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**Eviction of unlawful occupiers in view of  
*City of Johannesburg Metropolitan  
Municipality v Blue Moonlight Properties  
(Pty) Ltd 2012 (2) SA 104 (CC)***

by

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Submitted in partial fulfilment of the requirements for the degree  
Master of Laws (Mercantile Law)

In the Faculty of Law,  
University of Pretoria

November 2020

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## **Declaration**

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Yamkela Mhlauli

November 2020

## Summary

Over the years, from as early as the 1600s, South African law has had mechanisms in place to regulate illegal evictions and unlawful occupation of land by people who were not authorised to be in occupation of that specific land. There have been developments in terms of our law and one can observe the ever so developing and dynamic legal framework of this country. During the pre-constitutional South Africa, common law was the most preferred source of law to deal with unlawful occupation of property and as time went by, more sources of law were introduced such as legislation and customary law. In 1991 negotiations commenced that suggested that a new Constitution should be developed, which would then change the laws that were applicable at the time, by 1993 a common decision had been reached to promulgate a new Constitution. It was promulgated in 1996 and came into being in 1997, namely the Constitution that is being used in South Africa now.<sup>1</sup> The Constitution has greater authority than legislation, customary law or policies as it is the supreme law of the land. In the current constitutional dispensation, South Africa has a number of statutes that deal with illegal evictions and unlawful occupation of land, depending on the type of property as well as the type of land or location upon which the property is situated. The main point of reference is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd and Another*.<sup>2</sup> In this matter the court applied the PIE Act to come to a solution for both the property owners and the unlawful occupiers. The court decided that the state bears the obligation to provide housing for the unlawful occupiers as per section 26 of the Constitution, while the property owners were protected by section 25(1) of the Constitution. The court emphasized that an eviction order can only be granted if it is just and equitable to do so.<sup>3</sup> In considering whether an eviction order should be granted, the court has to take into account the rights of the elderly, children, disabled persons and particularly households headed by women.<sup>4</sup> Evictions should take place in a humane manner in light of the constitutional values of our country, and evictions cannot undermine the

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> 2012 (2) BCLR 150 (CC).

<sup>3</sup> S 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>4</sup> S 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

rights entrenched in the Bill of Rights. The state needs to, within its available means, make available accommodation for unlawful occupiers that are being evicted to avoid homelessness. Predominantly, the duty to accommodate and ensure adequate housing in our country rests on the Government.

## Acknowledgements

I would like to thank Our Heavenly Father for giving me the strength and endurance to complete this dissertation. Our Heavenly Father answered numerous nervous prayers that I voiced in the early hours of many mornings. I remain in awe of His compassion, grace and love that I witness every day.

This dissertation is a special dedication to my father, Victor Sdima Mhlauli. You were almost taken away from us but you fought a good fight, we are grateful to God for your life and I vow to make you proud for as long as I live.

To my mother, Feziwe Sokhutu and my siblings (Athi, Jamba, Qaqamba and Sothembela) thank you for your constant support over the years. Thank you for encouraging me to take a break when it all got too much. It is done!

Zeluthi and Samuel, God's love personified, I appreciate you.

To my supervisor, Professor Reghard Brits, thank you for being patient with me and believing in me. Words cannot express my gratitude to you, thank you for your time, energy, support and guidance.

T, you have been my greatest cheerleader and I am truly grateful for your support.

To Sisipho and Nonhlanhla, I could not have done this without you ladies, thank you so much for your love and support.

To my friends, your positivity, companionship and prayers made sure that this journey was never lonely and that I maintained a balance in my life.

To the Safety and Security Sector Education and Training Authority (SASSETA) I am truly grateful for your generous financial assistance towards my studies.

*At the right time, I, the LORD, will make it happen.*

*Isaiah 60:22*

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# Chapter 1

## Introduction

### 1.1 Introduction

This dissertation is a critical analysis of the prevention of illegal evictions and unlawful occupation of land during the pre-constitutional and now in the constitutional South Africa. The main point of reference is *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd and Another*<sup>1</sup> with regard to the current standards and principles in our country. During the pre-constitutional era, courts had various approaches in terms of which they dealt with evictions and unlawful occupation of land. In the constitutional South Africa, there is a Constitution which was promulgated in 1996 and came into operation in 1997.<sup>2</sup> There is legislation as well as policies in place, that are given authority by the Constitution to deal with unlawful occupation of land, unlawful occupiers as well as providing alternative accommodation for the affected individuals. The Prevention of Illegal Squatting Act of 1951 (PISA) was repealed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). In *Ndlovu v Ngcobo, Bekker and Another v Jika*<sup>3</sup> the court stated that the effect of PIE does not intend to expropriate the landowner. Therefore, PIE cannot be used to expropriate someone indirectly and landowners are protected by section 25 of the Constitution. Essentially, what PIE does is to impose a delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made; whether the eviction is just and equitable and in terms of which conditions and circumstances.<sup>4</sup> With regard to *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*, the following aspects are to be considered when analysing the case: the balancing of sections 25 and 26 of the Constitution; the spirit and relevant provisions of PIE; the facts of the case; the relevant circumstances of the occupiers; the relevant circumstances of the owner; the arguments that the state submitted; the court's findings on the duty of the state in general, and the state's policies on such matters and lastly the just and equitable factors with regard to evictions.

