UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

PROTECTION OF A SUBSTANTIVE RIGHT OF ACCESS TO ADEQUATE HOUSING

by

MONGEZI NTANGA

Submitted in fulfilment of the requirements of the degree

LLM

(Master of Laws: Socio-economic Rights)

In the Faculty of Law

University of Pretoria

Student No: 25359152

Supervisor: Dr. Isolde de Villiers

January 2019

Acknowledgement

I am influenced in this topic by my interaction with a community from the South of Johannesburg who occupied houses belonging to a mining company for a period of more than twenty five years. They approached me for assistance and they are destitute with no means to fund their legal battle against eviction application. I was intrigued to enquire within our legal system whether communities like this enjoy protection not to be evicted after such a long period of occupation. I would like to thank this community for triggering an inquisitive mind in me regarding the socio-economic right to have access to adequate housing.

To the University of Pretoria, its academic and administration employees, thank you for affording me an opportunity to advance my academic path.

To my children, Wandisa and Luvo, you are a precious gift of my life and because of you I dare shall not linger. You are a driving force that inspires me to work harder day by day to set a good example to you. To my late Grandmother, notwithstanding your loss of properties (which were your only source of income), without any form of compensation pursuant to implementation of apartheid segregation policies, you persisted with strength, this has always been and will forever be my source of inspiration.

I am grateful to my supervisor Dr. Isolde de Villiers for her helpful comments and suggestions on the earlier drafts of this work. Her guidance, support, patience and caring personality was a great privilege and inspiration to me. She is an eye-opener to my academic journey.

Summary

This research project focuses on protection of the right to have access to adequate housing. This study is motivated by the need to examine protection mechanisms in the South African Legal system for former employees of a mining company in the South of Johannesburg who occupied houses through a housing scheme provided to them. Their former employer has sold the property to a third party who has applied for an eviction order against these people on the ground that they are unlawful occupiers as they do not have permission from him to occupy the property. The second chapter discusses an overview of the existing legal system by analysing the policies of residential segregation and legislation developed post-democracy. The third chapter discusses the Constitutional Court's contribution towards development of the legal system relating to protection of the right to have access to adequate housing. The fourth chapter focuses on the limitation of the law faced by the courts when adjudicating claims relating to the right to have access to adequate housing. In this study I hope to contribute to the development of the legal system relating to protection of the right to have access to adequate housing, particularly former mining company employees who have occupied houses for more than twenty years, taking into account that the houses were provided to them through an employment housing scheme.

Declaration of Originality

I, Mongezi Ntanga with student number 253-591-52, understand what plagiarism is and I am aware of the University's policy in this regard. I declare that this dissertation is my own original work. Where other people's work has been used, this has been properly acknowledged and referenced in accordance with departmental requirements. I have not used work previously produced by another student or any other person to hand in as my own.

……..

SIGNATURE

Contents

Chapter 1

Introduction

1.1 Research Problem

The central research problem of this project is adequacy of protection of the right to have access to adequate housing in South Africa. I look at development of this socio-economic right in South Africa subsequent to adoption of the Constitution ("Constitution").[1]

I focus on three main topics through which I examine the protection of the right to have access to adequate housing. In chapter 2 I discuss the legal system prior to adoption of the Constitution as well legislative framework developed in the post-apartheid era. Prior to the democratic South Africa, accommodation was regulated through segregating residential legislation and policies. Chapter 2 further discusses the effect of implementation of such policies and the effect of apartheid spatial policy. Section 7 of the Constitution imposes a duty on the state to respect, protect and fulfil the rights enshrined in the Bill of Rights.[2] This obligation is reiterated in section 26(2) of the Constitution as the state is required to take reasonable legislative measures, within its resources to achieve progressive realisation of the right to have access to adequate housing.[3] This obligation was affirmed in the *Grootboom* judgment.[4] It is on this basis that I examine the extent to which the state has developed legislation to fulfil its obligation.

[1] Constitution of the Republic of South Africa, 1996.
[2] Constitution of the Republic of South Africa, 1996.
[3] Constitution of the Republic of South Africa, 1996.
[4] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 46.

In chapter 3 I discuss contribution by the Constitutional Court in the development of the right to have access to adequate housing. My starting point is the *Grootboom* judgment as it is a landmark case on matters relating to protection of the right to have access to adequate housing. The critical point about the *Grootboom* judgment is the approach adopted by the Constitutional Court which was to broadly examine the existing housing policy in order to determine whether the state's policy is adequate to fulfil its constitutional obligation.[5] I also discuss the principle of meaningful engagement as developed in the judgment of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC). The essence of this principle is that there must be a meaningful discussion with the persons affected by an eviction application for the purposes of affording them an opportunity to state their needs and the negative effect that the eviction will have on them.[6] The purpose of this research is to examine protection of right to have access to adequate housing focusing on former employees of a mining company who face eviction subsequent to sale of the property they have occupied for more than twenty five years. I consider the effect of granting an eviction order that will effectively render these people perpetually displaced. I then examine the available remedy of requiring a municipality with jurisdiction to provide temporary accommodation. The *Blue Moonlight Properties* judgment is relevant as occupiers in this case were in occupation of the property for more than twenty years. The eviction order was granted and they were provided temporary accommodation. The temporary accommodation provided to these people was not a solution as it will be seen in the judgment of *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC) where they again approached court for protection of their right to have access to adequate housing. I argue that the remedy of temporary accommodation does not guarantee a security of tenure.

In chapter 4 I discuss the limits and limitations faced by the courts when adjudicating claims relating to the right to have access to adequate housing. I also discuss extensively the constraints faced by the courts due to the requirement of the rule of law notwithstanding the constitutional requirement to develop the law to ensure

[5] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), paras 65, 66, 68 and 69.
[6] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para 59.

protection of the rights enshrined in the Constitution. I focus on the on the judgment of *Residents of Joe Slovo Community v Thubelitsha Homes* 2010 (3) SA 454 (CC) primarily due to the extensive analysis of the requirement of unlawful occupation before an order for eviction order is granted. Four judges in this case wrote different judgments discussing different views in relation to the requirement of unlawful occupation.

I am influenced in this topic by my interaction with a community from the South of Johannesburg who occupied houses belonging to a mining company for a period of more than twenty five years. They are former employees of a mining company that owned the property and they occupied the property on the basis of a housing scheme provided by this mining company to its employees. The mining company sold the property to a third party who has approached court for an eviction order on the basis that they are unlawful occupiers as they do not have permission from the new owner to occupy the property. They approached me for assistance and they are destitute with no means to fund their legal battle against eviction application. I was intrigued to enquire within our legal system whether communities like this enjoy protection against eviction after such a long period of occupation.

1.2 Socio-economic rights overview

Section 1(a) of the Constitution provides that the Republic of South Africa is founded on *inter alia* 'Human dignity, the achievement of equality and advancement of human rights and freedoms'.[7] When dealing with a claim based on the right to have access to adequate housing Justice Yacoob confirmed these founding principles in the *Grootboom* Case.[8]

[7] Constitution of the Republic of South Africa, 1996.

[8] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 1.

Human rights provide assurance, protection and restoration of human dignity. Human existence is the source of entitlement to human rights and protection thereof.[9] The concept of human rights was developed to protect and provide for standards of living for the human race. Safeguards are provided against violations of these rights that may be committed by fellow human beings, corporate and government entities. Hence the talk of horizontal and vertical application in protection against any such violations. Thaddeus Metz argues that 'To have a dignity, in the sense meant here, is roughly to have a superlative non-instrumental value that deserves respectful treatment'.[10] Michelo Hansungule describes human rights to 'mean ethical demands or claims accruing to human beings simply because they are human beings'.[11] Provision of right to have access to adequate housing is cardinal in protecting human dignity. I argue that this socio-economic right is at the core of human rights.

Socio-economic rights enjoy protection from the rule of law. In describing rule of law, Johan de Waal, Iain Currie and Gehard Erasmus referred to the description made by AV Dicey who stated that 'the purpose of the rule of law is to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures'.[12] The concept of rule of law was developed to advocate for protection of civil, political and socio-economic rights.

Courts are bound to adhere to the principle of legality, when making decisions they apply the existing general principles of the law. However, section 8(3) of the Constitution requires courts to apply and develop common law to the extent that legislation does not give effect to the rights enshrined in the Bill of Rights.[13] Hoexter

[9] M. Hansungule 'The Historical Development of International Human Rights Law' *in Chowdhury, AR_An Introduction to International Human Rights Law*_(2010) Leiden-Boston:Martinus Nijhoff Publishers, [1].

[10] T. Metz, 'African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights', *Human Rights Rev* (2012), 19.

[11] M. Hansungule, 'The Historical Development of International Human Rights Law' *in Chowdhury, AR_An Introduction to International Human Rights Law*_(2010) Leiden-Boston:Martinus Nijhoff Publishers', [1].

[12] J de Waal, I Currie, G Erasmus, *The Bill of Rights Handbook, Juta (3rd Edition),* 2000, 'AV Dicey, *An Introduction to the Study of Laws of the Constitution 10 ed* (1959) xxxiv', 9.

[13] Constitution of the Republic of South Africa 1996. Unnecessary use of footnote

argues that 'the principle of legality operates as a much-needed safety net for exercise of public power that do not amount to administrative action'.[14]

The International Covenant on Economic, Social and Cultural Rights of 1996 ("Covenant")[15] provides a description of socio-economic rights. The socio-economic rights described in the Covenant include amongst others adequate standard of living including housing. Adequate living conditions are cardinal in restoration of human dignity. Socio-economic rights are deemed as positive rights, de Waal, Currie and Erasmus describe socio-economic rights 'as claims by individuals and groups for delivery of goods by government. It has been argued that their application requires the courts to direct the way in which government distributes the state's resources'. [16]

I am of the view that right to adequate housing is significant for protecting existence of human beings.[17] Provision of right to have access to adequate housing restores dignity to a family, children grow in an environment that gives them self-confidence, with positive personal growth and better academic performance.[18] This guarantees a productive and positive society, which we all aspire for. This will be the beauty of life for humanity. Access to adequate housing guarantees protection against health hazards associated with inadequate sanitation and exposure to harmful conditions associated with bad weather conditions.[19] A family with access to adequate housing enjoys respect amongst fellow community members.

---

[14] Cora Hoexter, *Administrative Law in South Africa, Juta (2nd Edition)*, 2012, 418.

[15] International Covenant on Economic, Social and Cultural Rights of 1996, resolution 2200A (XXI) of 16 December 1966, Article 11.

[16] Johan de Waal, Iain Currie, Gehard Erasmus, *The Bill of Rights Handbook, Juta (3rd Edition),* 2000, 400.

[17] See *Olga Tellis v Bombay Municipal Corporatio*n AIR 1985 3 SC 545, where the court stated that 'If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation'.

[18] Albert Mathews, Right to Housing, The, 6 Black L.J. 247 (1978), 247. (Whether or not any organised family life will be at all possible depends very much on the character of the house or dwelling unit. Children cannot be reared in a satisfactory manner if there is no place for them at home where they cannot play without constantly irritating the adults or being irritated by them. Overcrowding may keep them out of their homes more than is good for them-in fact so much that family controls become weak. The result is that some of the children become juvenile delinquents. This danger may become even more pronounced if there are insufficient recreational facilities in the neighbourhood…Children in crowded homes usually have great difficulty in doing their homework; their achievements in school may suffer in consequence.

[19] A. Mathews 'Right to Housing', The, 6 Black L.J. (1978), 247.

Lack of access to adequate housing is a source of sorrow and pain. Albie Sachs describes a painful situation of Mrs Grootboom who found herself in a destitute situation with housing challenges and imagines her thinking as follows: "Why was I born? What does it mean to be alive? What does it mean to be a human being, just looking up and staring and imagining? What rights do I have? I've got nothing, nothing, nothing, nothing; just some children, and the responsibilities that go with that. What does it mean to be living in the new democratic South Africa? I can vote. I can speak. I can move freely if I've had the money to get from place A to place B. But here I am without a roof over my head."[20] Lack of access to housing can only bring misery to the affected people and this description by Sachs is an apt way of thinking when one places himself in the shoes of those who do not have access to adequate housing.

Rule of law provides legal limitations to courts when adjudicating socio-economic rights claims. The right to adequate housing is entrenched in the Constitution and section 26 of the Constitution. Currie & De Waal argue that Section 26(3) of the Constitution 'expressly entrenches a conventional negative right, unqualified by considerations relating to the state's available resources, against arbitrary evictions and demolitions.'[21] This is an important consideration that courts have to take into account as they consider limited state resourcing in fulfilling their obligation for progressive realisation of socio-economic rights.

1.3 Right to have access to adequate housing

The Covenant sets out standards for member states to ensure progressive realisation of socio-economic rights including the right to adequate standard of living housing.[22] The Constitution recognises the right to have access to adequate housing and section 26 of the Constitution provides that:

'(1) Everyone has the right to have access to adequate housing.

[20] A. Sachs 'Enforcement of Social and Economic Rights', *22 Am. U. Int'l L. Review*. (2007), 674.
[21] Iain Currie & Johan De Waal; The Bill of Rights Handbook; *Juta (6th Edition)*, 2013, 586.
[22] International Covenant on Economic, Social and Cultural Rights of 1996, resolution 2200A (XXI) of 16 December 1966, Article 11.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) 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'.[23]

Section 26 of the Constitution imposes negative obligations against any person from performing an act which may render another one homeless. Legislation and case law has been developed to give effect to this obligation.[24] The purpose of this study is to analyse the extent to which legislation and case law has been developed to ensure progressive realisation of this socio-economic right as well as protection mechanisms established to protect it.

This study is triggered by an interest in looking beyond what seems to be a positive duty imposed by Section 26 of the Constitution on the state. Section 26(3) requires consideration of all relevant circumstances.[25] In this research I argue that circumstances surrounding occupation by former mining employees of houses provided to them in the form of employment housing scheme needs to be taken into account before a decision for eviction is taken. I will also examine residential segregation policies of apartheid South Africa.

1.4 Approach and methodology

The framework of this study is premised on the socio-economic right to have access to adequate housing as enshrined in section 26 of the Constitution. The research methodology to be adopted will be based on desktop analysis. The research analysis will be based on: (i) the Constitution of the Republic of South Africa; (ii) Legislative Framework relevant to the right to have access to adequate housing; (iii) Articles written by different scholars relating

[23] Section 26 of the South Africa 1996.

[24] See Land Reform (Labour Tenants) Act No. 3 of 1996, Extension of Land Tenure Act No. 62 of 1997 and Prevention of Illegal Eviction from and unlawful Occupation Act No. 19 of 1998.

[25] Constitution of the Republic of South Africa 1996.

to the right to have access to adequate housing and protection thereof; and (iv) case law dealing with the right to have access to adequate housing.

1.5 Research questions and chapter overview

In striving to achieve the objective of this study, an analytical enquiry will be made by addressing the following research questions:

- Has the state developed legislative and policy framework to ensure progressive realisation of the right to have access to adequate housing? Prior to adoption of the Constitution eviction could be effected in terms of common law. It sufficed for a person applying for an eviction order to allege that he was the owner or lawful possessor of the property and that the person to be evicted is in unlawful occupation. Section 26 of the Constitution has introduced a shift from this approach. Legislation like PIE Act and ESTA Act have been enacted to pave way for the post-apartheid eviction jurisprudence. This has ushered a transformation from the oppressive eviction legal system. Marius Pieterse describes transformative constitutionalism as 'mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a culture of justification for every exercise of public power'.[26] Pieterse states that '…constitutional transformation in South Africa includes the dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity'.[27] The apartheid government enforced its oppressive agenda through implementation of policies and legislation.[28] To break away from

[26] M. Pieterse: 'What do we mean when we talk about transformative constitutionalism?' SAPR/Pl, (2005) Vol. 20 155,156, 159.

[27] M. Pieterse: 'What do we mean when we talk about transformative constitutionalism?' SAPR/Pl, (2005) Vol. 20 155,156, 159.

[28] See Natives (Urban Areas) Act No. 21 of 1923, Native Administration Act No. 38 of 1927, Natives Resettlement Act No. 19 of 1954.

the legacy of apartheid, the democratic government needs to develop policies and legislation that will enhance achievement of a just and equal society.

- What is South African Constitutional Court's contribution in development of the right to have access to adequate housing, using the *Grootboom* case as a benchmark? In addressing this question I will analyse the manner in which the Constitutional court has developed the right to have access to adequate housing in the post-apartheid era. Prior to adoption of the Constitution socio-economic rights like the right to have access to adequate housing were non-existent in South Africa. As discussed above, section 8 of the Constitution imposes a duty on courts to develop common law to give effect to progressive realisation of socio-economic rights. In his address during the Claude Leon Lecture, Justice Ngcobo referred to the statement of Justice Susan Kenny and agreed with her where she stated that 'As trustees of the rule of law, the judiciary administers the law not for its own benefit, but for the benefit of each and every member of the community. The public, then is the whole community – which at times may not be represented by the majority or the media'.[29]

- What are the limits and limitations of the law faced by our courts when dealing with a claim relating to the right to have access to adequate housing? Common law has evolved over the years and the rule of law has developed to introduce protection and realisation of human rights. Judges do not make laws, their duty is to enforce and develop the existing law. The principle of legality places a duty on courts to make decisions by application of the known and existing principles of law.

