crossroad that this dissertation sought to dissect the intricacy envisaged in the proponents of law (as envisaged by the interpretation and adjudication of constitutional housing rights) as enablers or disablers of public policy (in this instance socio-economic transformation) within a transformative constitutional framework.

In tackling this intricacy, Chapter 2 envisaged the importance and the consequential impact of the judicial approach on the horizontal application of the right to adequate housing. The general judicial approach to interpretation prior and during the advent of the new constitutional dispensation, the shift from a formal to a transformative approach was highlighted. More significantly, the consequential impact of this shift was illuminated through its application on the case law on horizontal application. In that respect, the need for a thorough appraisal of the socio-political and historical context, the subsequent purpose of the enactment of s 8 of the Constitution as a fore bear to s 26 underpinned by the Constitutional mandate to create an equal society, was illuminated. This renewed appreciation of the legal-historical context of forced evictions accentuated the comprehension of the case law probe which followed in the later chapters as the courts have sought to develop the normative character of section 26(1) of the Constitution.

The aim of chapter 3 was to provide a jurisprudential analysis of the impact of section 26 of the Constitution through the legislative gaze of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*PIE*) and the Extension of the Security of Tenure Act 62 of 1997 (*ESTA*). An attempt to show how the common law of evictions has changed since the advent of democracy and what it has become to mean to have access to adequate housing. In chapter 3, I set out to show that the coming into force of the right of access to adequate housing and the enactment of *PIE* and *ESTA* 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 new constitutional dispensation where each eviction application requires a situational appraisal of all the relevant

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<sup>406</sup> The Constitution of the Republic of South Africa, 1996.



circumstances surrounding the eviction. The courts discussed herein confirmed that the traditional enquiry into evictions had been reconfigured into a new 'constitutional matrix' of relationships that flow from the co-habitation of sections 25 and 26 of the Constitution.<sup>407</sup> The rights of the owner could no longer be held higher than those of the unlawful occupiers. Instead, the enquiry proffered by the courts in Chapter 3 presupposes an approach that tries to reconcile the interests of the landowner and the unlawful occupiers by engaging with the specific circumstances of the case to reach a just and equitable solution. Pursuant to that, the courts accentuated the consideration of the rights and needs of the unlawful occupiers in general, but specifically, the rights and needs of the elderly, people with disabilities, child headed households.

Perhaps the most significant jurisprudential development was that of the implied inclusion of the precondition that 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. The effect of the development as envisaged in Chapter 3 was the granting of suspended eviction orders, while obligating the State to provide emergency housing alternatives on a temporary basis. These orders albeit unintended, had the consequential effect of suggesting that the landowners' right to property would be unjustifiably infringed in the absence of a suspended eviction order. That is to say, the jurisprudence in Chapter 3 reiterated the courts stance that private parties were under no positive obligation to provide housing even when the State clearly had no means to do so.

Chapter 4 was a transformative critique of the jurisprudence described in Chapter 3 envisaging how a conservative legal culture has impeded the development of jurisprudence on the horizontal application of the right to adequate housing. The tendency of the judiciary to conform to the conservative ingrained inarticulate premises that inform their professional discourse and outlook was envisaged against the backdrop of a painstakingly slow transformative development of the normative content of s26.<sup>408</sup> In chapter 4, I showed and bemoaned the need to critically engage with sub-conscious inertia that inform the judicial approach and understanding of socio-

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<sup>407</sup> Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC).

<sup>408</sup> Du Plessis v De Klerk 1996 (5) BCLR 658 (CC) at par 119.

economic rights as seen in Chapter 3. In particular, the right to adequate housing as enunciated by Chapter 3 critical not only to the effective realization of the right to housing but also the equal redistribution and access to resources, in general. This is in tandem with the transformative aspirations of the Constitution and necessitated by the contextual lived reality of the gap in the living conditions between the haves and the have nots. In line with the findings above, I believe private parties should bear the brunt of providing alternative accommodation in instances where, the private party can do so, and the State is not, in order to fully realize the access to adequate housing right in terms of s 26(2).<sup>409</sup>

What I have derived from the findings of this research is that the exact extent to which private parties can be positively obligated in the realization of the right to adequate housing cannot continue to be answered in the abstract. Put differently, the precarious position which the remedy of suspended evictions has imputed on the unlawful occupiers in anticipation of State intervention is both untenable and unsustainable, to the effect that it reinforces that which it seeks to prevent, which is insecure tenures. While I accede to the positive developments made in the paradigmatic shift from an authoritarian approach to contextual balancing approach in eviction cases, I accordingly suggest that this has not had the desired effect of bringing finality to eviction cases. Instead, it has laid the foundations for a more robust and critical engagement on the call for the formation of new rules and principles that reflect and are congruent with the change in societal needs and aspirations.