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<sup>1</sup> 2012(2) BCLR 150 (CC).

<sup>2</sup> Constitution of the Republic of South Africa, 1996.

<sup>3</sup> 2002 4 All SA 384 SCA (30 August 2002) para 15.

<sup>4</sup> Para 15.



## **1.2 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd***

The occupiers in this matter had been in the occupation of a building for more than six months.<sup>5</sup> The occupation was indeed lawful, since the respondent was aware of the occupiers when they bought the property.<sup>6</sup> The main issue in this case was whether or not the City of Johannesburg Metropolitan Municipality had an obligation to provide alternative accommodation in the case of private landowners requesting their land back from unlawful occupiers. The City believed that it had no obligation and further argued that it was not in a position to assist the occupiers after they were evicted.<sup>7</sup> The first submission was that the city had no obligation to provide accommodation for evicted occupiers who were evicted by private landowners, while the second submission was that the national and/or provincial government had the duty to fund emergency housing and the third submission was the main argument of the City.<sup>8</sup> The main argument of the City was that the City had relied on its Housing Report and the document in which its policy was contained for its interpretation of Chapter 12.<sup>9</sup> Both these documents made it clear that the local government's capacity to provide housing was based on funding that was dependent on the provincial government.<sup>10</sup> Finally, the City submitted that it simply lacked resources to assist with emergency housing.<sup>11</sup>

The court then answered the submissions provided by the City in its judgment, where it stated that the effect of PIE is not to expropriate the landowner.<sup>12</sup> Furthermore, a private landowner has no obligation to provide free housing to occupiers at his own expense.<sup>13</sup> The court stated that the right to housing under section 26 of the Constitution falls on all spheres of government – local, provincial and national. Essentially, no sphere can deny this obligation or rely on the other sphere based on lack of accountability, and the City in this matter cannot shift responsibility.<sup>14</sup> The court found that the City's Housing Policy was unconstitutional, because it excluded the

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<sup>5</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) para 39.

<sup>6</sup> Para 40.

<sup>7</sup> Para 49.

<sup>8</sup> Para 61.

<sup>9</sup> Para 61.

<sup>10</sup> Para 61.

<sup>11</sup> Para 63.

<sup>12</sup> Para 77.

<sup>13</sup> Para 77.

<sup>14</sup> Para 77.

occupier and the exclusion was unreasonable.<sup>15</sup> Lastly, the court stated that the City has a duty to plan proactively for any situation and this led to the final submission of the City regarding resources. The court then stated that it was not in position to tell organs of state how to perform their jobs; however, proper budgeting could have avoided the entire situation.<sup>16</sup> Finally, the court granted the occupiers the relief they sought and further added that while private owners are not responsible to provide housing for them, a great degree of patience should be expected from owners while waiting for the spheres of government to respond.<sup>17</sup> In this matter, the municipality filed a general report that did not assist the court to come to a peculiar decision, therefore the court rejected the report and gave the municipality four weeks to submit a report that would lay down how the municipality was planning to provide housing or alternative accommodation for the people.<sup>18</sup>

Factors that contribute towards homelessness in South Africa are poverty, unemployment, lack of affordable housing, divorce and underprivileged childhood amongst other things.<sup>19</sup> In my view, the eviction of the occupiers could lead to homelessness and a lot of people's lives could be endangered. This dissertation will discuss three aspects, namely how the courts dealt with illegal evictions and unlawful occupiers in the pre-constitutional era, how the courts deal with illegal evictions and unlawful occupiers in the current constitutional dispensation and lastly, the responsibility to take care of the homeless in terms of the right to adequate housing. The aim of this dissertation is to reach a common ground with regard to the above-mentioned matters, as well as persuade and advise the spheres responsible for the right to housing in South Africa. What seems to be the main issue with regard to the matter at hand is the conflict between people's constitutional rights not to be evicted in an arbitrary manner and a property owner's right not to be deprived of property arbitrarily.<sup>20</sup> In making decisions regarding granting eviction orders, the courts have to find a balance between these opposing rights, which can lead to the limitation of a landowner's normal ownership entitlements in order to give content to the occupiers'

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<sup>15</sup> Para 84.

<sup>16</sup> Para 86.

<sup>17</sup> Para 100.