1.6 Motivation of study

This discussion is premised on the concern for the vulnerability and homelessness of destitute members of our society. The researcher is intrigued to examine remedies available to destitute families in protection of their right to have access to adequate housing. The Constitution is the backbone of support for these communities and

[29] https://constitutionallyspeaking.co.za/chief-justice-sandile-ngcobo/claude-leon-lecture/ Accessed on 17-06-2018.

various mechanisms should therefore be developed to protect their right to have access to adequate housing. The state is at the centre point for realisation of this right. This can be achieved by development of progressive policies as well as enactment of legislation. The judiciary plays an oversight role in ensuring that the state fulfils its constitutional obligations and guards against infringement by private individuals. Justiciability of socio-economic rights is an important safeguard for progressive realisation of these rights and in particular the right to have access to adequate housing.

On June 21, 2018 Statistics South Africa ("Stats SA") released a report on the latest statistics relating to housing in South Africa. The report indicates that 'slightly over four-fifths (80, 1%) of South African households lived in formal dwellings in 2017, followed by 13, 6% in informal dwellings, and 5, 5% in traditional dwellings. The highest percentage of households lived in formal dwellings was observed in Limpopo at 91, 7%, while the lowest was Eastern Cape at 70, 4%. Approximately one-fifth of households lived in informal dwellings in North West (19, 9%) and Gauteng (19, 8%)'.[30] These statistics do not exist by coincidence, these figures call for accelerated efforts to improve the living conditions of our destitute societies. The homeless and residents of informal settlements do not find themselves in these conditions out of their own making, this is a legacy of decades of apartheid spatial policies.

1.7 Literature Review

Literature reviewed in this study includes *inter alia* law journals, books, law reports, online reports, statutes and unpublished papers. In the South African context it is impossible to address the right to have access to adequate housing without first considering the spatial policy of the apartheid regime. This approach was also adopted by the constitutional court when dealing with a claim relating to the right to have access to adequate housing. In the *Grootboom* case Justice Yacoob stated that 'The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a

[30] http://www.statssa.gov.za/The latest household statistics and more, Accessed on 24-09-2018.

system of influx control that sought to limit African occupation of urban areas'.[31] Justice Albie Sachs points out that 'the right to have access to adequate housing cannot be separated from the right to human dignity'.[32] John C. Mubangizi explores the 'challenges and prospects facing the protection of human rights in a predominantly poor and unequal society'.[33] He points out that 'the right to have access to adequate housing is a critical basic necessity of life that has a significant bearing on the lives of the poor'.[34] On how this substantive right can be protected Mubangizi argues that 'there ought to be reasonable mechanisms for the implementation and enforcement of these rights'.[35] This is the essence of this research project.

The Covenant determines that socio-economic rights 'contain a minimum core obligation that must be fulfilled by state parties'.[36] The concept of minimum core arises out of duties and obligations of member states of the United Nations Organisation, Continental or Regional organisations to ensure that as a minimum, basic socio-economic rights are accessible to individuals within their jurisdictions. However, the Constitutional Court in the *Grootboom* matter concluded that 'The determination of a minimum core in the context of the right to have access to adequate housing presents difficult questions'.[37] Justice Yacoob stated that 'the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable'.[38]

Justice Yacoob although not rejecting the minimum core, he criticised the minimum core approach and concluded that it is not necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of

[31] *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) SA 46 (CC), para 6.

[32] A. Sachs 'Enforcement of Social and Economic Rights', *22 Am. U. Int'l L. Rev.* 673, 708 (2007), 680.

[33] J. C. Mubangizi 'Protecting Human Rights amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing', *2 Afr. J. Legal Stud.* 130, 146 (2008), 131.

[34] J. C. Mubangizi 'Protecting Human Rights amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing', *2 Afr. J. Legal Stud*. 130, 146 (2008), 131.

[35] J. C. Mubangizi 'Protecting Human Rights amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing', *2 Afr. J. Legal Stud*. 130, 146 (2008), 139-140.

[36] International Covenant on Economic, Social and Cultural Rights of 1996, resolution 2200A (XXI) of 16 December 1966.

[37] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 33.

[38] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

a right.[39] In criticism of the Constitutional Court approach David Bilchitz argues that the arguments presented by the Constitutional Court regarding minimum core 'exhibit confusion as to the nature of a minimum core obligation which arises from failing to draw a crucial distinction.'[40] He argues that 'this is the distinction between the invariant, universal standard that must be met in order for an obligation to be fulfilled and the numerous particular methods that must can be adopted in order to meet this standard and comply with a constitutional obligation'[41]. The Constitutional Court looked at the minimum core argument differently. It appears that the Constitutional Court was not prepared to limit itself to the strict application of the minimum core concept but adopted a broader approach of assessing reasonableness of the state's policy in meeting its constitutional obligation.[42]

South African historical background dictates that a holistic approach needs to be adopted and the approach adopted by the Constitutional Court is supported in this research. The Constitutional Court instead of making an award to an individual claim brought before it, examined broadly the housing policy of the state in meeting its constitutional obligation in terms of Section 26. The state was required to 'devise and implement …a comprehensive and coordinated programme progressively to realise the right of access to adequate housing'.[43] Danie Brand points out that ' the court evaluated the state's entire housing policy and found it to be inconsistent with the right to have access to adequate housing in the Constitution to the extent that it made no provision for the plight of those in the position of the claimants before it'.[44] Mark Kende states that 'the *Grootboom* case shows that placing socio-economic rights in a Constitution does not mean every individual is entitled to assistance on demand.

[39] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[40] David Bilchitz, Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance, 119 S. African L.J. 484, 501 (2002), 487.

[41] D. Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance', *119 S. African L.J*. 484, 501 (2002), 487.

[42] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[43] Oscar Vilhena, Upendra Baxi and Frans Viljoen: 'Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa: Danie Brand 'The South African Constitutional Court and Livelihood Rights', *Pretoria University Law Press*, (2013), 437.

[44]Oscar Vilhena, Upendra Baxi and Frans Viljoen: 'Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa: Danie Brand 'The South African Constitutional Court and Livelihood Rights', *Pretoria University Law Press*, (2013), 417.

Instead the Court analysed whether the whole policy was reasonable'.[45] This was also demonstrated by the Constitutional Court in the judgment of *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).[46]

The law has been used for many years to regulate occupation and this resulted in reservation of space in terms of the spatial policy of the apartheid regime. Certain communities were condemned to abject living conditions whilst others were afforded decent living conditions. The legacy of the apartheid spatial policy is still conspicuous in the post-apartheid era. Substandard housing schemes were designed for black communities with poor infrastructural designs. These abject conditions are still prevalent in poor communities. Isolde de Villiers makes reference to Philippopoulos-Mihalpoulos who states that 'Spatial justice should connote something more than social justice or regional justice with some regard to the spatial, and in fact, it is almost unthinkable that justice cannot be spatial when it is concerned with the distribution of resources in a given area'.[47] Residential segregation laws is the source of abject living conditions and lack of access to adequate housing for many black South Africans. Legislation were enacted to regulate space within which different races may reside.[48]

Adoption of the Constitution ushered in a new order in the South African legal system. Prior to the adoption of the Constitution property rights and evictions were largely regulated by common law. In this discussion I examine the manner in which the Constitution has introduced a new legal system whose purpose is to provide and protect socio-economic rights, and my focus is the right to have access to adequate housing. The Constitutional Court in the matter of *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* has stated that 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the

[45] M. S. Kende: 'The South African Constitutional Courts Construction of Socio-economic Rights: A Response to Critics', *Connecticut Journal of Int'l Law* (2004) Vol. 19, 620.

[46] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at para 31.

[47] I de Villiers, Tshwane 2055 and the (im)possibility of spatial justice, De jure, (2014), 208.

[48] See Natives (Urban Areas) Act No. 21 of 1923, Native Administration Act No. 38 of 1927, Natives Resettlement Act No. 19 of 1954.

Constitution and is subject to constitutional control'.[49] The democratic South Africa created an expectation for transformation from the oppressive practices adopted before democracy and this is seen as a vehicle towards achievement of socio-economic rights and protection thereof. Catherine Albertyn and Dennis Davis argue that 'the constitution's transformative purpose constitute an invitation for a realistic critique and realist methods to be introduced into the adjudicative process'. [50] They further argue that this 'requires achievement of socio-economic equality and individual well-being through the dismantling of structures of exclusion and oppression and the development of a caring and inclusive society'.[51] The analysis made by Albertyn and Davis fits within the purpose of this research as I intend to analyse mechanisms developed for protection of the right to have access to adequate housing. Iain Currie & Johan De Waal[52] argue that 'One can understand South Africa's housing jurisprudence during this phase as a 'bridge', employing procedura principles-principally joinder of the relevant municipality, reporting obligations and meaningful engagement – to move towards establishing the substantive content of s 26 housing right'.[53] Currie and De Waal, quoting from Justice Mahomed, describe one of the purposes of the South African Constitution as a desire that there should be 'a ring and decisive break with the past'.[54] Tim Hodgson[55] argues that 'the discourse on transformative constitutionalism is therefore in need of transformation so as to redirect its gaze from the law and the legal system to the people of South Africa'. As I engage with this research questions I will argue that there is a need to develop mechanisms to protect the right to have access to adequate housing, the effect of the historical segregation policies as a factor that needs to be taken into account when balancing the interests of the property owners and occupiers that face eviction applications. This I point out by referring to the former employees of a mining company who face eviction application subsequent to the sale of the property they occupy through a housing scheme provided to them by their former employer. I argue that segregation legislation

[49] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC).

[50] C. Albertyn and D. Davis: 'Legal realism, transformation and the legacy of Dugard', SAJHR, (2010), 203.

[51] C. Albertyn and D. Davis: 'Legal realism, transformation and the legacy of Dugard', SAJHR, (2010), 203.

[52] Iain Currie & Johan de Waal: The Bill of Rights Handbook, Sixth Edition, 2013, 589.

[53] Iain Currie & Johan de Waal: The Bill of Rights Handbook, Sixth Edition, 2013, 589.

[54] Iain Currie & Johan de Waal: The Bill of Rights Handbook, Sixth Edition, 2013, 141.

[55] T. F. Hodgson: 'Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy', *Acta Juridica*, (2015), 199.

pushed these people to the peripheries of the cities and the only way for them to be in the economic hubs was though provision of housing schemes by their employers so that they can provide cheap labour. Transformation cannot be achieved without taking these factors into account.

Section 1(a) of the Constitution imposes a duty on the courts to ensure that the outcome of their decisions will protect human dignity and advance basic human rights by ensuring that the 'basic necessities of life' are achievable. This duty however does not come without limitations, Courts are limited by the rule of law. The principle of legality dictates that courts must make decisions based on application of the known and general principles of the law. In the matter of *Matshidiso and Others v President of the Republic of South Africa Justic*e Fabricius stated that 'Our Constitution is based on the Rule of Law. Without it our society will not survive, be it in its present form or any other form. Violence can never be the solution to economic problems of the plight of the poor, which I recognise. If I could remedy the inequalities of the past, I would…''.[56] Notwithstanding the sympathy on the abject conditions of the applicants, courts are mindful of their duty to balancing upholding of existing laws.

In compliance with the state's obligations imposed by section 26 of the Constitution, various legislation like Prevention of Illegal Eviction from and unlawful Occupation Act ("PIE Act")[57] and Extension of Land Tenure Act ("ESTA Act")[58] have been enacted to guard against arbitrary evictions. One interesting development is the introduction of the concept of 'meaningful engagement' by the Constitutional Court and subsequent judgments thereafter, when dealing with eviction cases.[59] This concept was introduced to ensure that persons who would be adversely affected by an eviction order should be meaningfully engaged by the authorities before an order can be obtained. This is a development I will explore in my discussion.

---

[56] *Matshidiso and Others v President of the Republic of South Africa and Others* (75657/2016), 12/10/2016, para 19.

[57] Prevention of Illegal Eviction from and unlawful Occupation Act No. 19 of 1998.

[58] Extension of Land Tenure Act No. 62 of 1997.

[59] *51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC), paras 22 and 23.

Chapter 2

Overview of the legal system relating to the protection of the right to have access to adequate housing

2.1 Introduction

The central research problem of this project is lack of adequate protection of the right to have access to adequate housing in South Africa. The research question that guides this chapter is whether the state has developed legislative and policy framework to ensure progressive realisation of the right to have access to adequate housing and hence to prevent arbitrary evictions.

I will examine how access to housing for black South Africans was regulated in terms of apartheid segregation residential legislation. I will discuss various legislation during the apartheid regime that was enacted to implement residential segregation against blacks. I will focus on the case of *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another*[60] as this is a post-apartheid judgment that has provided a broad analysis of apartheid residential segregation legislation. I will further discuss the effect of apartheid spatial policy and its legacy in the post-apartheid era. I will also examine the legislative framework developed subsequent to adoption of the Constitution and in compliance with the requirements of section 26 of the Constitution. In so doing, I will examine whether there is a gap in the post-apartheid legislative framework for protection of persons like former employees of mining company in the South of Johannesburg who face eviction should they lose their jobs or should the employer decide to sell the

[60] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC), para 41-48.

property they occupy. I will lastly discuss inequality in South Africa and its effect on the progressive realisation of the right to have access to adequate housing.

The evolution of the concept of human rights has resulted in housing being viewed a basic necessity for human habitation. It is no longer acceptable for any human being to be without a housing structure. Clinton Aigbavboa and Wellington Twhwala provide a theoretical perspective of the origins of housing and trace it to the 'Paleolithic' period when *Homo sapiens* began to use 'natural materials such as stone, wood, leaves, animal skin and other similar items to create shelter from the elements of weather'.[61] Housing is essential for achievement and acknowledgment of human values. Access to housing is a source of happiness for any human being who enjoys the right to life.[62] Article 11(1) of the Covenant recognises the right of everyone to an adequate standard of living for himself/herself and his/her family including housing.[63] In his analysis of the right to have access to adequate housing Justice Yacoob states that section 26 of the Constitution 'recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of sewage and financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met…'.[64]

From the advent of apartheid South African government did not recognise human rights for black people and they were deprived of enjoyment of right to have access to housing. They were forcefully removed from their homes through segregation residential policies and it was easy to obtain eviction court orders obtained in terms of common law.[65] Upon adoption of the Constitution the state has an obligation in terms on section 26 to take reasonable legislative and other measures within its available

[61] Clinton Aigbavboa and Wellington Thwala, Residential Satisfaction and Housing Policy Evolution: *Abingdon, Oxon; New York, NY: Routledge*, (2018), 20.

[62] A. Mathews 'Right to Housing, (H. Cruse, THE CRISIS OF THE NEGRO INTELLECTUAL 551 (1967)', The, 6 Black L.J. 247 (1978), 1.

[63] International Covenant on Economic, Social and Cultural Rights of 1996, resolution 2200A (XXI) of 16 December 1966, Article 11.

[64] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 35.

[65] The Native Administration Act No. 38 of 1927.

resources, to achieve the progressive realisation of the right to have access to adequate housing.[66]

2.2 Historical analysis of access to housing in South Africa

Justice Yacoob correctly attributes the 'acute housing'[67] shortage in South Africa to the apartheid system. South African government developed for decades a legal system that was designed to deprive Blacks, Coloureds and Indians ("Historically Disadvantaged Individuals") access to decent living conditions.[68] Various legislation was enacted to ensure that the foregoing communities did not enjoy the same privileges relating to housing in the same way as their white counter-parts did. Racial was used as a basis of dividing South African societies.[69] This resulted in oppressive legislation being enacted to ensure that the Historically Disadvantaged Individuals are forcefully removed from their homes in areas that the government deemed to be prime land for occupation by white communities, for industrial development and for commercial agricultural purposes.[70] Historically Disadvantaged communities were allocated land for accommodation in the furthest outskirts of cities, or in remote rural areas.

In *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another*[71] Justice Ngcobo provides a historical analysis of the apartheid system in relation to housing and argues that 'residential segregation was the apartheid policy'.[72] In the first case of government segregation policy, the Native Land Act No. 27 of 1913 was enacted to limit occupation

[66] Section 26(2) of the Constitution.
[67] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 6.
[68] Natives (Urban Areas) Act No. 21 of 1923.
[69] See Natives (Urban Areas) Act No. 21 of 1923, Native Administration Act No. 38 of 1927, Natives Resettlement Act No. 19 of 1954.
[70] Natives (Urban Areas) Act No. 21 of 1923.
[71] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC), para 41-48.
[72] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC), para 41-48.

of blacks to only 13% of the South African land. Blacks were not allowed to own land and/or houses in the designated black townships, instead, rental housing schemes were created and blacks were issued with leasehold permits to occupy the houses. Ownership vested with local authorities responsible for black townships.[73] This was a grossly unfair system as it was in addition to the fact that blacks were prohibited from owning houses in areas reserved for whites and other groups. Blacks were turned into tenants with no security of tenure anywhere in their motherland. I align myself with de Villiers's observation that 'For Black South Africans, having a home was never a certainty in the 20th century'.[74] This was the status of blacks in South Africa with regard to security of tenure.