As *Roux* rightfully submits that,

'The problems with the currently available theories of judicial review, is that none of them is directed at constitutional courts in new democracies. What is required therefore, is a new account, drawing on some of the political science insights but expressed in terms of an acceptable legal theory.'<sup>410</sup>

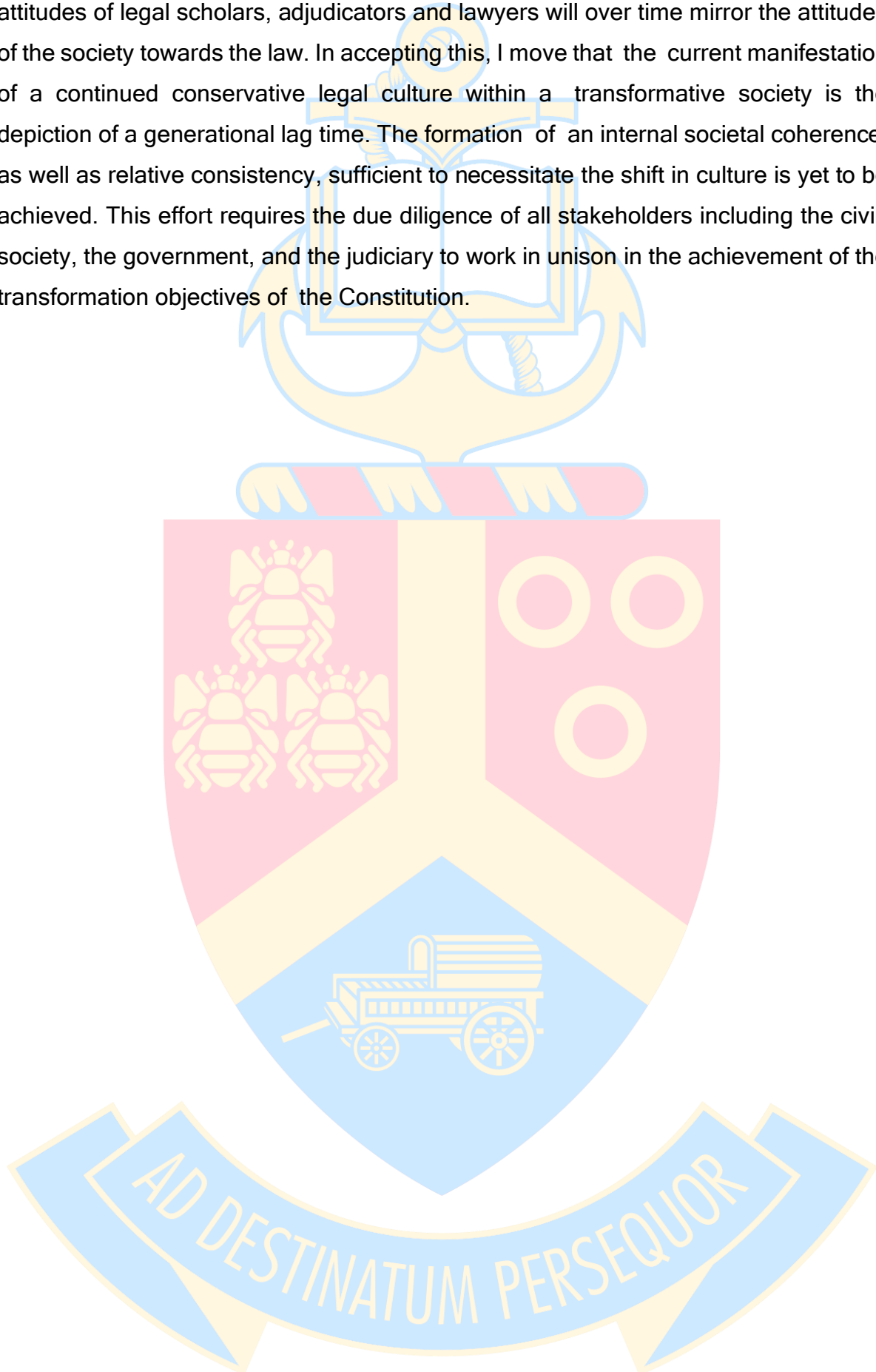
To achieve this will require more than a cosmetic change in the legal culture of South Africa, an embodiment of flexibility within the legal culture to ensure that the new way of doing things is inherently capable of addressing and rising to the changing needs of the society it seeks to serve. In Chapter 4, the linkage between the internal and external culture was explained with the view that, the internal

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<sup>409</sup> Id fn 12.

<sup>410</sup> Roux, T 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 International Journal on Constitutional Law at 112.

attitudes of legal scholars, adjudicators and lawyers will over time mirror the attitudes of the society towards the law. In accepting this, I move that the current manifestation of a continued conservative legal culture within a transformative society is the depiction of a generational lag time. The formation of an internal societal coherence, as well as relative consistency, sufficient to necessitate the shift in culture is yet to be achieved. This effort requires the due diligence of all stakeholders including the civic society, the government, and the judiciary to work in unison in the achievement of the transformation objectives of the Constitution.



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