<sup>18</sup> Para 100.

<sup>19</sup> M Makiwane "Homeless individuals, families and communities: The societal origins of homelessness" (2010) 27 *DSA* 39-49 40.

<sup>20</sup> J Strydom & S Viljoen "Unlawful Occupation of Inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PELJ* 1206-1261 1207.

housing rights.<sup>21</sup> There is a great responsibility on the judiciary to always take into account the rights of the people when applying the law and people have rested their faith on the legal fraternity to ensure that justice is served at all times.

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<sup>21</sup> J Strydom & S Viljoen “Unlawful Occupation of Inner-city buildings: A constitutional analysis of the rights and obligations involved” (2014) 17 *PELJ* 1206-1261 1211.

## Chapter 2

# How the law dealt with illegal evictions and unlawful occupation in the pre-constitutional era

### 2.1 Introduction

This chapter aims to discuss how the law dealt with illegal evictions and unlawful occupiers prior to the 1996 Constitution; the focus will be on the remedies that were available to owners of immovable property to evict unlawful occupiers on their property. Cloete comments that prior to the current constitutional dispensation, in an instance where a rightful owner of immovable property found occupiers on his/her property, the law was available to them to get the right of recourse in such that those unlawful occupiers would be vindicated.<sup>1</sup> In 1991 the South African government commenced negotiations regarding finding a solution to end the segregation between white and non-whites. The negotiations went on for longer than expected and ended in 1993.<sup>2</sup> Coles notes that, land issues were central to the whole apartheid regime and the policies that were available at the time, and therefore land reform was one of the key elements in dismantling the apartheid era.<sup>3</sup> Coles writes that “land policies associated with apartheid shaped the most basic areas of life for all South Africans, and resulted most significantly in widespread dispossession of land for non-whites.”<sup>4</sup> To reiterate the point made by Coles, during the apartheid era it was easy to spot the land as per a certain racial group and with the current dispensation, the government is trying to rectify the issues of the past by putting plans in place in terms of the constitution, legislation and policies. The introduction of the 1996 Constitution strives to correct the policies as mentioned by Coles.

In 1996, South Africa adopted what is known to be a transformative constitution which included a Bill of Rights, and which happens to be the most important part

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<sup>1</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* 2016 LLM thesis University of Stellenbosch 9.

<sup>2</sup> C M Coles “Land reform for post-apartheid South Africa” *Boston College Environmental Affairs Law Review* (1993) 20 699-760 700.

<sup>3</sup> C M Coles “Land reform for post-apartheid South Africa” *Boston College Environmental Affairs Law Review* (1993) 20 699-760 700.

<sup>4</sup> C M Coles “Land reform for post-apartheid South Africa” *Boston College Environmental Affairs Law Review* (1993) 20 699-760 701.

regarding the protection of the people.<sup>5</sup> I will take into account common law, legislation, case law and the policies that were applied prior the current constitutional dispensation. Therefore, I will establish the court's approach to legal remedies that were available to owners and unlawful occupiers prior the 1996 Constitution. The aim is to analyse the application of law during those years and trace the progress that might have been brought by the development of the law, for both landowners and occupiers. The period prior to the 1996 Constitution is referred to as the apartheid era. During the apartheid era an owner had a qualified right to exclude those that were unlawful occupiers from his or her land if he or she could prove that any right, permission or license that he or she had previously granted had been revoked or if he or she could prove that any real or personal right that entitled the occupiers to occupy the property lawfully had been terminated.<sup>6</sup> With regard to property rights prior the 1996 constitutional dispensation, I will look into apartheid land law as noted by Van der Walt, who states that:<sup>7</sup>

“Apartheid land law were introduced for a number of interrelated reasons: to define and physically separate various groups; to provide a legal framework for administrative and political control over black population movements and concomitant land rights; to create and control a black unskilled labour market; and to ensure through spatial-political separation that universal suffrage does not result in black majority rule.”

The Laws that Van der Walt refers to include the two options that were common law and legislation, these were the two sets of sources that courts relied on when deciding on a matter. The Black Land Act 27 of 1913 was one of the pieces of legislation that enabled Apartheid laws to thrive. This Act was mainly in place to uphold and enforce the so-called traditional black land and reserve it for the exclusive use and occupation of black people. In terms of South Africa's history and relating to this dissertation, it important to note two fundamental categories, namely land and labour.<sup>8</sup> According to Terreblanche, from as early as the mid-seventeenth century up until the late twentieth

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<sup>5</sup> L A Williams “The right to housing in South Africa: an evolving jurisprudence” (2014) 45 *CHRLR* 816-845 817.

<sup>6</sup> G Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (2011) LLD thesis University of Stellenbosch 33.