Langa Township in the Western Cape is an example of a township where blacks were not allowed to own property. Blacks could not buy property as sale to them was prohibited by law. Instead, long term leases of up to ninety nine years were the only means by which they could take occupation. It is only in post-apartheid era that ownership was transferred to the occupiers who could prove their entitlement to occupy in terms of what was known as permits to occupy.[75] This process of transfer of ownership was not carried out in a smooth manner, as most of these houses were overcrowded with family members and it was not simple to choose a person to take ownership amongst competing siblings. Females were granted permission to occupy if there was a male person who would be registered as the head of the family. A woman whose husband had passed on would be granted this permit if the eldest son was registered as the head of that family. This disadvantaged female siblings as their male siblings enjoyed preference in becoming permit holders.

The Native Administration Act[76] empowered government to forcefully remove blacks from their homes at its own whim. Justice Ngcobo points out that the Native Administration Act was the 'most powerful tool of government in implementing forced

[73] http://www.alhdc.org.za/static_content, accessed on 27-10-2018.
[74] Isolde de Villiers 'Law, Spaciality and the Tshwane Urban Space, submitted in fulfilment of the requirements of the degree LLD, Faculty of Law', University of Pretoria, 2017.
[75] http://www.alhdc.org.za/static_content, accessed on 27-10-2018.
[76] The Native Administration Act No. 38 of 1927.

removals of Blacks'[77] from their homes to designated areas. Governments use different means of ensuring that their objectives are achieved and legislation is the most effective way of forcing people to adhere to their instructions. This makes the process simple because anybody who resists such instructions is compelled through government agencies to enforce compliance with the set policies and legislation. Courts are used to issue orders against those who offer resistance and once such orders are made anybody who resists is subjected to penalties designed to alter behaviour. Justice Ngcobo painfully relates that the 'forced removals resulted in untold sufferings'.[78] When blacks were forcefully removed in implementation of the Native Administration Act, they lost their livelihoods, their houses, business opportunities and access to basic amenities that they enjoyed before. Padraig O'Malley makes an observation that '…[t]he displaced Black populations were largely rehoused in segregated mono-racial municipal housing estates on the urban periphery'.[79] The primary purpose of the Native Administration Act was to drive blacks away from the inner cities where employment and business opportunities were easily accessed.

The South African government engineered various forms of segregation and when it realised that there were too many blacks in the urban areas it then decided to establish Bantustans.[80] Government created what it initially called homelands for black people within South Africa. Such Bantustans were allocated to various Black communities on the basis of their language and ethnicity.[81] I argue that the objective of this division of the black communities strengthening the apartheid system of governance, with the object of 'divide and rule'. To government's surprise, this never worked as the struggle for equality and liberation of the oppressed communities grew stronger. This struggle included the right to have access to adequate housing.[82]

---

[77] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 41-48.

[78] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 41-48.

[79] https://omalley.nelsonmandela.org/omalley//index.php/site/q/03lv01646/05lv01728.htm (Christopher 1994: 38) Accessed on 29-09-2018.

[80] Natives (Urban Areas) Act No. 21 of 1923.

[81] Natives (Urban Areas) Act No. 21 of 1923.

[82] See The Freedom Charter, adopted at the Congress of the People at Kliptown, Johannesburg, on June 25 and 26, 1955.

Much of the land designated for residence by the blacks was barren with little or no prospects of agricultural, commercial and industrial production.[83] These residential areas were on the outskirts of towns and cities, away from commercial activities. Economic opportunities in the towns and cities were largely reserved for whites and the design was that in the residential areas for blacks there should effectively be no economically viable activities to create dependency on employment by the whites, which employment was offered as cheap labour. It is estimated that between 1960 and mid-1983, approximately 3.5 million people were relocated as a consequence of segregation policies.[84] Subsequent to the forceful removals to the Bantustans, blacks were forced by the need to earn a leaving to revert back to the cities to seek employment but there was a catch, they were not allowed to reside in the whites' designated areas. Seeing that it was inevitable for the Black communities to provide labour to the White owned businesses, government resorted to enacting legislation like Natives (Urban Areas) Act No. 21 of 1923, later repealed by the Native Urban Areas Consolidation Act No. 25 of 1945. Section 5(1) of the Natives (Urban Areas) Act provided that:

> 'Whenever the Governor-General deems it expedient, he may, by proclamation in the Gazette, declare that, from and after a date to be specified therein, all natives within the limits of any urban area or any specified portion thereof other than those exempted under sub-section (2) of this section, shall reside in a location, native village or native hostel'.[85]

Justice Ngcobo makes reference to the government's acknowledgment of the need for blacks to provide cheap labour and makes the following reference:

> 'Assuming that the ideal to be arrived at is the territorial separation of the races there must and will remain many points at which race contact will be

[83] A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, '*De Jure* Housing Segregation in the United States and South Africa: *The Difficult Pursuit for Racial Justice'*, 1990, *U. Ill. L. Rev.* (1990), 763.
[84] A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, '*De Jure* Housing Segregation in the United States and South Africa: *The Difficult Pursuit for Racial Justice'*, 1990, *U. Ill. L. Rev.* 763 (1990), 780.
[85] Natives (Urban Areas) Act No. 21 of 1923.

> maintained, and it is in the towns and industrial centres, if the economic advantage of cheap labour is not to be foregone, that the contact will continue to present its important and most disquieting features.'[86]

Whilst there was a clear intention of separating blacks from the whites and other races, they could not be permanently driven away as there was a need for them to interact with the whites for provision of labour to the white owned business. There was an acknowledgment by the apartheid government that their economic activities cannot be a success without taking advantage of cheap labour that was provided by the blacks.[87] It is on this basis that housing schemes were developed to accommodate black labourers for the period that they were employed in the white owned businesses.

The relentless efforts of displacing black communities continued and the Natives Resettlement Act No. 19 of 1954[88] was passed in terms whereof 'Africans residing in Sophiatown were forcefully removed to Meadowlands in Soweto, with residents of Alexander Township surviving such removals'.[89] This however was to the disadvantage of the white owned business and it appears that there was concern from the architect of apartheid Dr. Henrick Verwoed. Justice Ngcobo has noted this concern and referred to the speech made on June 13, 1952 by Dr. Hendrick Verwoed who stated that:

> 'While we are already establishing Native towns in the vicinity of the big cities to provide housing for the Natives it will mean that in addition a large number of black spots will be spread out throughout that whole Free State mining area. Now we must bear in mind that when the mines stop working one day that large number of towns will remain there spread out over that area.'[90]

---

[86] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 41-48.

[87] Natives (Urban Areas) Act No. 21 of 1923.

[88] Natives Resettlement Act No. 19 of 1954.

[89] https://www.sahistory.org.za/dated-event/natives-resettlement-act-act-no-19-1954-passed

[90] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 41-48.

The mining company which informs the subject matter of this research had downscaled its operations. A large number of its employees were laid off but they continued to reside in the houses allocated to them in terms of their employer's housing scheme. This is what Dr. Verwoed had in mind because these people now reside in the industrial area to the total defiance of what the residential segregation policies were intended. In my view, these people should not be subjected to evictions as this will be a perpetuation of apartheid legacy which ought to have been eradicated by our constitutional order. Legislation should be developed to protect people like occupiers of houses provided to employees of a mining company in the South of Johannesburg.

Justice Ngcobo observes that it is not a coincidence that 'Soweto is near Johannesburg, Katlehong near Germiston, Umlazi near Durban, Mdantsane near East London, and Gugulethu near Cape Town'.[91] Similarly, it is not a coincidence that places like Camps Bay and Gardens City in Cape Town exist as predominantly white residential areas. This is the apartheid legacy that as South Africans we will live with for decades to come,. Indeed the architects of segregation policies constructed what has turned out to be a long term image of South African society. We are now expected to be proud of being born in these townships which in actual fact is a distortion of the exact purpose for existence of black townships. We must always be mindful of pain and sufferings endured by black communities when they were established.

The oppressive government was faced with a dilemma, on the one hand it wanted to drive blacks to the outskirts of towns and economic activities.[92] On the other hand, it could not avoid the need for cheap labour provided by blacks for white owned businesses. Furthermore and as Justice Ngcobo observed with regard to existence of black townships, hostels, servants' quarters and other employee housing villages do not exist by coincidence.[93] These were established to ensure provision of cheap labour

[91] A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, 'De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice', (1990), *U. III. L. Rev*. (1990) 763.
[92]A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, 'De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice', 1990, *U. III. L. Rev*. (1990) 763.
[93] A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, 'De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice', 1990, *U. III. L. Rev*. (1990), 763.

to the white owned business establishments. One of the ways of enhancing this was the provision of relatively cheap train and bus services to town and city centres, and these still operate. However, we must bear in mind the rights of residents of these designated accommodation areas to protection to enjoy the right of access to adequate housing.

There were strict restrictions imposed for blacks to be within the urban areas. Legislation was used to give effect to such restrictions an example is the Native Laws Amendment Act.[94] Section 27 of the Native Laws Amendment Act in terms of amendment contained in Section 10 of the Natives (Urban Areas) Consolidation Act which restricted blacks to no more than seventy-two hours within the urban areas. Various residential segregation legislation passed by the South African government became a pillar of residential segregation whose intention was to facilitate easy implementation of these segregation laws.[95] This is a fact that must be taken into consideration whenever an eviction application is brought before court.

2.3 Effect of apartheid spatial policy

Apartheid South Africa allocated residential areas on the basis of a spatial policy that mirrored segregation laws.[96] Clarissa A. Wertman argues that 'the housing landscape in South Africa today exists in the shadow of apartheid'.[97] This resulted in decades of deprivation and inequality. Black communities have for decades been forced to reside in underdeveloped residential areas far from economic hubs. The most important legislation which is deemed as a pillar of segregation is the Group Areas Act[98] which was enacted to allocate residential areas according to racial groups. Justice Ngcobo correctly describes this form of residential segregation as 'the cornerstone of the

[94] Native Laws Amendment Act No. 53 of 1952.
[95] A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice, 1990, U. III. L. Rev. 763 (1990).
[96] The Group Areas Act No. 27 of 1950.
[97] Clarissa A. Wertman, There's no Place like Home: Access to Housing for all South Africans, 40 Brook. J. Int'l L. 719, 748 (2015), 721.
[98] The Group Areas Act No. 27 of 1950.

apartheid policy'.[99] This segregation policy only allowed blacks in whites' allocated residential areas to be there in the morning to work and immediately leave after work. These are described by Altus Mostert as 'by far the worst acts of apartheid'.[100] More than two decades post-apartheid this unfortunate legacy can still be witnessed. Residential segregation will unfortunately not disappear in a short period of time and take decades to reverse: it can only be done through positive policy formulation and implementation.

Apartheid spatial policies have no doubt created immense challenges in accessing right to adequate housing.[101] These policies determined space according to racial divides and I align myself with De Villiers's observation she made upon making reference to Philippopoulus that 'it is almost unthinkable that justice cannot be spatial when it is concerned with the distribution of resources in a given area'.[102] The apartheid government enacted various policies and legislation to regulate space in order to ensure that resources are distributed in an unbearably skewed manner in favour of white communities. The intention of the residential segregation policies was to separate South Africans into racial groups and resources were made available for the residential areas designated for whites.[103] The only way for blacks to be accommodated within the areas of economic activities was for them to provide cheap labour. There was no desire in the legal system to fairly distribute and allocate residential areas to blacks hence housing schemes were designed to accommodate them as long as they provided labour to the white owned businesses.[104]

[99] *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 41-48.

[100] https://www.quora.com/What-were-the-effects-of-the-Group-Areas-Act, Accessed on 29/09/2018.

[101] Clarissa A. Wertman, There's no Place like Home: Access to Housing for all South Africans, 40 Brook. J. Int'l L. 719, 748 (2015), 722.

[102] I de Villiers, Tshwane 2055 and the (im)possibility of spatial justice, 2014 De jure (Philippopoulus A 'Law's Spatial Turn; Geography, Justice and a certain Fear of Space' Law Culture and Humanities 2010 7 (2) 187-202), 208-209.

[103] A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice, 1990, U. III. L. Rev. 763 (1990).

[104] A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice, 1990, U. III. L. Rev. 763 (1990).

It is undeniable that the apartheid legal system regulated the occupation of space. Boundaries were set out to determine who may reside in which area on the basis of race. There is different legislation which were enacted to govern the space in South Africa on racial grounds.[105] In analysing the origin of the law Kim Economides, Mark Blacksell and Charles Watkins state that 'It is important to make this enquiry to enlighten those who wish to know the extent to which the legal norms penetrate a given society'.[106] This is indeed a correct approach; law and space cannot be detached when considering the social ills that affect us. People reside in areas that they do not necessarily have a choice; they are forced by legal systems to reside in those areas. This also plays a role in accessing and participating in economic opportunities.

John Weicher has made an analysis of the impact of the housing policy of the United States of America based on the history of the United States of America and its implication for the future.[107] South Africa has a historical housing policy that was designed to discriminate amongst its inhabitants. Economic hardships associated with the apartheid system made it impossible for majority of South Africans to acquire houses that meet the standard of adequate housing as guaranteed in the Constitution. In his analysis, Weicher argues that:

> 'the residential areas previously established as low income areas will continue to exist as such in the foreseeable future…The truth or falsity of the spatial mismatch hypothesis should not divert attention from the problems of the poor, wherever they live, or from policies and programs already in place that will result in deconcentration, directly or indirectly '.[108]

In the post-apartheid South Africa, people like former mining employees who are facing eviction, are destitute with no means of acquiring adequate houses on their

[105] Natives (Urban Areas) Act No. 21 of 1923, Native Administration Act No. 38 of 1927, Natives Resettlement Act No. 19 of 1954.

[106] Kim Economides; Mark Blacksell; Charles Watkins. The Spatial Analysis of Legal Systems: Towards a Geography of Law, 13 J, L. & Soc'y 161 (1986).

[107] John C. Weicher, Policy Implications of the Spatial Mismatch Hypothesis: Comment on Deconcentrating the Inner City Poor, The, 67 Chi.-Kent L. Rev. 855 (1991).

[108] John C. Weicher, Policy Implications of the Spatial Mismatch Hypothesis: Comment on Deconcentrating the Inner City Poor, The, 67 Chi.-Kent L. Rev. 855 (1991), 859-860.

own. Should they be evicted, they will not be accommodated within the economic hub of the city. There is no available land where they can be accommodated within the city's economic hub. Pockets of available land are in the outskirts of the city. They will find it difficult to travel to the economic hub to seek employment as transport costs will not be affordable for them. This will be a perpetuation of the apartheid spatial policy of accommodating blacks in the outskirts, as the only conclusion is that being poor is the reason for them to be driven far out of the city. These people deserve protection against possible eviction. Transformation cannot be achieved unless there is an integration of society regardless of their economic status.

Francis Johnston discussed the impact of spatial inequality to determine the 'degree to which social resources are spatially distributed in an unequal way'.[109] Francis Johnston points out that the 'uneven economic growth is the result of government policy that assisted coastal provinces to capitalise on their comparative strengths'.[110] South African Constitution guarantees human dignity, achievement of equality and places an obligation on the state to respect, protect and promote fulfilment of human rights.[111] These value systems cannot be achieved unless positive steps are taken to eradicate the legacy of the apartheid spatial policy.[112] Whilst these policies are being developed, at least those who are poor and reside within the economic hubs should be protected from being evicted to the outskirts of the city. In South Africa, developmental activities directed towards economic growth take place within the areas that were previously designed for whites, it is therefore only fair to protect the poor from being evicted from these areas. Even though mining activities may have collapsed leading to the employees losing their jobs, the areas where they reside through housing schemes of their former employer are still within the vicinity of various industrial activities and this will enable them or children born from these houses to easily access employment opportunities and other public amenities. Even though I

[109] M. F. Johnston 'Beyond Regional Analysis: Manufacturing Zones, Urban Employment and Spatial Inequality in China', 1999 China Q. 1 (1999), 2, 3, 11.
[110] M. F. Johnston 'Beyond Regional Analysis: Manufacturing Zones, Urban Employment and Spatial Inequality in China', 1999 China Q. 1 (1999), 3.
[111] Constitution of the Republic of South Africa Act, 1996.
[112] C. A. Wertman 'There's no Place like Home: Access to Housing for all South Africans', *40 Brook. J. Int'l L.* 719, 748 (2015), 722.

appreciate City of Johannesburg's efforts to establish low cost housing schemes within the inner-city through an entity known as Johannesburg Social Housing Company, the magnitude of apartheid spatial policy legacy will take a very long time to reverse.

Janet Kodras makes an observation that 'The evident spatial variations in poverty, labour market, welfare systems, and attitudes towards public assistance indicates that individuals are confronted with very different combinations of opportunities and constraints, depending on where they live'.[113] This is a correct analysis, various legal systems have adopted spatiality policies that determine the social status of our communities. This plays a significant role in the standard of education, health and amenities accessed by those who are condemned by the spatial policy which results in uneven distribution of resources. I argue that the occupants of houses provided by their former mining company employer are located at the centre of economic hub in the South of Johannesburg. They reside in an area where various industrial activities are taking place including shopping centres where they can walk to seek employment. They can also walk to the inner-city of Johannesburg without difficulty. They have access to developed public amenities like schools, parks, religious centres and health facilities. Should they be evicted, they will be accommodated in areas far from all these benefits that they enjoyed for years. This will result in hardships that they will never recover from like many other blacks who were forcefully removed to the outskirts of Johannesburg in the implementation of apartheid-era segregation residential policies and legislation.