<sup>7</sup> AJ van der Walt “Towards the development of post-apartheid land law: an exploratory survey (1990) 23 *De Jure* 1-45 1.

<sup>8</sup> S Terreblanche *A history of inequality in South Africa 1652-2002* (2002) University of Kwa Zulu Natal Press: Durban 6.

century, the colonial powers enriched themselves at the expense of the indigenous people.<sup>9</sup> Therefore, laws and policies have always been in place and they continue to develop and evolve.

## 2.2 Common law: *rei vindicatio*

During the pre-constitutional dispensation, the courts strongly enforced the *rei vindicatio* as one of the main remedies with regard to property in terms of common law. *Rei Vindicatio* is a common law remedy that originates from Roman law, the type of law that holds a philosophical background for our law in South Africa.<sup>10</sup> The *rei vindicatio* has a unique operation that sets it apart from other remedies; the operation being that it allows the owner of property the right to recover possession from any type of unlawful occupier, whether bona fide or mala fide, the owner will then have his/her physical control over the property back and the fruits thereof.<sup>11</sup> The *rei vindicatio* was interpreted such that an owner was given an absolute right to evict all occupiers from the owner's property without taking into consideration their personal circumstances and/or housing needs.<sup>12</sup> The main concern with this common practice was that, evictions from land occurred without taking into consideration personal circumstances of the occupiers; this was a possible way of living, because at the time there was no constitutional right to housing that could act as a counterweight for the owner's proprietary rights.<sup>13</sup> During the pre-constitutional dispensation there was no consideration of housing rights or any other socio-economic interests, fundamentally different from what we have now. With that being said, it is quite evident that there was unlawfulness in those decisions if we compare it to the current South Africa, because not all the parties were considered and rights were infringed upon. When the requirements of unlawfulness were satisfied, the court had no discretion but simply to grant the order of eviction.<sup>14</sup> Owners were also allowed to evict people, because it was

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<sup>9</sup> S Terreblanche *A history of inequality in South Africa 1652-2002* (2002) University of Kwa Zulu Natal Press: Durban 6.

<sup>10</sup> AJ van der Walt *Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation* (2002) *TSAR* 254-289 258.

<sup>11</sup> C G van Der Merwe (2<sup>nd</sup> ed 1989) *Sakereg* 96-97.

<sup>12</sup> S Terreblanche *A history of inequality in South Africa 1652-2002* (2002) University of Kwa Zulu Natal Press: Durban 27.

<sup>13</sup> G Muller *The impact of Section 26 of the Constitution on the eviction of squatters in South African Law* (2011) LLD Thesis University of Stellenbosch 6.

<sup>14</sup> G Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *SASLH* 367-396 368.

common belief that landowners had a right to exclusive and undisturbed possession of their property.<sup>15</sup> In *Chetty v Naidoo* the court established three requirements that an owner had to prove in terms of common law: a lessor had to prove in terms of *rei vindicatio* that he was the owner of the premises and the lessee was still in occupation, the alleged property must still be in possession of the unlawful occupier when the action is being instituted and lastly, the property must still exist and one should be able to identify it.<sup>16</sup> If the owner of property succeeded in proving the three requirements, then an eviction order would be granted and they would be in a position to take back the property.<sup>17</sup> However, the unlawful occupier had in turn the obligation to prove that he/she had the right of lawful possession if he/she was disputing the eviction order granted by the court.<sup>18</sup> With the commendable development of law in South Africa, it is important to note that the principle of both parties proving their allegations in court has always existed. In *Brisley v Drotsky* the court confirmed common law rights of a lessor to evict a lessee who is holding over.<sup>19</sup> In essence, common law was a well-accepted sphere of law during the pre-constitutional dispensation and it applied on a broad spectrum which went as far as leases were concerned.

## 2.3 Legislation

Legislation was the other option the courts relied on when dealing with the law of property in the pre-constitutional dispensation. In relation to rural (including agricultural) land, three pieces of legislation were relevant; namely, the Black Land Act 27 of 1913 (BLA), the Development Trust Land Act 18 of 1936 (DTLA) and the Group Areas Act 41 of 1950. The South African Development Trust (SADT) was in place to control all state owned land set aside by government for black South Africans.<sup>20</sup> The following acts were not land acts, but they assisted the facilitation of operation of land acts by empowering the state to control, evict and exclude non-whites from areas in which they were breaking the law: the Prevention of Illegal Squatting Act 52 of 1951,

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<sup>15</sup> G Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *SASLH* 367-396 368.

<sup>16</sup> 1974 (3) SA 13 (A) 20-21.

<sup>17</sup> 1974 (3) SA 13 (A) 20-21.

<sup>18</sup> 1974 (3) SA 13 (A) 20-21.

<sup>19</sup> (432/2000) [2002] ZASCA 35 (28 March 2002) paras 40-45.

<sup>20</sup> C M Coles "Land reform for post-apartheid South Africa" *Boston College Environmental Affairs Law Review* (1993) 20 699-760 713.

the Reservation of Separate Amenities Act 49 of 1953 and the Trespass Act 6 of 1959.<sup>21</sup>

Section 1(1)(a) of the BLA prohibited black people from acquiring a right to, interest in or servitude over land that did not fall within the so-called traditional land in terms of what was deemed as a sale, lease or any other agreement entered into.<sup>22</sup> However, this section allowed sales between natives. Section 1(1)(b) of the BLA provided that black people could only obtain a right to, interest in or servitude over land that was located outside these traditional areas if it was owned by another black person. Therefore, the BLA did not make room for natives to obtain land, thus making it difficult for them to own land and increasing the chances of unlawful occupation, which would at the time result in lawful evictions. Section 1(2) of the BLA stated that only black people could purchase, hire or acquire a right to or interest in the land that was located in the so called traditional areas, whether it was direct or indirect.<sup>23</sup> Consequently; if one was found occupying land in contravention of section 1, one would be found guilty of an offence. However, black people could avoid these fines and possible imprisonment if they worked as labour tenants on white farms. The second Act that had a major impact at the time was the DTLA.<sup>24</sup> This Act governed and controlled how many black people lived on white people's farms as for example the employees on those farms. Chapter 4 of the Act is dedicated to black men occupying land. It states that in order for a black man to occupy land that was not the so-called traditional land, they must have met the following provisions: they must have been the registered owner of that specific land, be a servant of the owner of the land, be a registered squatter or be exempted by the provisions in the DTLA. Consequently, if any black person was in contravention of the prohibitions, they would be guilty of an offence as per the Act. Section 37(5) of the DTLA deemed black people to be in contravention by being in unlawful occupation of land if they failed to vacate the land after the notice of the termination period. The process that was followed at the time to curb unlawful occupation was to serve those in contravention with a written notice that would request them to show cause as to why they should not be evicted.<sup>25</sup> Section 38

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<sup>21</sup> C M Coles "Land reform for post-apartheid South Africa" *Boston College Environmental Affairs Law Review* (1993) 20 699-760 714.

<sup>22</sup> S 1(1)(a) of the Black Land Act 27 of 1913.

<sup>23</sup> S 1(2) of the Black Land Act 27 of 1913.

<sup>24</sup> Development Trust and Land Act 18 of 1936.

<sup>25</sup> S 35(7) of the Development Trust and Land Act 18 of 1936.



stated that the government and the Department of Native Affairs would then bear the obligation to accommodate the evicted people in a traditional or released area after the eviction had taken place.<sup>26</sup>

In the urban areas, a number of statutes were applicable. The first was the Group Areas Act 36 of 1966, which was mainly in place to separate people in the urban areas. The second relevant statute was the Black (Urban Areas) Act 21 of 1923, which was in place to ensure that black people had adequate accommodation in or near urban areas, as they would be working in urban areas. Those areas would be what we now know as hostels, where many black men used to stay when they were working in big cities. As noted above, in order to control the occupation of land by these labourers, certain measures had to be taken and procedures followed. As black people would move to the cities to seek employment, they were required to live in “proclaimed areas” and upon their arrival they would have to let the authorised officer know about their arrival, which the officer would then let them pay a license fee and issue them with a certificate and a badge authorising their occupation.<sup>27</sup> If an individual was found offering accommodation to any person without following the prescribed measures, they could be found guilty of an offence.<sup>28</sup> If a native person was found occupying land that they were not supposed to occupy, they had to explain themselves to the magistrate and seek relief thereto.

The government criminalised black people’s occupation of land, therefore the Prevention of Illegal Squatting Act 52 of 1951(PISA) was introduced and was later repealed by PIE, PISA was a criminalising Act as compared to PIE, consequently evictions would follow a criminal procedure route hence being harsh as compared to the application of PIE. O’Regan is of the opinion that originally the Prevention of Illegal Squatting Act was not primarily aimed at controlling squatting, but was introduced to control squatters in the urban areas.<sup>29</sup> O’Regan notes the amendments made by PIE from PISA, in that these amendments introduced new provisions to control those that were rural squatters as well as those that were urban squatters.<sup>30</sup> Subsequently, the

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<sup>26</sup> S 38 of the Development Trust and Land Act 18 of 1936.

<sup>27</sup> S 12(1) of the Development Trust and Land Act 18 of 1936.

<sup>28</sup> S 5(3) of the Development Trust and Land Act 18 of 1936.

<sup>29</sup> C O’Regan “No more forced removals? An historical Analysis of the prevention of Illegal Squatting Act” (1989) 5 *SAJHR* 361-394 370.