Lisa Pruitt and Beth Colgan have examined 'the inequality that arise as a result of socio-geographic conception of spatial inequality in relation to the funding'.[114] They argue that 'the geographic location turns to be represented by spatial inequality and

[113] J. E. Kodras 'The Spatial Perspective in Welfare Analysis', *6 Cato J.* 77 (1986), 82.

[114] L. R. Pruitt; B. A. Colgan 'Justice Deserts: Spatial Inequality and Local Funding of Indigent Defence', *52 Ariz. L. Rev*. 219 (2010), 227.

has shifted the core sociological inquiry from 'who gets what' to 'who gets what, where'.[115]

> 'Spatial inequality is closely associated with uneven development-that is, place-to-place variations in degree and type of development. As a result of uneven development, location dictates employment and other market-related opportunities. Depending on the level or scale of financing, uneven development can also result in spatial inequality in terms of access to government services'.[116]

This is a correct analysis of the impact of a spatial policy driven by uneven distribution of resources. Equality can never be achieved without drastic policies intended at unravelling the impact of the historical spatial policies. In the post-apartheid South Africa, people who are lucky to be provided with permanent accommodation are provided with RDP houses. These RDP houses, such as in the apartheid era, are in the townships previously designated for black residents. The other issue is that these are mostly at the areas with no prospects of industrial development. The old black townships even look much better than the areas where the RDP houses are developed, where there is poor infrastructure, and no access to schools or health facilities. There are no employment opportunities in these RDP areas and people who reside in these houses illustrate another level of poverty. Evicting former employees of a mining company who currently reside within the vicinity of industrial areas and other developed public amenities will simply perpetuate inequality that is a legacy of apartheid. These people must be protected against being condemned to the worst level of inequality that may result from their eviction.

[115] L. R. Pruitt; B. A. Colgan, Justice Deserts: Spatial Inequality and Local Funding of Indigent Defence, 52 Ariz. L. Rev. 219 (2010) at 227.

[116] L. R. Pruitt; B. A. Colgan, Justice Deserts: 'Spatial Inequality and Local Funding of Indigent Defence', (Lobao et al., supra note 28, at 2. Spacial inequality analysis thus reveals how place can be a maker or axis of stratification. Lobao, supra note 28, at 1. Law, too, has seen something of a geographic turn in recent years.)', *52 Ariz. L. Rev*. 219 (2010) 227.

The legacy of apartheid spatial policies is prevalent in our society as the majority of blacks reside in the outskirts of the economic activities.[117] They spend more time commuting to work due to their location and spend substantial amount of their salaries on travelling to work. Their places of residence are still overcrowded and they do not have opportunity to spend time with their children after work so that they can assist them with homework. The living conditions are still substandard, with inadequate infrastructure that is impossible to upgrade to the same standard as suburban areas previously designated for whites and they are also exposed to health hazards. Evicting former employees of a mining company from a well-developed area will do nothing more than expose them to the unpleasant legacy of apartheid spatial policies.

Johan van der Walt correctly analyses the segregation policy legacy by pointing out that:

> '[y]ears of separation from and suppression of the Black majority left the White minority scared and distrustful as to what the end of official racial segregation would bring to their door steps. They took recourse to the one enclave of separate existence that 'post-apartheid' Johannesburg could be expected still to afford them, at least for a while, namely, the economic exclusivity of the already expensive and soon to be drastically more and more expensive properties in the neighbourhoods and suburbs towards the north of Johannesburg'.[118]

South Africa has implemented segregation of its society through its legislation and policies.[119] This has resulted in an image that will define this country for many generation. This system of segregation is as Van der Walt correctly points out, manifested by market prices in the new dispensation.[120] In areas that were previously

[117] C. A. Wertman 'There's no Place like Home: Access to Housing for all South Africans', *40 Brook. J. Int'l L.* 719, 748 (2015), 721.

[118] J. van der Walt: Johannesburg, 'a tale of two cases' in Philipoulos-Mihalos (ed) Law and City' (2007), 221.

[119] A. Leon Jr. Higginbotham; F. M.Higginbotham; S. S. Ngcobo, 'De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice', 1990, *U. III. L. Rev.* 763 (1990).

[120] J. van der Walt: Johannesburg, 'a tale of two cases' in Philipoulos-Mihalos (ed) Law and City', (2007).

designated for whites, properties are increasingly expensive whilst in the previously designated black areas properties are relatively cheap. This is also accompanied by different standards of living, because in the black areas the standard of living is lower than in the previously white designated areas.

Economic exclusion also played a significant role in segregation of societies. I align myself with how Van der Walt describes Johannesburg as a 'tale of two cities'[121] as this means that we are geographically located in one city but enjoy different privileges as a result of the legacy of apartheid spatial policies. The employees of the mining company that may be evicted due to sale of housing schemes where they reside continue to enjoy the privileges of residing within the economic hub and to evict them to the outer reaches of the city will go against the objective of the Constitution which embraces equality and access to opportunities for the betterment of all our lives.

The apartheid segregation spatial policies have left a long lasting legacy for the inadequate access to housing.[122] I argue that systematic efforts were made successfully to ensure that South African society remains segregated for generations to come.[123] The hardships caused by the segregation policies have made the living conditions unbearable and a solution is the implementation of drastic policy measures to remediate the greatest of the evils. The majority of blacks still reside in the areas allocated to them through prior segregation policies.[124] They commute on a daily basis to seek employment or to work in the economic hubs. High traveling expenses makes it difficult for the unemployed to seek employment. To evict former employees of a mining company within the economic hub on the basis that they are unlawful occupiers, will be a confirmation of the apartheid segregation policies as they can only

[121] J. van der Walt: Johannesburg, 'a tale of two cases' in Philipoulos-Mihalos (ed) Law and City', (2007).
[122] C. A. Wertman 'There's no Place like Home: Access to Housing for all South Africans', *40 Brook. J. Int'l L*. 719, 748 (2015), 721.
[123] C. A. Wertman 'There's no Place like Home: Access to Housing for all South Africans', 40 Brook. J. Int'l L. 719, 748 (2015), 721.
[124] C. A. Wertman 'There's no Place like Home: Access to Housing for all South Africans', 40 Brook. J. Int'l L. 719, 748 (2015), 721.

be allocated alternative accommodation far from the economic hub. Something better must be done for them.

2.4 Post-Apartheid legislative framework

The Constitution has brought about the dawn of hope and ended years of compulsory segregation and oppression.[125] Section 26 of the Constitution guarantees the right to have access to adequate housing and prohibits arbitrary evictions. It also requires courts to consider all relevant circumstances before granting an eviction order.

The Constitution places an obligation on the state to *inter alia* take legislative and other measures within its available resources to achieve the progressive realisation of the right to have access to adequate housing. This obligation does not only arise from the Constitution as it is also a requirement in terms of Article 11 of the Covenant that 'state parties must take appropriate steps to ensure the realisation of this right'.[126] Subsequent to adoption of the Constitution, various legislation has been enacted to fulfil the state's obligation to ensure progressive realisation of this right as well as protection against arbitrary evictions.[127]

The Land Reform Act was enacted to provide security of tenure to labour tenants and other persons occupying or using land as a result of their association with labour tenants.[128] This Act defines a labour tenant as a person residing in a farm or has a right to reside on a farm including the right to use cropping or grazing land.

[125] See section 1(a) of the Constitution.
[126] International Covenant on Economic, Social and Cultural Rights of 1996, resolution 2200A (XXI) of 16 December 1966, Article 11.
[127] See Land Reform (Labour Tenants) Act No. 3 of 1996, Extension of Land Tenure Act No. 62 of 1997 and Prevention of Illegal Eviction from and unlawful Occupation Act No. 19 of 1998.
[128] Land Reform (Labour Tenants) Act No. 3 of 1996.

The ESTA Act was enacted with acknowledgment that black South Africans did not have security of tenure and were vulnerable to unfair and arbitrary evictions. This legislation acknowledges the hardships endured as a result of such evictions which also results into social instability and that this is a consequence of the discriminatory laws of the apartheid system. The purpose of this Act is to ensure achievement of long-term security of tenure and facilitate amicable solution amongst landowners, occupiers and government authorities. An Occupier is defined in section 1 of ESTA Act as 'a person residing on land which belongs to another person and who has or on February 4, 1997 or thereafter had consent or another right in law to do so'.[129] This definition however excludes labour tenants as defined in the Land Reform Act.[130] Also those who earn a salary above the prescribed threshold are excluded from a definition of an occupier. The last category excluded is a person using or intending to use the land in question mainly for industrial, mining, commercial farming purposes. The ESTA Act does not apply to land in proclaimed townships except on agricultural land.

The PIE Act prohibits unlawful eviction within urban areas without a court order. This Act sets out a procedure that must be followed before an eviction order may be obtained. The procedure set out by the PIE Act is applicable to an unlawful occupier of a property belonging to a person seeking eviction.

It appears that there is still a gap in terms of our legislation that is enacted to protect vulnerable societies. Earlier in this discussion reference was made to former mine workers who face eviction from their homes on the ground that their former employer has decided to sell the property previously allocated to them as a housing scheme on the basis of their employment. A historical background was provided which demonstrates that in perpetuation of segregation policies, employers were required to provide accommodation to their employees for the period that they are employed. What seems to have been a consequence is that these employees ended up residing in these houses for decades some even retiring whilst residing in those houses. Others established families, their children were born from these houses and they know no

[129] Extension of Land Tenure Act No. 62 of 1997.
[130] Land Reform (Labour Tenants) Act No. 3 of 1996.

other homes. Others are widows and these houses are only their households, they have no other homes. What then should happen to them? These are members of our society who are destitute for they only earned meagre wages, they could not have substantial savings that could sustain them and their families post-employment. The design was that they provide cheap labour and that is simply what happened to them.

Even though I appreciate that there is some development of our legal system through enactment of legislation mentioned above, there seems to be a gap in our legislation. The gap in our legislation is that mine workers who have provided their labour for many years and resided in the housing schemes provided by their former employers stand to be evicted on termination of their employment contracts. Notwithstanding their occupation of the houses for more than two decades. They will be categorised as unlawful occupiers as they will no longer have consent of their former employer to occupy the houses. This particular group of people is left to fend for itself. However, they still have hope that one day the post-apartheid government will come to their rescue. This can only be achieved by legislative policy formulation to deal with this legacy of segregation policies of the apartheid government.

There seems to be attempts by the current government to acknowledge the social ills and the origin of hostels. Initiatives have been made to upgrade some of the hostels in the south of Johannesburg into family units, which initiative is a positive step towards restoring the dignity of hostel dwellers. There are challenges though as some of hostels due to neglect have deteriorated to an extent that it is impossible to upgrade them. However, there is nothing stopping the fast track of upgrading those that are in a better position to be upgraded. What is still also questionable is the failure to award title deeds to those hostels that can be upgraded. National policy would be the best way of dealing with negative impact of spatiality policy. The manner that the issue of hostels is dealt with seems to be sporadic, it is not enough to leave this to municipalities or provincial governments. There must be a consolidated policy which must get to the root of reversing the social ills of the past caused by the apartheid spatiality policy. Selby Hostels for an example are inside the city and there are efforts

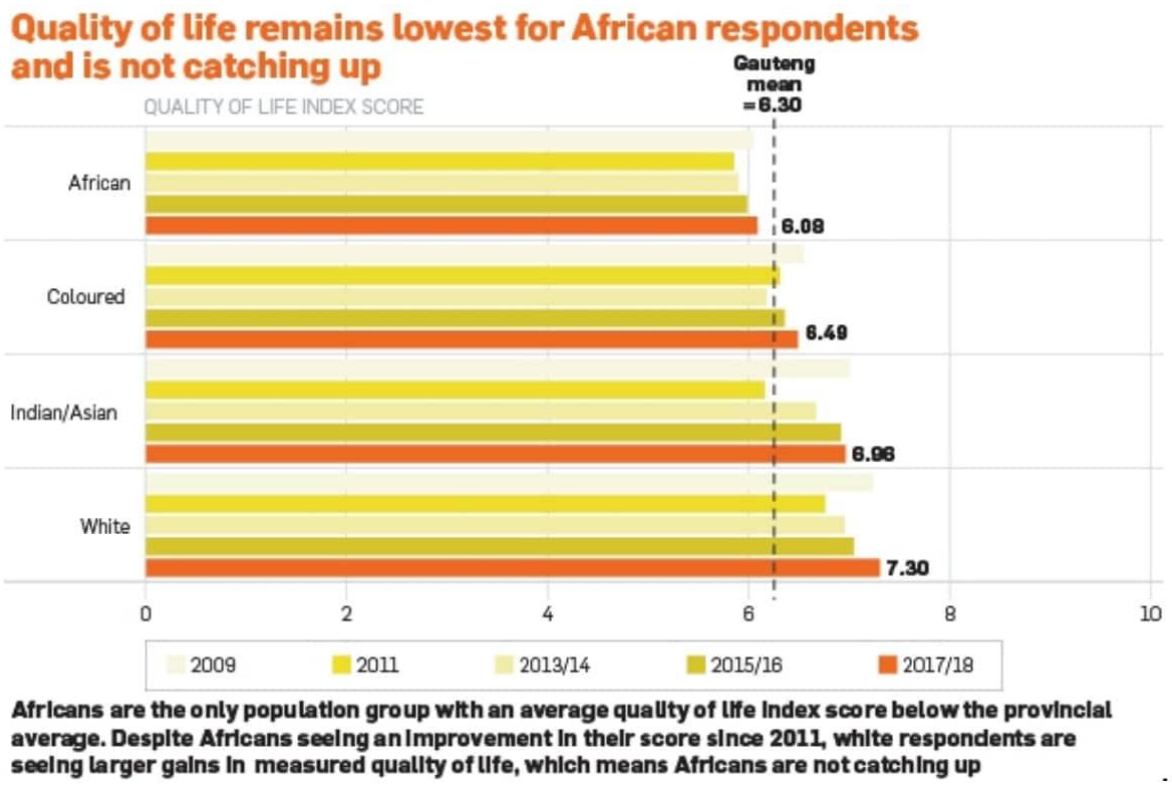
from the City of Johannesburg to initiate a process of issuing title deeds to the residents of Selby Hostel.

2.5 Inequality in South Africa

South Africa is one of the most unequal societies in the world and this largely emanates from the discriminatory policies of the apartheid government. Inadequate access to housing is one example where inequality can be witnessed in nearly a quarter of a century of our democracy. This goes against the hopes and aspirations of millions of South Africans who thought the dawn of democracy means an end of inequality. As statistics were released from time to time, complete eradication of inequality seems unlikely. Stats SA released a report in June 2018 which indicates that an average of 13.6% of South Africans reside in informal settlements, Gauteng and North West Provinces with above 19%.[131] Lack of access to housing is a challenge in the post-apartheid era.

The Gauteng City-Region under the auspices of Gauteng Provincial Government has conducted a survey acting together with the University of Johannesburg on the quality of life for different racial groups and have concluded that Africans live under the lowest standards of living compared to other races.[132] The diagram below demonstrates the quality of life by the different groups as at the financial year 2017/2018. The picture is sad for the Africans whilst there is an indication of improvement of quality of life for the whites as well as the Asians.

[131] http://www.statssa.gov.za/The latest household statistics and more, Accessed on 24-09-2018.
[132] https://briefly.co.za/19735-survey-claims-white-people-quality-life-races.html Accessed on 20-11-2018.



133

I acknowledge that the democratic government has taken positive steps directed towards eradication of inequality but the results are far from achieving this objective. As long as there is there is inequality, access to adequate housing will remain a challenge.

[133] https://briefly.co.za/19735-survey-claims-white-people-quality-life-races.html Accessed on 20-11-2018.

2.6 Conclusion

Historically the South African government adopted a system of allocating houses through segregation residential policies. To sustain this a variety of legislation was adopted to ensure adequate implementation of these unfortunate policies. This chapter was formulated to answer the research question of whether the post-apartheid state has developed a legislative and policy framework to ensure progressive realisation of the right to have access to adequate housing. In this chapter I briefly set out the historical analysis of housing policies during the apartheid regime. This was done by looking into the tools utilised to implement and ensure success of segregation housing policy. I then focussed in the judgment of *Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* as this judgment provides a detailed historical background of the apartheid segregation residential policies. I focussed on specific legislation which I believe to be key in implementation of segregation residential policies. I considered the Native Land Act which limited blacks to 13% of the South African land. The next legislation discussed is the Native Administration Act which has left painful legacy, as it was used to effect forceful removals of blacks from their homes at the whim of government. The Natives (Urban Areas) Act which was later repealed by the Native Urban Areas Consolidation Act authorised the Governor-General to determine that blacks within the reserved residential areas should be relocated to black townships, black villages or black hostels. I further discussed the Natives Resettlement Act which was passed to authorise resettlement of blacks from Sophiatown to Meadowlands in Soweto. I then examined the legacy of apartheid spatial policy and argue that South Africa has a long lasting legacy of dividing residential areas according to racial groups. I also discussed inequality in South Africa and argue that apartheid segregation policy is the main source of inequality and lack of access to adequate housing.