<sup>30</sup> C O’Regan “No more forced removals? An historical Analysis of the prevention of Illegal Squatting Act” (1989) 5 *SAJHR* 361-394 370.

introduction of PIE brought about positive changes for the unlawful occupiers as compared to the landowners; the landowners lost their absolute rights over property while unlawful occupiers were afforded some leniency.

## 2.4 Case law

In *R v Maluma*<sup>31</sup> the court concluded that the appellant lived on a farm in Kalkfontein, a district in Lydenburg without a permit and was in contravention of section 7 of the Transvaal Ordinance 21 of 1895. De Villiers J held that the court *a quo* erroneously found that Proclamation 218 of 1940 revived Transvaal Ordinance 21 of 1895 when it repealed Proclamation 264 of 1937, which extended the operation of the DTLA to the district of Lydenburg.<sup>32</sup> Therefore, De Villiers J held that the Transvaal Ordinance 21 of 1895 was repealed in its entirety in terms of section 50(4) of the DTLA and that the appellant was therefore convicted for an offence in terms of that piece of legislation which essentially had no authority in that area.<sup>33</sup> Courts relied on both common law and legislation when dealing with cases of property, there is an evident development found in the above mentioned case to prove that courts relied on available sources of law and went as far as developing the law during the pre-constitutional dispensation. In *S v Mafora*<sup>34</sup> the court of first instance ruled that the appellant and nineteen others lived on the farms of Braklaagte and Leeufontein without the permission of the Secretary for Bantu Administration and Development, in contravention of section 26(1)(b) of the DTLA. These farms were owned and controlled by the South African Native Trust in terms of chapter 4 of the DTLA. Hiemstra J held that “the government erroneously instituted criminal proceedings against the appellants in terms of section 26(4) of the DTLA because it would have to institute criminal proceedings against itself for permitting the unlawful occupation”.<sup>35</sup> Hiemstra J stated that “the Government in any event has powers to remove them and it is obvious that all those concerned should co-operate in speeding up this removal which can in any event be achieved if the correct procedure is followed”.<sup>36</sup> Therefore, Hiemstra J upheld the appeal and set

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<sup>31</sup> 1949 (3) SA 856 (T).

<sup>32</sup> *R v Maluma* 1949 (3) SA 856 (T).

<sup>33</sup> *R v Maluma* 1949 (3) SA 856 (T).

<sup>34</sup> 1970 (3) SA 190 (T).

<sup>35</sup> *S v Mafora and others* 1970 (3) SA 190 (T).

<sup>36</sup> *S v Mafora and others* 1970 (3) SA 190 (T).

aside the convictions and sentences.<sup>37</sup> In the above mentioned case the court demonstrated the need for the correct application of law, applicants had to accept the consequences of which ever option of law they relied on.

## 2.5 Conclusion

In conclusion, as much as the apartheid era is associated with the period from 1948 to 1994, the framework of race-based land occupation was entrenched long before 1948.<sup>38</sup> As it stands in South Africa today, harmful effects of this legacy still affect the new South Africa and the maldistribution of property to be a major source of political and legal contention.<sup>39</sup> Prior to the current constitutional dispensation, the courts had two distinct legal remedies; common law and legislation, courts had the option to adjudicate over matters using any of the two options depending on which of the options the owner relied upon.<sup>40</sup> With regards to common law, the remedy used was *rei vindicatio* and with regards to legislation there was a number of statutes in placed as mentioned above. When deciding on whether to grant an eviction order or not, the courts had to take into consideration the requirements of the remedy as well as the facts of each case.<sup>41</sup> In essence, the courts have always had legal remedies in place to provide direction with regard to the granting of eviction orders. The courts may have relied on either of the two options, but the advantage was that the results of both mechanisms would be that the owner's lost possession would be restored and the owner's right to exclude would enjoy priority.<sup>42</sup>

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<sup>37</sup> *S v Mafora and others* 1970 (3) SA 190 (T).

<sup>38</sup> L A Williams "The right to housing in South Africa: an evolving jurisprudence" (2014) 45 *CHRLR* 816-845 819.

<sup>39</sup> L A Williams "The right to housing in South Africa: an evolving jurisprudence" (2014) 45 *CHRLR* 816-845 819.

<sup>40</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* 2016 LLM thesis University of Stellenbosch 10.

<sup>41</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* 2016 LLM thesis University of Stellenbosch 10.

<sup>42</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* 2016 LLM thesis University of Stellenbosch 56.