I have acknowledged that various legislation has been enacted in compliance with section 26 of the Constitution to ensure progressive realisation and protection of the right to have access to adequate housing. I discussed the Land reform Act whose

purpose is to guarantee security of tenure for labour tenants and other persons occupying or using land as a result of their association with labour tenants. I further discussed the ESTA Act whose objective is to guarantee long-term security of tenure for occupiers in the agricultural land and prohibits their arbitrary evictions. The last legislation discussed is the PIE Act which prohibits unlawful eviction of unlawful occupiers in the urban areas without a court order.

I go on to argue that employees allocated accommodation in the employment housing schemes like the mining employees in the South of Johannesburg stand to be evicted should the procedures set out for eviction be adhered to. I argue that this is an unjust situation, as these people have occupied these properties for decades as their homes. Children who were born in these houses have been residing there for more than 20 years, it will be unjust and unfair to evict them by following the eviction procedures set out in legislation. These people are not in these areas of accommodation out of their own choice, the apartheid system of segregation created this legacy. As it happens they are living in a privileged area in the South of Johannesburg, as that is where the mine was based.

I conclude that there is a gap in our legal system as there is no legislation or policy enacted to protect these people against eviction. I will make suggestions for their situation below. The Constitution sets out requirements for provision of right to have access to adequate housing and the state is required to take reasonable measures including legislation and policy formulation to ensure progressive realisation of this socio-economic right. The state is required to break away from the housing segregation policies by ensuring that fair and just legislation and policies are enacted to fulfil this requirement. An examination of existing housing policies is necessary to ensure that those who had been deprived basic necessities of life like access to housing are afforded equal opportunities to enjoy these rights.

Chapter 3

Development of our legal system and Constitutional Court's contribution in relation to protection of right to have access to adequate housing

3.1 Introduction

The central research problem of this project is lack of adequate protection of the right to have access to adequate housing in South Africa Section 26(1) and (3) of the Constitution.

The research question that guides this chapter is whether the Constitutional Court has contributed towards development of the right to have access to adequate housing, focusing to the *Grootboom* judgment

On June 25 and 26, 1955 the African National Congress adopted the Freedom Charter. In the Freedom Charter certain declarations were made which include *inter alia* that 'there shall be houses, security and comfort'.[134] It is provided in the Freedom Charter that 'all people shall have the right to live where they chose, to be decently housed, and to bring up their families in comfort and security'.[135] The Freedom Charter carried promises of what would be delivered by the African National Congress should it ascend to power in a democratic South Africa.[136] This raised expectations of what in the biblical terminology is referred to as the promised land of milk and honey. Society

[134] The Freedom Charter, adopted at the Congress of the People at Kliptown, Johannesburg, on June 25 and 26, 1955.
[135] The Freedom Charter, adopted at the Congress of the People at Kliptown, Johannesburg, on June 25 and 26, 1955.
[136] The Freedom Charter, adopted at the Congress of the People at Kliptown, Johannesburg, on June 25 and 26, 1955.

had a legitimate expectation that democracy will result into a complete break away from the oppressive system and hardships related to it.

The main research problem of this chapter is to examine contribution by the South African Constitutional Court towards development of the right to have access to the right to adequate housing with specific focus to the former employees of a mining company in the South of Johannesburg. This chapter will be guided by answering a question whether the Constitutional Court has contributed towards this right, using the *Grootboom* judgment as a benchmark. In this chapter I discuss the contribution of the Constitutional Court towards development and protection of the right to have access to adequate housing. The *Grootboom*[137] judgment will be the starting point of my discussion because of its prominence in relation to this right. I will examine the objective approach adopted by the Constitutional Court in adjudicating an individual claim and balancing the broader societal interests.

I will also discuss analysis by Mark Kende[138] of the approach adopted by the Constitutional Court in adjudicating individual rights' claims. I will also discuss the other Constitutional Court judgments that deal with the right to have access to adequate housing, for instance, the *All Builders*[139] judgment which considered the just and equitability of an order sought for eviction. I will also discuss the *Blue Moonlight* judgment, taking into account the fact that prior to purchase of the property by *Blue Moonlight*[140] in 2004, the occupiers resided in the property from 1976. This length of time in occupation is similar to the length of time in the research question in this project. I will also discuss development of the concept of meaningful engagement in the *Port Elizabeth Municipality*[141] judgment and how it has become part of our jurisprudence.

[137] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
[138] M. S. Kende: 'The South African Constitutional Courts Construction of Socio-economic Rights: A Response to Critics', *Connecticut Journal of Int'l Law* 2004, Vol. 19, 620.
[139] *All Builders And Cleaning Services CC v Matlaila and Others (42349/13) [2015] ZAGP JHC 2 (16 January 2015).*
[140] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
[141] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

3.2 Transformative Constitutionalism

The adoption of the Constitution raised expectations of a transformative constitutionalism with the hope that there will be a transition from the apartheid oppressive policies to a more democratic dispensation that would protect socio-economic rights.[142] Marius Pieterse describes transformative constitutionalism as 'mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a 'culture of justification' for every exercise of public power'.[143] Two concepts arise out of this, firstly the transition from the apartheid system to a democratic system is described as a transformation. This is a process of effecting changes through policy formulation that will lead to remedying the imbalances created by unjust policies of the past. Implementation of these policies will result to transformation of our society.

The Constitution is the supreme law of the land and this makes South Africa a constitutional democracy.[144] Policies formulated must be within the framework and prescripts of the Constitution: we cannot adopt policies that will turn out to be reverse oppression.[145] This results in what many scholars refer to as transformative constitutionalism. Various attempts have been made to define transformative constitutionalism. Justice Langa correctly accepts that 'there is no single accepted definition'.[146] He states that 'It is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism'.[147] Whilst I acknowledge different views from scholars relating to transformative constitutionalism I align myself with the approach of the Constitutional Court in *Du Plessis v De Klerk* where it is stated that 'The Constitution is a document that seeks to transform the status quo ante into a new order'.[148] Transformative constitutionalism

[142] See section 7(1) and (2) of the Constitution of the Republic of South Africa.
[143] M. Pieterse: What do we mean when we talk about transformative constitutionalism? SAPR/Pl (2005) Vol. 20, 155,156, 159.
[144] See section 2 of the Constitution of the Republic of South Africa.
[145] See section 2 of the Constitution of the Republic of South Africa.
[146] P. Langa 'Transformative Constitutionalism', 17 *Stellenbosch L*. 351 (2006), 351.
[147] P. Langa 'Transformative Constitutionalism', 17 *Stellenbosch L.* 351 (2006), 351.
[148] *Du Plessis v De Klerk* 1996 3 SA 850 (CC).

is a viable vehicle to transcend the impact of apartheid housing segregation policies. Solange Rosa correctly points out that:

'[t]he transformation from a racially-biased, resource-biased society to an egalitarian one where all enjoy the aims, values and rights upheld in the Constitution of the Republic of South Africa…requires a concerted effort by all institutional players to redress the material as well as the psycho-socio-political deficiencies that continue to inhibit the full enjoyment of our new democracy for approximatively half of the population'.[149]

The Constitution clearly sets out what must be done to provide for right to have access to adequate housing. The state is expressly required to take reasonable measures including legislative and policy formulation to ensure progressive realisation of this socio-economic right.[150] The state is clearly required to break away from the housing segregation policies by ensuring that fair and just legislation and policies are adopted to fulfil this requirement. The Constitutional Court has correctly interpreted this obligation for the state by requiring it to develop a housing policy that will ensure access to right to adequate housing.[151] An examination of existing policies is necessary to ensure that those who had been deprived basic necessities of life like access to adequate housing are afforded equal opportunities to enjoy these rights. In so doing our legal system would have been developed for the good of the society.

[149] S. Rosa 'Transformative Constitutionalism in a Democratic Developmental State', 22 *Stellenbosch L*. Rev. (2011), 542.

[150] Section 26(2) of the Constitution of the Republic of South Africa.

[151] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 24, 40-42.

3.3 The Grootboom Case

The *Grootboom* case is a landmark judgment in South Africa on adjudication of claims relating to right to have access to adequate housing. Many scholars have analysed this judgment, however, it is unavoidable to have a brief discussion of the *Grootboom* judgment due to its prominence when dealing with the right to have access to adequate housing. Clarence Tshoose describes the *Grootboom* case as the '*locus classicus* when dealing with claims based on the right to housing'.[152]

Ms Grootboom together with other affected persons approached the court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation.[153] The matter proceeded from High Court up to the Constitutional Court. Various issues were considered by the Constitutional Court in dealing with the claim of Ms Grootboom and her fellow Respondents. At commencement the Court examined the basis for the 'acute housing shortage'[154] and determined that this was as a consequence of the apartheid policy whose 'central feature was a system of influx control that sought to limit African occupation in urban areas'.[155] The Court acknowledged the effect of residential segregation policy and the long lasting legacy it left behind for generations.

The Court noted the fact that Ms Grootboom had initially been evicted through a court order obtained at a Magistrates' Court. The Constitutional Court was concerned with manner in which the eviction order was obtained at Magistrates' Court. Firstly, it was not satisfied that such an eviction was executed in accordance with the PIE Act.[156] This is critical because the PIE Act is one of the positive developments of our legal

[152] C. Tshoose 'A closer look at the right to have access to adequate housing for inhabitants of informal settlements post Grootboom', *SAPL*, (2015) Vol. 30 99.

[153] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 4.

[154] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 6.

[155] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 6.

[156] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

system as it was enacted in compliance with the requirements of section 26 of the Constitution which *inter alia* prohibits arbitrary evictions.[157]

The second issue was the manner in which such an eviction was executed and this was described as having been done 'prematurely and inhumanely: reminiscent of apartheid-style evictions'.[158] The fact that their homes were bulldozed, burnt and their possessions destroyed and that many of them were not there and could not even salvage their personal belongings was one of the factors that the Constitutional Court determined as behaviour similar to the apartheid style of evictions.[159] This conduct is disappointing and hurtful and is not acceptable in a democratic South Africa, which prides itself as a country that observes and protects human rights.[160] The Constitutional Court was also concerned with lack of mediation efforts and bad weather conditions under which such evictions were executed.[161] Those who executed evictions chose a day with most unbearable weather conditions to spite and inflict pain on Ms Grootboom and other Respondents.[162] As eviction was executed Ms Grootboom and other evicted persons might have asked themselves what they have done to deserve such hardships and ill-treatment, especially during a democratic dispensation. Whilst everyone was celebrating freedom, to them freedom was meaningless. They might have been convinced that freedom does not exist and that it will never be. The observation made by the Constitutional Court is a positive step and I argue that as they sat in the courtroom listening to the judgment, their hopeless faces were developing a glimmer of smile. They were witnessing the development of our legal system through the Constitutional Court, and their hopes and dignity were being restored.

[157] Section 26(3) of the Constitution of the Republic of South Africa.

[158] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 10.

[159] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[160] See section 7(1) and (2) of the Constitution of the Republic of South Africa.

[161] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[162] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

In dealing with the requirements of section 26 of the Constitution relating to right to have access to adequate housing, the Constitutional Court stated that realisation of the socio-economic rights including shelter 'is key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their potential…The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing'.[163]

The Constitutional Court was alive to the fact that, limiting itself to the specific relief would not ameliorate the historical hardships emanating from the apartheid policies.[164] It analysed the current housing policy of the state to determine whether it has met its constitutional obligations.[165] This is in line with the Covenant obligations in terms whereof 'state parties are required to demonstrate that every effort has been made to use all the resources at their disposal to satisfy the minimum core of the right'.[166] The court emphasised that 'the real question in terms of our Constitution is whether measures taken by the state to realise the right afforded by section 26 are reasonable'.[167] However, a distinction between 'right to adequate housing'[168] and 'right of access to adequate housing'[169] was drawn and identified to mean that 'housing entails more than bricks and mortar'.[170] The Court stated that 'for a person to have access to adequate housing: (i) there must be land, there must be services, there must be a dwelling'. The court further stated that 'the state must create conditions for access to adequate housing for people at all economic levels. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system,

[163] *The Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* at para 20.
[164] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
[165] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
[166] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 30.
[167] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC*)* at para 33.
[168] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 35.
[169] Robinson, Simon. "For Activist Judges, Try India" (http://www.time.com/time/world/article/0,8599, 1556853,00.html), Time Magazine (2006-11-08),Harish Khare.
[170] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 *(CC)* at para 35.

providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance'.[171]

The Court emphasised that 'state policy needs to assist those who are otherwise unable to support themselves and their dependents'.[172] In analysing this obligation, the Court stated that the 'state is required to devise a comprehensive and workable plan to meet its obligations'.[173] The state's obligations were defined as the obligation to '(i) take reasonable legislative and other measures; (ii) to achieve the progressive realisation of the right; and (iii) within available resources'.[174] Further that 'a reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available'.[175] In analysing the housing programme the Court stated that 'it is required to decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements'[176] and concluded that 'programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for the relief to the categories for people in desperate need identified earlier'.[177] The state was required to 'devise and implement …a comprehensive and coordinated programme progressively to realise the right to have access to adequate housing'.[178] What the Court did was to broaden the scope of its judgment by enforcing state's obligation in terms of section 26(2) of the Constitution and it did not limit itself to the specific order sought by the Respondents. Danie Brand points out that it

[171] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 36.
[172] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 36.
[173] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 38.
[174] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 38.
[175] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 39.
[176] *The Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* at para 56.
[177] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 69.
[178] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 69.

'evaluated the state's entire housing policy and found it to be inconsistent with the right to have access to adequate housing contained in the Constitution to the extent that it made no provision for the plight of those in the position of the claimants before it'.[179]

Mark Kende[180] in referring to the Grootboom case states that 'the *Grootboom* case shows that placing socio-economic rights in a Constitution does not mean that every individual is entitled to assistance on demand'. Instead the Court analysed whether the whole policy was reasonable'.[181] He also referred to a critique of this judgment by David Bilchitz who argued that 'the Court's statement that it is not possible to determine the housing right as a 'minimum core' is flawed because certain fundamental principles are indisputable'.[182] He refers to further critique by Bilchitz who argued that 'the Court is not fulfilling new Constitution's promise of transformation'.[183] However, Kende does not agree with this critique and argues that 'these critiques lack perspective in that South Africa is one of the only countries whose highest court treats socio-economic rights with the same reverence as civil human rights law, particularly in a country with virtually no history of a judicial role in such matters'.[184] He also addresses Bilchitz's argument that the right 'does not mean that some receive housing now, and others receive it later; rather, it means that each is now entitled to basic housing provision, which the government is required to improve gradually over time'.[185] Kende argues that 'South African Bill of Rights drafters never intended to have socio-economic rights provisions create such an individual right on demand'.[186] There are

[179] Oscar Vilhena, Upendra Baxi and Frans Viljoen: 'Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa: Danie Brand 'The South African Constitutional Court and Livelihood Rights', *Pretoria University Law Press*, (2013), at 417.

[180] M. S. Kende: 'The South African Constitutional Court's Construction of Socio-economic Rights: A Response to Critics', *Connecticut Journal of Int'l Law* (2004) Vol. 19, 620.

[181] M. S. Kende: 'The South African Constitutional Court's Construction of Socio-economic Rights: A Response to Critics', *Connecticut Journal of Int'l Law* (2004) Vol. 19, 620.

[182] D. Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance', 119 S. African L.J. 484, 501 (2002), 620.

[183] D. Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance,, 119 S. African L.J. (2002), 484, 501.

[184] M. S. Kende: 'The South African Constitutional Court's Construction of Socio-economic Rights: A Response to Critics', Connecticut Journal of Int'l Law, (2004) Vol. 19, 620.

[185] David Bilchitz, Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance, 119 S. African L.J. 484, 501 (2002), 493.

[186] M. S. Kende: The South African Constitutional Court's Construction of Socio-economic Rights: A Response to Critics, Connecticut Journal of Int'l Law (2004) Vol. 19, 620.

two sides on this judgment: Claimants approached Court desperately expecting their dire situation to be immediately resolved.[187] They got disappointed with the Court's approach. The Court took note of historical circumstances that led to lack of access to adequate housing and other basic necessities of life including human dignity. I commend the approach adopted by the Constitutional Court in analysing the state's policy when addressing the right to have access to adequate housing in a broader scheme. This has a long term effect of beginning to solve the endemic lack of access to adequate housing in South Africa.

Subsequent to the *Grootboom* case the Constitutional Court has adjudicated upon a number of cases relating to the right to have access to adequate housing. The Constitutional Court has played a significant role in developing this area of the law. The Constitutional Court developed an approach of considering various factors including the possibility of rendering a person homeless subsequent to an eviction order. The Constitutional Court attached significant weight in the requirements of the PIE Act, for instance, the provisions of section 4(7) which requires that an eviction order must be granted if it is just and equitable upon consideration of all relevant circumstances.[188] The fact that a person has occupied the property for a long period of time in excess of twenty years should be a fact to be considered and this should mitigate against granting of an eviction order. In *All Builders and Cleaning Services CC v Matlaila and Others*[189] the Court refused to grant an eviction order upon consideration of whether based on the facts before it, the order would be 'just and equitable'.[190] The Court when considering the factors set out in section 4(7) of the PIE Act took into account *inter alia* the length of time First Respondent occupied the premises, if he is an old age pensioner and if he had no alternative accommodation. In the Court's view, these circumstances 'tilted the scales in favour of the

[187] Oscar Vilhena, Upendra Baxi and Frans Viljoen: Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa: Danie Brand 'The South African Constitutional Court and Livelihood Rights, Pretoria University Law Press, (2013), 437.
[188] *All Builders And Cleaning Services CC v Matlaila and Others* (42349/13) [2015] ZAGP JHC 2 (16 January 2015).
[189] *All Builders And Cleaning Services CC v Matlaila and Others* (42349/13) [2015] ZAGP JHC 2 (16 January 2015).
[190] *All Builders And Cleaning Services CC v Matlaila and Others* (42349/13) [2015] ZAGP JHC 2 (16 January 2015) at para 19.