## Chapter 3

# How the courts deal with illegal evictions and unlawful occupiers in the current constitutional dispensation

### 3.1 Introduction

This chapter aims to analyse the current legal framework that deals with illegal evictions and unlawful occupation of land. The constitutional order of the Republic of South Africa takes into context the social and historical context of property and related rights.<sup>1</sup> Pienaar and Muller are of the opinion that realising socio-economic rights brings tension between access to land and existing land rights.<sup>2</sup> Hence it is important to take into account socio-economic rights when applying the law to matters relating to evictions and unlawful occupation of land, so that the courts can strive to loosen the tension. The Bill of Rights provides a broad spectrum of socio-economic rights as it contains all the rights that are afforded to people. The most important factor regarding the Constitution with regard to evictions and unlawful occupiers, is the taking into account of socio-economic rights and promoting the values of our Constitution. Therefore, the chapter will analyse sections 25 and 26 of the Constitution, legislation with great emphasis on PIE, case law and opinions from various writers. This chapter aims to discuss the hypothesis of this dissertation and find possible solutions that will benefit all the parties involved. In *Blue Moonlight v City of Johannesburg Municipality*, the court noted the necessity to set out briefly the constitutional, legislative and policy framework, as a basis for the analysis that will be followed in the courts. In essence, we need to establish whether the eviction of the unlawful occupiers is a just and equitable thing to do before an eviction order can be granted by the courts.

Muller states that:<sup>3</sup>

“It is a well-known fact that the government has a considerable housing backlog and that overcrowded, ill-conceived, impoverished black neighbourhoods still exist

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<sup>1</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) para 34.

<sup>2</sup> Pienaar & Muller “The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework” (1999) 10 *SLR* 370-396 375.

<sup>3</sup> Muller “Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa” (2015) 132 *SALJ*: 616-638 630.

next to spacious, well-established, affluent, white neighbourhoods in certain parts of South Africa. The housing of unlawful occupiers living in informal settlements and abandoned inner-city buildings within the large metropolitan municipalities of South Africa is not always suitable for habitation because of a lack of water, sanitation and electricity. It is clear that these conditions are viewed as serious by judges when deciding whether it would be just and equitable to grant an eviction order, and when or under what conditions it would be just and equitable to execute such an order.”

South Africa is a developing country and our laws are constantly developing. PIE came into effect to establish a framework for evicting unlawful occupiers as legislation to support the current Constitutional provisions as noted in our Constitution. PIE is the most commonly used legislation for unlawful occupation and illegal evictions, because it applies over a broad spectrum as compared to other pieces of legislation. Cloete states that PIE is the constitutionally ordained eviction measure which was brought into being to ensure that both the rights of the owner and the unlawful occupier are protected in the process of evictions.<sup>4</sup>

## **3.2 Constitutional overview**

### **3.1.1 Introduction**

In applying the law to eviction cases and unlawful occupation of land, the courts need to promote the values of the Constitution and apply applicable rights as stipulated by the Bill of Rights so that the courts can aid in healing the divisions created by the past and prevent mass violations of human rights from reoccurring in the future.<sup>5</sup> For a developing country like South Africa, it is vital that we acknowledge how far we have come and work on building a better South Africa for all. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*<sup>6</sup> the court emphasised the importance on section 25(1) of the Constitution, which provides for property rights in the Republic of South Africa. The South African Constitution aims to provide fairness and restore hope for us all, the courts should always strive to apply fairness that benefits all parties involved.

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<sup>4</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context*. 2016 LLM thesis University of Stellenbosch 80.

<sup>5</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* 2016 LLM thesis University of Stellenbosch 74.

<sup>6</sup> 2012 (2) BCLR 150 (CC) para 17.

### 3.1.2 Relevant constitutional issues

Section 25(1) explicitly states that no one should be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. Section 25(2) further states that property can only be expropriated in terms of law of general application for the benefit of the public and should be subject to compensation. Section 26(1) of the Constitution states that everyone has a right to have access to adequate housing. Section 26(2) states that the state must take reasonable and other legislative measures to realise the rights stipulated in section 26(1). Section 26(3) stipulates that no one may be evicted from their home or have their home demolished without an order of court.<sup>7</sup> With regard to the *Blue Moonlight* case, the essential element to pay attention to in terms of section 26(3) is whether the unlawful occupiers had claim to the establishment as being their home.<sup>8</sup> The unlawful occupiers in the *Blue Moonlight* case substantiated their rights by section 26 of the Constitution and they also referred to section 9 of the Constitution.<sup>9</sup> PIE was enacted to give effect to section 26(3) of the Constitution and specifically to provide procedural protection and substantive safeguard to unlawful occupiers who use buildings, structures or land for residential purposes.