Respondents'.[191] This is a positive development of the right to have access to adequate housing.

Another consideration in protection of the right to have access to adequate housing is the striking of a balance between the right to property as enshrined in section 25 of the Constitution against the right to have access to adequate housing. In *Hattingh and Others v Juta*[192] the Court stated that:

> 'The part of section 6(2) of ESTA that says: 'balanced with the rights of the owner or person in charge' calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity into the inquiry required by section 6(2)(d) is not the only provision into which ESTA seeks to infuse justice and equity or fairness. In this regard I draw attention to the requirement in section 6(4) that the landowner's rights to impose conditions… must be exercised reasonably, and the requirement in section 8(1) that the termination of an occupier's right of residence must not only be based on a lawful ground but also that it be 'just and equitable, having regard to all relevant factors'. These factors…make it clear that fairness plays a very important role'.[193]

The principle indicated in this judgment cannot be limited to agricultural land governed by ESTA Act. It is fully applicable in all other properties including urban areas. I argue in the current example of former employees of a mining company not being evicted on the basis that they now occupy the houses without permission of the new owner, that instead, the circumstances that led to their occupation should be taken into consideration in determining whether it will be just and equitable to grant an eviction order against them.

---

[191] *All Builders And Cleaning Services CC v Matlaila and Others* (42349/13) [2015] ZAGP JHC 2 (16 January 2015) at para 27.

[192] *In Hattingh and Others v Juta* 2013 (3) SA 375 (CC).

[193] *In Hattingh and Others v Juta* 2013 (3) SA 375 (CC).

The Constitutional Court considered a case of occupiers who had occupied the property for a long period in the Case of City of *Johannesburg Metropolitan v Blue Moonlight Properties.*[194] In this Case, the occupiers resided in the property for several years, one had been a resident there since 1976, but had passed away and the other since 1990. The Occupiers were paying rent for the premises. In 2004 Blue Moonlight Properties 39 (Pty) Ltd purchased the property. The occupiers paid rent to an individual and into two bank accounts until 2005. However, Blue Moonlight contended that it never received such rental. The Court noted that the 'quest for a roof over one's head lies at the heart of our Constitutional, legal, political and economic discourse on how to bring about social justice within a stable democracy'.[195] The issue before the Court was 'whether the Occupiers must be evicted to allow the owner to fully exercise its property rights and whether their eviction must be linked to an order that the Municipality provides them with alternative accommodation'.[196] The Court considered the rights of the private property owner in terms of section 25(1) of the Constitution and the occupiers' right to have access to adequate housing in terms of section 26 of the Constitution.[197] It also considered the state's obligation towards the private property owners and the rights of occupiers not to be rendered homeless. The Court stated that 'unlawful occupation results in a deprivation of property under section 25(1), however, deprivation might pass constitutional muster by virtue of being mandated by law of general application and if not arbitrary'.[198] The Court further stated that 'PIE allows for eviction of unlawful occupiers only when it is just and equitable'.[199] Eviction was granted and the housing policy of the City of Johannesburg to the extent that it excludes the Occupiers from consideration for temporary accommodation in emergency situations was declared unconstitutional. The City was ordered to provide

[194] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 7.
[195] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 2.
[196] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 3.
[197] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
[198] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 37.
[199] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 37.

the Occupiers with temporary accommodation in a location as near as possible to the area where the property is situated. My critic of this judgment is that right to property was accorded more weight compared to the right of access to adequate housing. The court did not attach sufficient weight to the long term occupation by the occupiers.[200] The fact that the occupiers were renting the premises should not mitigate against them but their circumstances like the mining company employees in the South of Johannesburg should be taken into consideration. The negative effect on the occupiers is displacement from an area that they have considered home for a long period of time. An order to a municipality to provide a temporary accommodation is no solution as these people find themselves with no security of tenure. This is a painful situation for the tenants to find themselves in.

It appears that the *Blue Moonlight Properties* case has reared its head in a different situation. It has resurfaced in the Constitutional Court in the matter of *Dladla and Others v City of Johannesburg and Another*.[201] In this case 11 Applicants who are part of the people evicted in terms of the *Blue Moonlight* judgment were not provided with temporary accommodation as required in terms of the eviction order. Instead, the Municipality opted for provision of shelter in terms of a scheme called managed-care facilities. This scheme provides temporary accommodation for a period of six months which can be extended to a period of 12 months. During this extended period the residents are required to complete their development plan in preparation for a sustainable exit. The curve ball with this arrangement was that there were various restrictions which in Applicants' view amounted to encroachment of their civil rights.

The *Dladla* case is a clear demonstration of the effect of eviction orders more especially taking into account that these people before their eviction they had occupied 7 Sangora Avenue for periods of up to 20 years. They now find themselves with no security of tenure. The question that we should ask ourselves is for how long the destitute families will endure such painful experiences which are no different from the effect of those who were evicted in terms of residential segregation policies. An offer

[200] *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
[201] *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC).

of temporary accommodation is not a solution as it does not take away the pain and suffering of being evicted from a place where you have regarded as home for more than 20 years. The destitute people can only feel hopeless as their plight to enjoy the right to have access to adequate housing seems to be a pipedream. In IsiXhosa these people would say '*singabangcuchalazi emhlabeni woobawomkhulu*', loosely translated to mean 'we are vagrants in the land of our forefathers'. There is a need for a review of the current legislative framework relating to protection against eviction of people who have been occupiers of property for periods as long as 20 years. The applicants in the *Dladla* case were affected by eviction in terms of the *Blue Moonlight Properties* case after occupation of the property for at least two decades. They are now facing eviction from the temporary accommodation that was provided to them.

De Villiers has analysed the impact of eviction of residents of Schubart Park and argued that 'In Schubart Park housing complex, the initial evacuation of the residents was the silencing of the working class and this was a complete disregard of the working class'.[202] She referred to Justice Froneman's warning that 'inhabitants of the City should not be seen as a nuisance and the voices of the poor and marginalised should not only be heard during consultations to appease the Constitutional Court, but should be heard in the very policies that will affect their future'.[203] This argument is applicable to the research problem of this discussion. This discussion is about former employees of a mining company who face eviction from the houses they occupied with permission of their former employer but the portion where the houses are situated has been sold to a new owner.

In *Mazibuko and Others v City of Johannesburg and Others*, Justice O 'Regan remarked as follows:

[202] I. de Villers: Tshwane and the (im)possibility of spatial justice, De jure, (2014), 211.
[203] I. de Villers: Tshwane and the (im)possibility of spatial justice, De jure, (2014), 211.

"When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy; its investigation and research; the alternative considered, and the reasons option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values our Constitution and, in particular, the principles that government should be responsive, accountable and open…Social and economic rights empower citizens to demand of the State that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life'.[204]

The *Mazibuko* judgment is a clear indication of an objective approach that should be adopted by the Courts in that a thorough examination of government policy and legislation will lead towards holding government accountable in provision of socio-economic rights.

3.4 Brand's: 'The Proceduralisation of South African Socio-economic Rights Jurisprudence or What are Socio-economic Rights for?

When reading judgments adjudicating upon socio-economic rights claims, one is always filled with enthusiasm based on an expectation of a drastic shift of our legal system towards improvement of the conditions of the destitute amongst us. However, it then transpires that the courts are faced with a mammoth task in balancing various interests including the manner in which a particular judgment may have a long term effect on the national policy. Brand describes his experience on reading some of these cases including the *Grootboom* case as a feeling of 'vague sense of disappointment,

[204] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at para 161.

notwithstanding the ground-breaking nature of these judgments'.[205] In the *Grootboom* case applicants approached court with only one thing in their mind, they were hoping to be assisted with realisation of their socio-economic right of access to adequate housing. What they hoped for was an order directing the state to provide them with housing but the judgment was much more complicated in their understanding. They probably left court without understanding what it meant to them and in particular the claim that they brought to court. Brand argues that '…the Constitutional Court has proceduralised its adjudication of socio-economic rights, because it leans toward seeing for itself a formal, structural or procedural, rather than a substantive role in adjudicating these rights'.[206] This observation is correct as the courts are careful not to find themselves stepping into the state's shoes of policy formulation, they would rather provide directives and guidelines for state policy that will achieve progressive realisation of socio-economic rights.

Brand makes a comparison of the court's approach in the *Soobramoney* case[207] and the *Grootboom* case and argue that in the *Grootboom* case, the court 'required a much stronger link between the policy at issue and its constitutionally mandated goal than in *Soobramoney*'.[208] This analysis is important because it goes to the heart of this discussion. The purpose of this research is to make an examination of the manner in which persons in occupation of housing schemes provided to them pursuant to their employment in a mining company later find themselves to be required to vacate the premises as a result of sale of the premises by their previous employer to a third party. What is examined in this chapter is how the Constitutional Court has developed protection of the right to have access to adequate housing. In so doing I examine whether the former employees of a mining company in the south of Johannesburg at issue enjoy protection against eviction through development of this right by the

[205] Botha H, Van der Walt AJ & Van der Walt JWG (eds) Rights and democracy in a transformative constitution: D. Brand, 'The Proceduralisation of South African Socio-economic Rights Jurisprudence, Or 'What Are Socio-economic Rights For?' *Stellenbosch: Sun Press,* (2003), 33.

[206] Botha H, Van der Walt AJ & Van der Walt JWG (eds) Rights and democracy in a transformative constitution: D. Brand, 'The Proceduralisation of South African Socio-economic Rights Jurisprudence, Or 'What Are Socio-economic Rights For?' *Stellenbosch: Sun Press*, (2003), 37.

[207] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

[208] Botha H, Van der Walt AJ & Van der Walt JWG (eds) Rights and democracy in a transformative constitution: D. Brand, 'The Proceduralisation of South African Socio-economic Rights Jurisprudence, Or 'What Are Socio-economic Rights For?' *Stellenbosch: Sun Press*, (2003), 41.

Constitutional Court, taking into consideration their long period of occupation prior to the eviction application.

3.5 Meaningful engagement

The concept of meaningful engagement is a welcome contribution by the Constitutional Court towards development by our courts of our legal system in relation to eviction. This concept dictates that before people are evicted they must be meaningfully consulted to their concerns, needs and proposals be listened to and an amicable solution be found before their eviction.[209] This is a way of ensuring that as painful as eviction might be, the affected people must be treated with dignity and respect and that their input be considered.[210] In *Port Elizabeth Municipality v Various Occupiers*[211] the Court considered the length of time that Respondents had been in occupation of the property including lack of 'evidence that either the Municipality or the owners needed to evict the occupiers in order to put the land to some other productive use and the fact that there were no significant attempts by the Municipality to listen and consider the problems of the occupiers who appear to be genuinely homeless'.[212] The Court concluded that it would not be 'just and equitable to order eviction' under those circumstances. The Court held that 'availability of suitable alternative accommodation is a consideration in determining whether it is just and equitable to evict the occupiers'[213]. This judgment introduced the principle of meaningful engagement and examined suitability of alternative accommodation offered.

Meaningful engagement was also adopted in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*[214] where the court stated that 'a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit

[209] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[210] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[211] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[212] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), at para 59.
[213] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 58.
[214] *51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

and purpose of the constitutional obligations set out there in'.[215] Adoption of the Constitution created an expectation of involvement of society in decision making, and this is known as participatory democracy. This means that decisions are not only made on behalf of the people but they must be part of decisions taken. The Constitutional Court developed the concept of meaningful engagement in eviction cases to enforce participatory democracy.

Shannelle van der Berg[216] correctly states that 'Meaningful engagement constitutes an important development in socio-economic rights jurisprudence'.[217] Brand describes this as a 'new concern with participatory democracy'.[218] This is a correct analysis of the concept of meaningful engagement, communities are placed in a position where they can feel and see that they are treated with dignity and respect by being allowed to participate in a decision that would have negatively affected their own dignity when eviction is executed against them.

3.6 Conclusion

This chapter was guided by the research problem developed to examine the Constitutional Court's contribution in development of the right to have access to adequate housing. I examined the Constitutional Court's approach in adjudicating claims relating to the right to have access to adequate housing. I conclude that the Constitutional Court has adopted an objective approach instead of subjectively limiting itself to individual claims before it. I discussed the Constitutional Court's role of providing directives and guidelines to the state in ensuring that the right to have access to adequate housing is progressively realised. I discussed this as the approach adopted by the Constitutional Court in the *Grootboom* judgment which examined the existing housing policy and provided a directive for development of an adequate policy

[215] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 16.

[216] S. van der Berg: 'Meaningful engagement: 'Proceduralising socio-economic rights further or infusing administrative law with substance', *SAJHR*, (2013), 376.

[217] S. van der Berg: 'Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance', *SAJHR*, (2013), 376.

[218] D. Brand: The 'Politics of Need Interpretation' and the Adjudication of Socio-Economic Rights Claims in South Africa', *Stellenbosch: Sun Press* 33, (2003), 34.

to ensure fulfilment of the state's obligation to ensure progressive realisation of this right. I discussed the principle enunciated in *Mazibuko* judgment where the court explained its role by stating that the state must be held accountable to explain reasonableness of its policies to achieve progressive realisation of the socio-economic rights. I also discussed the *All Builders and Cleaning Services* judgment which held that before an eviction order is granted the court must be satisfied that it is just and equitable to grant such an order.

I also discussed a further development of jurisprudence relating to protection of the right to have access to adequate housing where the Constitutional Court in *Port Elizabeth Municipality* judgment introduced the concept of meaningful engagement and directed that persons affected by eviction must be meaningfully engaged to ensure that their needs are taken into account before an eviction order is sought. This concept was followed in the judgment of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg* and has grown to be part of our jurisprudence in relation to eviction cases. I discussed that in exercising their oversight responsibilities courts are at times placed in a difficulty where there is a legislative and policy gap and they are forced to tread carefully to avoid usurping the state's powers and try hard to observe the doctrine of separation of powers. I conclude that where there is a policy gap, courts provide a directive to the state to ensure that existing policies are improved to close such gaps. I observe that persons who have been in occupation of premises through housing schemes like employees of a mining company in the South of Johannesburg are left vulnerable as the courts are bound by common law requirements. Courts are constrained to grant an eviction order upon being satisfied that procedures set out in legislation like PIE Act have been adhered to. I argue against provision of temporary accommodation for persons facing eviction as this, in my view, does not ameliorate the plight of the poor and it falls short of protecting their right to have access to adequate housing. The *Dladla* judgment is a demonstration of the impact of an eviction which results in displacement and lack of security of tenure. This is the situation that the former mining employees in the South of Johannesburg may face should they be evicted after more than 20 years of lawful occupation of their houses.

Chapter 4

Limits and Limitation of the law faced by our courts when dealing with claims relating to the right of access to adequate housing

4.1 Introduction

The central research problem of this project is adequacy of protection of the right to have access to adequate housing in South Africa.

The research question that guides this chapter is what are the limits and limitations of the law faced by our courts when dealing with a claim relating to the right of access to adequate housing.

The purpose of this chapter is to examine the research problem relating to challenges faced by courts in protecting the right to have access to adequate housing. Protection of human rights is the cornerstone of our Constitution, however, rule of law provides guidance to courts in execution of their constitutional duties, particularly protection of socio-economic rights.[219] The other consideration to be discussed in this chapter is the courts' duty to balance the interests of society and not limit themselves to the individual claims before them. In his address during the Claude Leon Lecture, Justice Ngcobo referred to the statement of Justice Susan Kenny and agreed with her where she stated that 'As trustees of the rule of law, the judiciary administers the law not for its own benefit, but for the benefit of each and every member of the community. The public, then is the whole community – which at times may not be represented by the majority or the media'.[220] Justice Ngcobo correctly pointed out that it is the responsibility of a court to make a broader assessment and balance the interests of

[219] See Sections 1 and 7 of the Constitution of the Republic of South Africa.

[220] https://constitutionallyspeaking.co.za/chief-justice-sandile-ngcobo/claude-leon-lecture/ 2018-06-17.

the society rather than an inbox approach of limiting itself to an individual case before it.[221]

The other issue that I will examine in this chapter is limitations placed to courts by the doctrine of separation of powers. I will examine the manner in which courts have to guard against usurping powers of other tiers of government when adjudicating socio-economic rights claims. I will link this discussion with the complex budgeting system of government and the fact that courts do not have expertise and that they have to guard against making decisions that will negatively affect the manner in which a government budget is developed to meet broader societal needs.

Michael Dafel provides context to the judiciary's duty in adjudication of housing rights claims and argues that 'the judicial enquiry necessitates the judicial evaluation of all relevant circumstances on either side of the dispute. The defining feature of this form of judicial enquiry is that it may not by automatic application favour one right or interest over another.'[222] This project is about protection of right to have access to adequate housing and I find the analysis made by Dafel to be relevant to the discussion intended to be examined in this chapter. I also intend to examine extensively the concept of unlawful occupation and I will demonstrate how the courts have analysed this before coming to a conclusion of whether it will be just and equitable to make an order for eviction. I will focus on the Constitutional Court judgment of *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others*[223] particularly the manner in which four judges expressed different views in dealing with the issue of an unlawful occupier.

[221] https://constitutionallyspeaking.co.za/chief-justice-sandile-ngcobo/claude-leon-lecture/ 2018-06-17.
[222] M. Dafel 'The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect', *29 SAJHR*. (2013), 591, 614.
[223] *Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC).

4.2 Limits and limitation of the law in the socio-economic rights context

Prior to adoption of our Constitution the Australian High Court in *Mabo v Queensland* pointed out the courts' limitation by the existing law when adjudicating socio-economic rights claims and stated that "In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency…".[224]. This judgement is a demonstration that universally courts are bound by the rule of law when adjudicating claims before them.[225] Courts are therefore constrained by the rule of law and are forced to make rulings that are permissible within applicable legal framework.[226] Notwithstanding the constitutional requirement for our courts to develop our legal system to give effect to protection of human rights there is still an obligation to act within the existing legal framework.[227]

The Court acknowledged the inequality legacy of the apartheid system of governance but at the same time pointed out its obligation to be cautious against making a decision which may in itself be seen as condoning an illegal act. In *Matshidiso and Others v President of the Republic of South Africa*[228] Justice Fabricius stated that 'Our Constitution is based on the Rule of Law. Without it our society will not survive, be it in its present form or any other form. Violence can never be the solution to economic problems of the plight of the poor, which I recognise. If I could remedy the inequalities of the past, I would…''.[229] The court clearly acknowledged the harsh conditions of applicants and their desire to be rescued from such unbearable living conditions. However, the court became critical of the manner in which they went about to deal with their situation which in the opinion of the court included violent behaviour which

[224] *Mabo v Queensland* (no.2) [1992] HCA 23; (1992) 173 CLR 1 (3 June 1992) at para 29.
[225] *Mabo v Queensland* (no.2) [1992] HCA 23; (1992) 173 CLR 1 (3 June 1992).
[226] *Mabo v Queensland* (no.2) [1992] HCA 23; (1992) 173 CLR 1 (3 June 1992).
[227] See sections 1 and 8 of the Constitution of the Republic of South Africa.
[228] *Matshidiso and Others v President of the Republic of South Africa and Others* (75657/2016), 12/10/2016 ZAPPHC 902 (12 October 2016).
[229] *Matshidiso and Others v President of the Republic of South Africa and Others* (75657/2016), 12/10/2016 ZAPPHC 902 (12 October 2016) at para 19.

in our law amounts to a criminal offence. In this judgment, a clear message was sent out that all members of society have a responsibility to respect the law and the court will take into account the behaviour of applicants notwithstanding their legitimate claims for socio-economic rights.

Klare acknowledges limitation of the judiciary through the principle of rule of law and argues that 'adjudication is inevitably, a site of law-making activity'.[230] In analysing the judiciary's duty to fulfil their duties within the framework of democratic values, social justice and human rights, Klare acknowledges that Judges are constrained by the rule of law as they base their decisions on 'pre-announced, clear procedures and general rules'.[231] The analysis by Klare is supported in this discussion because he correctly points out the courts' responsibility and societal expectation that decisions will be made to alleviate their hardships.[232] However, he points out that courts do not operate without limitations as they are constrained by the applicable legal framework.[233] Whilst there is an expectation of development of the law for realisation of socio-economic rights, this can only be done within the rule of law. I align myself with the approach by Klare as the analysis made directly demonstrates legal challenges faced by the courts when adjudicating claims based on the right to have access to adequate housing.[234] This means that provisions of section 26 of the Constitution are not to be considered as a stand-alone but within the existing legal framework.

The constitutional court when dealing with a case relating to the right to have access to adequate housing has emphasised its obligation to consider both the interests of the land owners and the occupiers. In *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others*[235] Justice Yacoob stated that 'One is therefore not surprised when the Preamble expressly states that "it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner". But that part of the Preamble goes further and makes it clear that fairness to the unlawful

[230] Karle E Klare: Legal Culture and Transformative Constitutionalism (1998) 14 SAJHR, 147.
[231] Karle E Klare: Legal Culture and Transformative Constitutionalism (1998) 14 SAJHR.
[232] Karle E Klare: Legal Culture and Transformative Constitutionalism (1998) 14 SAJHR.
[233] Karle E Klare: Legal Culture and Transformative Constitutionalism (1998) 14 SAJHR.
[234] Karle E Klare: Legal Culture and Transformative Constitutionalism (1998) 14 SAJHR.
[235] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC).

occupier is not the only ingredient. The PIE Act at the same time recognises the right of land owners to apply to a call for an eviction order "in appropriate circumstances"…'[236] The *Residents of Joe Slovo Community* judgment is extensively discussed because it demonstrates courts' challenges when dealing with a claim for protection of the right to have access to adequate housing. The court considered the legal description of persons to be evicted within the existing legislative framework and noted that it is bound to consider whether a person is an unlawful occupier before granting an eviction order. This judgment demonstrates the courts objective approach of balancing the competing interests of the landowner and the occupier. This judgment becomes relevant to this research as I seek to examine protection of former employees of a mining company who face eviction because the property they occupy has been purchased by a new owner.

The occupiers that are referred to herein are former employees of a mining company. They occupied the premises through a housing scheme provided by their employer, which housing scheme allowed them to occupy with their families. They continued to pay rental as required in terms of this housing scheme and there is no issue about them being tenants. They were lawful occupiers for more than two decades until their former employer decided to sell the premises. The new owner has no lease agreement with them, they are in occupation of the premises without the consent of the new owner. In arguing against a common law principle of *huur gaat voor koop* the new seller argues against validity of the old lease by stating that it had lapsed. This therefore means that the occupiers have no consent from the new owner to occupy the premises and they would be categorised as unlawful occupiers. The court would then be required to balance the interests of persons who are now categorised as unlawful occupiers against the interests of the new owner.

Justice Ngcobo stated that the apartheid spatial policy '…tolerated African people in urban areas as long as they were willing to serve the labour needs of these areas which were reserved for Whites…apartheid bequeathed to the new democratic government poverty, landlessness, inadequate housing with resultant overcrowding

[236] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 66.

and the mushrooming of informal settlements. These are the conditions that prevailed on the eve of our constitutional democracy and our Constitution was adopted to address these conditions…'[237] I align myself with this analysis of Justice Ngcobo, the manner in which the former employees occupied the houses provided in terms of the housing scheme should mitigate against an eviction order. Legislation and policy framework should exempt them from being catergorised as unlawful occupiers within the context of the PIE Act.

Justice Yacoob acknowledges that the concept unlawful occupier has 'a deeply painful and pejorative connotation as in the apartheid era black people in occupation of public property were not regarded as human beings but as objects devoid of any humanity…They could be evicted without regard to any human considerations'. [238] The purpose of this discussion is not directed towards arguing on lawfulness or unlawfulness of occupation, however, reference to the dictum by Justice Yacoob is made to demonstrate acknowledgment of the negative effect of such terminology when taking into account the historical background of our housing system.

Justice Moseneke expressed the agony he endures when the issue of consent and unlawful occupation is brought to the fore during eviction cases. He stated that 'I consider it necessary to express myself on a constitutional matter that has caused me agony. And that is whether landless people who have no access to adequate housing and who as a result erect homes and live on vacant public land with knowledge and prolonged support of its owner, a government body, should be regarded as no more than unlawful occupiers who fall to be evicted under PIE without a right to any or adequate prior notice'.[239] This is an important development of our legal system on eviction cases and paves a way for breaking away from the impediments of unlawful occupation. Justice Moseneke sets the trend by stating that 'In my view, where the occupiers reside on land owned by the state or one of its organs, different and more stringent considerations may well apply given the obligations under section 26(2) of

[237] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 192.
[238] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 69.
[239] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 141.

the Constitution. The state, alive to its onerous constitutional obligations to facilitate access to housing and to prevent and protect people from arbitrary eviction, cannot lightly escape these obligations by simply resorting to treating occupiers who have nowhere else to go as mere unlawful occupiers liable to eviction. Also, the longer the occupation upon state land, the greater the state's obligation to afford the occupiers due and lawful processes consistent with constitutional protections on eviction and access to housing'.[240] This is an answer to the enquiry sought in this discussion, Justice Moseneke has correctly set out what needs to be taken into consideration by taking into account the historical reasons for the lack of access to houses suffered by the black communities. This is indeed what Justice Sachs describes as the 'evolving jurisprudence on the constitutional right of access to adequate housing'.[241] Courts should take this forward in development of our law rather than limiting themselves to lawfulness of occupation of the property. Our history should weigh as an important consideration when courts are called upon to adjudicate upon eviction cases.

Justice O 'Regan also considered the negative connotation of the concept of unlawful occupiers in the same *Thubelitsha* judgment and stated that 'It is unfortunate, perhaps, that PIE speaks of unlawful occupiers, particularly given our painful history in which black South Africans were, as a result of the policies of colonialism and apartheid, rendered unwelcome and homeless in their own land. To speak of people residing on state land, who have no other homes and nowhere else to go, as unlawful occupiers jars with the aspirations of our new constitutional framework. But the fact that the drafters may have used an unfortunate label to describe those who are at risk of eviction should not blind us to the real protections that PIE affords to those very people. PIE strikes a balance between landowners, government agencies and homeless people and ensures that the interests of homeless people are seriously considered by any court asked to make an eviction order'.[242] The purpose of this research is to make an examination of legal protection against eviction of former employees of a mining company who occupy houses through a housing scheme provided to them by their

[240] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 148.
[241] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 330.
[242] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 291.

previous employer. Notwithstanding occupation of the houses for more than twenty five years, the property was sold to a third party. As they do not have permission from the new owner to occupy the property, they are now unlawful occupiers. Hence an application by the new owner for an eviction order. I align myself with Justice O 'Regan's concern of description of unlawful occupiers in the PIE Act without taking into consideration of our historical segregation residential policies. In my view, these people should not be categorised as unlawful occupiers.

When dealing with the court's duty to find a solution that will be in keeping with the Constitution Justice Sachs states that 'the fact is that in a constitutionally-biased, pluralistic society such as ours, the courts' function will often move from simply determining the frontiers between "right" and "wrong", to holding the ring between "right" and "right". In many circumstances, instead of seeking to find a totally "right" or "correct" solution, the judiciary will be obliged to accept the intellectually more modest role of managing tensions between competing claims, in as balanced, fair and principled a manner as possible…in seeking to reconcile the competing interests the courts must give due weight to the overlap between the substantive and the procedural dimensions of the matter'.[243] People who face eviction place their hopes to the judiciary as the last tier of government which will come to their rescue in protecting their right to have access to adequate housing. Justice Sachs correctly acknowledges the court's responsibility to balance broader interests of society instead of limiting itself to an individual interest. What then this means is that in instances the mining community which is the subject matter of this debate, the court will not only focus on protecting the interests relating to protection of right of access to adequate housing. Instead, the court will have to balance both the interests of the land owner against the interests of occupiers.

These people do not find themselves in the hard and unbearable conditions out of their own making. They find themselves in these circumstances because of the legacy engineered by the apartheid segregation policies.[244] This is what courts must to take

[243] *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others* 2010 (3) SA 454 (CC) at para 333.

[244] Natives (Urban Areas) Act No. 21 of 1923, Native Administration Act No. 38 of 1927, Natives Resettlement Act No. 19 of 1954.

into account when fulfilling their obligation to consider relevant circumstances. It is proposed that the fact that black employees were limited to occupy premises within the radius of their work places for provision of their labour is an important and relevant circumstance that must be considered.

In *ABSA Bank Ltd v Moore and Another*[245] the court did not accept the bank's argument that if the banks could not recover security lost through fraud, they will be reluctant to give loans to low-income applicants, arguing that this has implications to the right to housing. In dismissing this argument the court stated that postulation regarding future business practices does not implicate the right to housing under section 26 and concluded that this does not introduce new principle regarding payment or discharge of a debt.[246] This is another classical example of the court's approach in following an established principle of the rule of law and unwillingness to easily depart from it and did not approve an argument relating to protection of the right to have access of adequate access to housing.

The other challenge for the judiciary in adjudication of socio-economic rights claims is the doctrine of separation of powers, this is so because when courts make decisions, they give directives to the state to fulfil its obligation towards progressive realisation of socio-economic rights. Constitutional Court has adopted an approach of directing the state to develop policy framework that will address the issues to a broader society.[247] Budgeting for resources falls within the competence of the state's responsibilities and courts are not in a position to determine state's budget and distribution of its resources. Courts are cautious when making decisions which will affect or may interfere with the state's competence to distribute resources. In *Soobramoney v Minister of Health, Kwazulu-Natal* the court stated that 'at times it would be required to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.[248] Currie and De Waal argue that separation of powers and polycentricity presents a problem to the judiciary in adjudicating

[245] *ABSA Bank Ltd v Moore and Another* 2017 (1) SA 255 (CC).
[246] *ABSA Bank Ltd v Moore and Another* 2017 (1) SA 255 (CC) at para 59.
[247] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).
[248] *Soobremany v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).

socio-economic rights claims.[249] They make reference to critics by other scholars and point out that 'the judiciary is an elite and undemocratically appointed branch of the state. It lacks the democratic legitimacy necessary to decide the essentially political question of how to apportion public resources among competing claims and between individuals, groups, and communities in society'.[250] They regard polycentricity as a recognition of the limits of adjudication in the sense of judicial capacity.[251] However, the judiciary is not without checks and balances as its decisions are subject to review or appeal until the highest court being the Constitutional Court.

Judicial difference also places challenges to adjudication of socio-economic rights as judges do not possess expertise other than being legally trained.[252] This places challenges on the institutional integrity of courts and some scholars have argued that courts should not deal with issues that they do not have control over. However, there is a way of dealing with this and courts have in many instances included in their judgments a report back mechanism to monitor whether the state has implemented its decisions.[253] This however overburdens the courts as they would seem to be stepping into the shoes of state administration. It is the state's responsibility to ensure that its constitutional obligations are fulfilled. Viljoen[254] states that the extent to which the courts must intervene remains unclear and has raised the concept of judicial deference or respect, and refers to Hoexter who describes the ideal level of deference as 'a judicial willingness to appreciate the constitutionally-ordained province of administrative agencies; to acknowledge the expertise of those agencies in policy-laden or polycentric issues; to give their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they have

[249] Iain Currie & Johan de Waal: The Bill of Rights Handbook, Sixth Edition, 2013, 589.
[250] Iain Currie & Johan de Waal: The Bill of Rights Handbook, Sixth Edition, 2013, 589.
[251] Iain Currie & Johan de Waal: The Bill of Rights Handbook, Sixth Edition, 2013, at page 566.
[252] D. Brand: 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa', *Stellenbosch LR* (2011), 616.
[253] D. Brand: 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa', Stellenbosch LR (2011), 616.
[254] S Viljoen: 'The systemic violation of section 26(1): An appeal for structural relief by the judiciary', (2015) SAPL, Vol.30 55.

to operate.'[255] Viljoen further argues that 'Judges must be actively involved in the realisation of specifically socio-economic rights and refrain from falling into the trap of judicial avoidance on the basis of separation of powers'.[256] He however acknowledges the Constitutional Court's indication that it shall refrain from adjudication issues where its orders will have multiple social and economic consequences for the community.[257] Whilst I accept the argument made by Viljoen, it is however unavoidable that the courts are careful in making decisions that will usurp the administrative powers of the state. Claimants will find themselves disappointed as in their mind they expect direct decisions from courts for protection and progressive realisation of their right to have access to adequate housing. The *Grootboom* case is an example of where the claimants approached court with a specific claim for progressive realisation of their right to housing, instead, the court concluded by analysing the housing policy of the state for progressive realisation of this right to the broader society.[258]

Brand argues that there is 'concern expressed by the courts for their capacity – with respect to their ability to process volume of information and with respect to the ability to technical expertise to engage with choices under scrutiny'.[259] He also refers to courts' concern for the threat of their institutional integrity, institutional illegitimacy and maintenance of their proper place within the framework of separation of powers'.[260] Brand's analysis is supported in this discussion as he correctly points out courts' limitation with regard to technical ability to engage with technical issues and the institutional integrity of the courts as they avoid descending to the arena of the other tiers of government. Before houses are built, there are various technical requirements that must be considered, for instance, township establishment with all the legislative

[255] S Viljoen: 'The systemic violation of section 26(1): An appeal for structural relief by the judiciary', *SAPL* (2015) Vol. 30, 55.

[256] S Viljoen: 'The systemic violation of section 26(1): An appeal for structural relief by the judiciary', *SAPL* (2015) Vol. 30, 55.

[257] S Viljoen: The systemic violation of section 26(1): An appeal for structural relief by the judiciary, (2015) 30 SAPL, 55.

[258] *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) SA 46 (CC).

[259] D. Brand: 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa', *Stellenbosch LR* (2011), 616.

[260] D. Brand: 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa', *Stellenbosch LR* (2011), 616.

requirements applicable thereto as well as availability of resources to achieve the provision of houses. This requires experts from various government departments to consider all technical issues and the courts do not have these experts.

4.3 Conclusion

This chapter was guided by the research problem relating to challenges faced by courts in protecting the right of access to adequate housing. I discussed the judiciary's role of adjudicating claims relating to the right to have access to adequate housing and challenges based on the rule of law. I have discussed that Courts are constrained to make decisions within prescribed procedures and existing legal framework. I discussed that the Constitutional Court in *Residents of Joe Slovo Community* identified the concept of unlawful occupier as a legal description of people who should be evicted. I discussed extensive analysis made by four judges in this judgment when describing an unlawful occupier and I pointed out the discomfort presented by this description as it seems to fail to acknowledge historical segregation accommodation policies which have created the legacy of acute housing shortage. I discussed that this presents a challenge to courts in making decisions which would ameliorate the problems related to progressive realisation of the right to have access to adequate housing. I discussed the Constitutional Court's indication that it is unfortunate the PIE Act gives a description of an unlawful occupier.

I also discussed that the other issue that presents a limitation to the courts is the separation of powers, courts are cautious in their approach as they do not was to be seen to usurp the constitutional powers of other tiers of government. I also discussed that the judiciary, unlike government departments that employ various staff members with different expertise, courts are not in a position to determine appropriate apportionment of state's resources for distribution and that this makes it difficult for courts to make decisions for specific delivery of houses to the claimants.

I also discussed that courts have a duty to balance the interests of competing parties, whilst there might be a claim based on section 26 of the Constitution the courts also have to consider the interests of the land owner. In this research focus is on the former employees of a mining company who are facing eviction because of an application by the new owner. The court is obliged to consider whether they are unlawful occupiers as prescribed by the existing legal framework. I conclude that this presents a challenge in protecting the rights to have access to adequate housing for these former mining employees.

Chapter 5

Conclusion

In the post-apartheid South Africa it is easier to forget the hardships endured by millions of South Africans under the oppressive regime. Some of us are so fortunate that we managed to attain qualifications and got decent job opportunities. This enables us to access basic necessities of life and enjoy decent living conditions. As we lead our lives we turn to down play the need by millions of South Africans to access these basic necessities as they continue to languish in poverty. My eyes were opened to this obliviousness by a community in the South of Johannesburg who are former employees of a mining company. Their lives were normal until their former employer decided to sell the property they have occupied for more than twenty five years to a third party. I saw children and widows who had resided in these premises for a long time, they have no other home except the property they occupied for more than two decades. One person is a pensioner who has occupied the premises for thirty three years. A person who has occupied a property as a home for more than twenty five years rightfully regards this as a permanent home. They now face eviction on the basis that they are unlawful occupiers as they occupy the property without consent of the new owner.

The essence of this research is to examine protection of the right to have access to adequate housing. I chose to investigate whether communities like former employees of a mining company in the South of Johannesburg enjoy protection of this right under our legal system. In chapter 2 I focussed on the legal system before adoption of the Constitution and legislative framework developed to achieve progressive realisation of the right to have access to adequate housing. I discussed the tools utilised by the oppressive government and focussed in the judgment of *Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another* which provides a detailed historical background of the apartheid segregation residential policies. This was necessitated

by acknowledgment of the fact that the existing housing challenges in South Africa can only be traced to the residential segregation policies of the oppressive government. The chapter then discusses the effect of apartheid spatial policy and the legacy of apartheid in relation to the residential areas which are still occupied according to the racial divides. In responding to the research question of this chapter I discuss legislative framework developed to protect and progressively realise the right to have access to adequate housing. This was discussed to examine whether within the existing legislative framework, the former employees of a mining company in the South of Johannesburg enjoy protection not to be evicted after occupation of the property for more than twenty five years. I then conclude that within the existing legislative framework there is a gap in that former employees of the mining company in the south of Johannesburg stand to be evicted should the procedures set out in the PIE Act be adhered to. They do not enjoy protection prescribed in other legislation like the ESTA Act.

In Chapter 3 I analysed how the South African legal system has developed through Constitutional Court's contribution. I focused on the *Grootboom* judgment as it is correctly described by Clarence Tshoose as the '*locus classicus* when dealing with claims based on the right to housing'.[261] I examined the Constitutional Court's approach in adjudicating claims relating to the right to have access to adequate housing. I concluded that the Constitutional Court has adopted an objective approach instead of subjectively limiting itself to individual claims before it. The Constitutional Court analysed the existing housing policy and directed the state to develop an adequate policy to ensure fulfilment of the state's obligation for progressive realisation of the right to have access to adequate housing. The next case discussed, which is relevant to the research question of this project is the *Blue Moonlight* judgment which I find relevant due to the length of time of occupation by the occupiers before they were evicted. I critic the granting of the eviction order notwithstanding the fact that the occupiers were in occupation of the property for more than 20 years. I further critic the remedy of alternative temporary accommodation as it does not ameliorate the displacement effect caused by eviction. The *Dladla* judgment is also discussed to

[261] Clarence Tshoose, A closer look at the right to have access to adequate housing for inhabitants of informal settlements post Grootboom, (2015) 30 SAPL, 99.

demonstrate the effect of displacement subsequent to an eviction order. The Applicants in the *Dladla* judgment were evicted in terms of an eviction order granted in the *Blue Moonlight* judgment. Their lives have never been the same since their eviction. I therefore argue against eviction of persons who have been in occupation of a property they regarded as a home for more than twenty years.

I also discussed the concept of meaningful engagement as developed in *Port Elizabeth Municipality* judgment. This is a new concept in our legal system which ensures that people facing eviction are meaningfully engaged to allow them to make an input before a decision is taken to evict them.

Chapter 4 focused on the limitation of law faced by the courts when adjudicating claims relating to the right to have access to adequate housing. The discussion focussed on the judgment of *Residents of Joe Slovo Community* which discussed description of an unlawful occupier before a court may grant an eviction order. Four judges in this judgment discussed at length the description of an unlawful occupier. I argue that description of an unlawful occupier should exclude circumstances like the former mining company employees. I conclude by arguing that when considering whether a person is an occupier, historical residential policies should be taken into account before deciding whether a person is an unlawful occupier or not. I support the views by the judges in the *Residents of Joe Slovo Community* who argue that the description of an unlawful occupier in the PIE Act as unfortunate. I link this with the research problem in that the occupiers of the property provided to them as employees of a mining company will be described as unlawful occupiers as they do not have permission to occupy the premises from the new owner. It will be impossible for the court to ignore this aspect.

In conclusion I argue that there is a gap in our legal system, the former employees of a mining company in the South of Johannesburg do not enjoy legislative protection. The stand to be evicted should the court be satisfied that they are unlawful occupiers. Furthermore, once the court is satisfied that procedures set out in the PIE Act, the

court will have a difficulty in refusing to grant an eviction order. I however recommend that there should be a policy formulation to protect these kind of occupants. The policy should prohibit eviction of people who have occupied property for more than twenty years subsequent to housing scheme provided to them by their former employer. I also recommend that courts should take into account the historical residential segregation policies which only permitted blacks to occupy houses within the economic hubs for provision of their labour. This will be a positive contribution to the project of transformation undertaken by the country for more than two decades to remedy the imbalances created by the oppressive regime.

I acknowledge the pain caused by lack of access to housing which can be traced to segregation policies of the previous regime. The hardships endured due to forceful removals cannot be reversed but progressive housing policies will contribute towards reconciliation and building a rainbow nation that we aspire.

Provision and protection of the right to have access to adequate housing is a panacea towards achieving human dignity and equality for our society. For those who never had access to housing will start enjoying the beauty of life. The talk of reconciliation, healing of divisions of the past and building a society united in diversity can be achieved through provision of socio-economic rights, particularly the right to have access to adequate housing. In conclusion I align with the description of beauty of life by Jennifer Edwards:

‘The beauty of life is, while we cannot undo what is done, we can see it, understand it, learn from it and change so that every new moment is spent not in regret, guilt, fear or anger but in wisdom, understanding and love’.[262]

[262] Jennifer Edwards, Heartfeltquotes.blogspot.com

Bibliography

Books

C Aigbavboa and W Thwala, Residential Satisfaction and Housing Policy Evolution: *Abingdon, Oxon; New York, NY: Routledge*, 2018.

Botha H, Van der Walt AJ & Van der Walt JWG (eds) Rights and democracy in a transformative constitution: Danie Brand, The Proceduralisation of South African Socio-economic Rights Jurisprudence, Or 'What Are Socio-economic Rights For?' *Stellenbosch: Sun Press,* 2003*.*

I Currie & J De Waal, *The Bill of Rights Handbook, Juta (6th Edition)*, 2013.

I Currie, J de Waal & G Erasmus, *The Bill of Rights Handbook, Juta (3rd Edition)*, 2000.

Cora Hoexter, *Administrative Law in South Africa, Juta (2nd Edition)*, 2012.

Articles

C Albertyn and D Davis 'Legal realism, transformation and the legacy of Dugard', *SAJHR* (2010) 188-216.

D Bilchitz, 'Giving Socio-Economic Rights Teeth 'The Minimum Core and Its Importance' *119 S. African L.J.* (2002) 484-501.

D Brand ‘Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa’, *STELL LR* (2011), 614-638.

D Brand The ‘Politics of Need Interpretation’ and the Adjudication of Socio-Economic Rights Claims in South Africa, ‘in Botha H, Van der Walt AJ &Van der Walt JWG (eds) Rights and Democracy in a transformative constitution Stellenbosch: Sun Press (2003), 33.

M Dafel, ‘The Negative Obligation of the Housing Right’, ‘An Analysis of the Duties to Respect and Protect’, S. Afr. J. on Hum. Rts, (2013) Vol. 29. 591- 614.

I de Villiers, ‘Spatial Practices in Lowliebenhof: The Case of Maphango v Aengus Lifestyle Properties (Pty) Ltd’, *Potchesfstroom Elec. L.J.* (2014) Vol.17 2164-2193.

I de Villiers, ‘Tshwane 2055 and the (im)possibility of spatial justice, (Philippopoulus A ‘Law’s Spatial Turn; Geography, Justice and a certain Fear of Space’ Law Culture and Humanities’, 2014 De jure (2010) 7 (2) 202-217.

I de Villers, ‘Tshwane and the (im)possibility of spatial justice’, De jure, (2014).

K Economides; Mark Blacksell; Charles Watkins ‘The Spatial Analysis of Legal Systems: Towards a Geography of Law’, *J, L. & Soc’y*, (1986) Vol. 13 161-181.

T Fish Hodgson: ‘Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy’, *Acta Juridica,* (2015), 189-212.

M. S. Kende ‘The South African Constitutional Courts Construction of Socio-economic Rights: A Response to Critics’, *Connecticut Journal of Int’l Law,* (2004) Vol. 19, 617-629.

A. Leon Jr. Higginbotham; F. Michael Higginbotham; S. Sandile Ngcobo, Housing Segregation in the United States and South Africa: *The Difficult Pursuit for Racial Justice*, *De Jure* 1990, *U. III. L. Rev*. (1990), 763-877.

M. Hansungule, ‘The Historical Development of International Human Rights Law’ *in Chowdhury, AR_An Introduction to International Human Rights Law’* Leiden-Boston:Martinus Nijhoff Publishers (2010), 1-15.

M. Francis Johnston, Beyond Regional Analysis ‘Manufacturing Zones, Urban Employment and Spatial Inequality in China’, *China Q.1* (1999), 1-21.

Karle E Klare ‘Legal Culture and Transformative Constitutionalism’, *SAJHR* (1998) Vol. 14, 146-188.

Janet E. Kodras ‘The Spatial Perspective in Welfare Analysis’, *6 Cato J.* (1986), 77-83.

Pius Langa ‘Transformative Constitutionalism’, *Stellenbosch L*. (2006) Vol.17, 351-360.

Albert Mathews ‘Right to Housing’, The, *6 Black L.J.* (1978), 247-264.

John C. Mubangizi ‘Protecting Human Rights amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing’, *2 Afr. J. Legal Stud (2008),* 130-146.

Thaddeus Metz ‘African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights’, *Human Rights Rev* (2012), 19-37.

Marius Pieterse ‘What do we mean when we talk about transformative constitutionalism?’ *SAPR/PI* (2005), Vol. 20, 155-166.

Lisa R. Pruitt; Beth A. Colgan ‘Justice Deserts: Spatial Inequality and Local Funding of Indigent Defence’, *52 Ariz. L. Rev*. (2010), 219-316.

G Quinton and S Liebenberg, ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-economic Rights Jurisprudence in South Africa’ *Stellenbosch Law Review*, (2011) Vol. 3 639.

IM Rautenbach ‘The limitation of rights and “reasonableness” in the right to just administrative action and the rights to access to adequate housing, health services and social security’, *TSAR*, (2005), 627-654.

Solange Rosa ‘Transformative Constitutionalism in a Democratic Developmental State’, *Stellenbosch L*. Rev. (2011), Vol. 22 542-565.

Robinson, Simon. “For Activist Judges, Try India” (http://www.time.com/time/world/article/0,8599, 1556853,00.html), Time Magazine (2006-11-08), Harish Khare.

Albie Sachs ‘Enforcement of Social and Economic Rights’, *22 Am. U. Int’l L. Rev*. (2007), 673-708.

Clarence Tshoose ‘A closer look at the right to have access to adequate housing for inhabitants of informal settlements post Grootboom’, *SAPL*, (2015) Vol. 30 94-111.

Shannelle van der Berg ‘Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance’, *SAJHR*, (2013), 376-398.

Johan van der Walt: Johannesburg, ‘a tale of two cases’ in *Philipoulos-Mihalos* (ed) *Law and City* (2007), 220-236.

Oscar Vilhena, Upendra Baxi and Frans Viljoen ‘Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa: Danie Brand ‘The South African Constitutional Court and Livelihood Rights’, *Pretoria University Law Press*, (2013), 414-440.

S Viljoen ‘The systemic violation of section 26(1): An appeal for structural relief by the judiciary’, *SAPL, (*2015) Vol. 30, 42-69.

Clarisa A. Wertman ‘There’s No Place like Home: Access to Housing for all South Africans’, *40 Brook. J. Int’l L.* (2015), 719-748.

John C. Weicher ‘Policy Implications of the Spatial Mismatch Hypothesis: Comment on Deconcentrating the Inner City Poor’, *The, 67 Chi.-Kent L. Rev*. (1991), 855-860.

Clarissa A. Wertman ‘There’s no Place like Home: Access to Housing for all South Africans’, *40 Brook. J. Int’l L*. (2015), 719-748.

Case Law

ABSA Bank Ltd v Moore And Another 2017 (1) SA 255 (CC).

All Builders And Cleaning Services CC v Matlaila and Others (42349/13) [2015] ZAGP JHC 2 (16 January 2015).

City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC).

Dladla and Others v City of Johannesburg and Another 2018 (2) SA 327 (CC).
Du Plessis v De Klerk 1996 3 SA 850 (CC).

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC).

Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa 2000 (2) SA 674 (CC).

Hattingh and Others v Juta 2013 (3) SA 375 (CC).

Mabo v Queensland (no.2) [1992] HCA 23; (1992) 173 CLR 1 (3 June 1992) at para 29.

The Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).

Matshidiso and Others v President of the Republic of South Africa and Others (75657/2016), 12/10/2016.

Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC).

51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC).

Olga Tellis v Bombay Municipal Corporation AIR 1985 3 SC 545.

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

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC).

Residents of Joe Slovo Community v Thubelitsha Homes 2010 (3) SA 454 (CC).
Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC).

Western Cape Provincial Government and Others In Re_DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2001 (1) SA 500 (CC).

Unpublished Research Work

Isolde de Villiers 'Law, Spaciality and the Tshwane Urban Space', submitted in fulfilment of the requirements of the degree LLD, Faculty of Law, University of Pretoria (2017), 1-290.

Legislation

Constitution of the Republic of South Africa 1996.

The Freedom Charter, adopted at the Congress of the People at Kliptown, Johannesburg, on June 25 and 26, 1955.

Extension of Land Tenure Act N0. 62 of 1997.

The Group Areas Act No. 27 of 1950.

International Covenant on Economic, Social and Cultural Rights of 1996, resolution 2200A (XXI) of 16 December 1966, Article 11.

Land Reform (Labour Tenants) Act No. 3 of 1996.

Natives (Urban Areas) Act No. 21 of 1923.

The Native Administration Act No. 38 of 1927.

Natives Resettlement Act No. 19 of 1954.

Prevention of Illegal Eviction from and unlawful Occupation Act No. 19 of 1998.

Prevention of Illegal Squatting Act No. 52 of 1951.

South Africa Act No.108 of 1996.

Rental Housing Act No. 50 of 1999.

Websites

http://www.alhdc.org.za/static_content, accessed on 27-10-2018.

https://omalley.nelsonmandela.org/omalley//index.php/site/q/03lv01646/05lv01728.htm (Christopher 1994: 38) Accessed on 29-09-2018.

https://www.sahistory.org.za/dated-event/natives-resettlement-act-act-no-19-1954-passed Accessed on 29-09-2018.

https://www.quora.com/What-were-the-effects-of-the-Group-Areas-Act, Accessed on 29/09/2018.

http://www.statssa.gov.za/The latest household statistics and more, Accessed on 24-09-2018.

https://briefly.co.za/19735-survey-claims-white-people-quality-life-races.html, Accessed on 20-11-2018

https://constitutionallyspeaking.co.za/chief-justice-sandile-ngcobo/claude-leon-lecture/, Accessed on 17-06-2018.