In essence, section 25 of the Constitution focuses on the protection of property and section 26 has a substantive reform element that looks at justice, fairness and reasonable state actions. It is difficult for our courts to find a balance between section 25 and section 26(1) of the Constitution, a balance that is just and equitable for all parties at stake. Section 25 prohibits arbitrary deprivation of property while it addresses the need to fix the grossly unequal social conditions.<sup>10</sup> Section 26 emphasizes the transformative vision of the Constitution.<sup>11</sup> Our law must regulate evictions in a manner that is fair and that satisfies all parties involved in the proceedings, as no one is above the law. There should be a balance established between section 25 of the Constitution and the substantive reforming effect of section 26(3). The considerations of justice and fairness, reasonable state action and the public interest are considered under PIE. In *Blue Moonlight* the court stated that a

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<sup>7</sup> Sec 26(3) Constitution of the Republic of South Africa, 1996.

<sup>8</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) para 17.

<sup>9</sup> Para 19.

<sup>10</sup> Para 36.

<sup>11</sup> Para 37.

property owner cannot be expected to provide free housing to the homeless on its property for a period not stipulated.<sup>12</sup> The court can instead decide to permit the unlawful occupiers to remain on the property until it is just and equitable to grant an eviction order in favour of the property owners, with that period being temporary.<sup>13</sup>

### **3.3 Legislation: PIE**

#### **3.3.1 Introduction**

With the pre-constitutional dispensation having had taken place, South Africa was left with the majority of the previously oppressed groups socially and economically marginalised.<sup>14</sup> This means that homelessness became evident in South Africa and the government was left with the duty to afford people shelter. As stated in the previous chapter, illegal evictions and unlawful occupation of land has always been evident, hence there were two options to choose from as stipulated in the previous chapter as to which type of law one would rely on to institute an order of eviction. Prior to PIE there was Prevention of Illegal Squatting Act 52 of 1951(PISA) which was then repealed by PIE.<sup>15</sup> A new Constitution was promulgated and came into being in 1997.<sup>16</sup> With regard to this dissertation, PIE is the main point of reference pertaining to illegal evictions and unlawful occupation, therefore this will be an analysis of PIE.

PIE sets out the procedural aspect that gives effect to section 26(3) of the Constitution. Section 26(3) stipulates that no one may be evicted from their home or have their home demolished without a court order granted after all the relevant circumstances have been considered.<sup>17</sup> Essentially, no legislation, PIE included, may permit arbitrary evictions. PIE applies to all land and to occupiers who have no rights, therefore, it applies in all instances whether rural and urban land. The instances where PIE will not apply are when the occupier is a legal person, the occupied structure is not a dwelling in terms of the Act and in instances where the Extension of Security of Tenure Act applies. PIE applies to housing, land/buildings used for residential

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<sup>12</sup> Para 40.

<sup>13</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1223.

<sup>14</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* 2016 LLM thesis University of Stellenbosch 79.

<sup>15</sup> Prevention of Illegal Squatting Act 52 of 1951.

<sup>16</sup> Constitution of the Republic of South Africa, 1996.

<sup>17</sup> Sec 26(3) Constitution of the Republic of South Africa, 1996.

purposes only.<sup>18</sup> In essence, PIE replaced both *rei vindicatio* and PISA hence PIE holds over a huge spectrum in terms of application. Section 2 of the Act states that the act applies to all land in the republic. The Preamble of PIE states that no person may be deprived of property, unless the deprivation is in terms of law of general application and the Preamble goes on to state that, no law may permit arbitrary deprivation of property. One of the important questions that came up with regard to PIE was whether it had authority over cases of holding over of a lease or if it applied to unlawful occupiers who had never had a right over the property.<sup>19</sup> The preamble of the Act gives an impression that the meaning of unlawful occupier becomes central to the scope and application of the Act, it stipulates that it is desirable that our law should regulate the eviction of unlawful occupiers from land and property that does not belong to them and that evictions must be conducted in a fair manner, while the rights of land owners and property owners are recognised.<sup>20</sup> Secondly, there should be special consideration of the rights of the elderly, children, disabled persons and particularly households headed by women.<sup>21</sup> Glover comments that it is important to note the reason behind the enactment of a statute; statutes are meant to amend common law and they must not be interpreted in a manner that can lead to an absurdity which the legislature did not intend.<sup>22</sup>

### **3.3.2 The approach to evictions in terms of PIE**

Section 1 of the Act defines eviction as the deprivation of occupation of a building or a structure, or the land upon which the building or structure is erected on. According to the Act, an owner is a registered owner of the property and this may include an organ of state. Our main point of reference relates to unlawful occupiers which are referred to as persons who occupy the land without express or tacit consent of the owner or person in charge, or without any other right stipulated in terms of the law to occupy such land, but it does not include occupiers in terms of the Extension of Security of Tenure Act.<sup>23</sup>

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<sup>18</sup> G Glover *Kerr's law of sale and lease* (4<sup>th</sup> ed 2014) 335.

<sup>19</sup> G Glover *Kerr's law of sale and lease* (4<sup>th</sup> ed 2014) 481.

<sup>20</sup> Prevention of Illegal Squatting Act 52 of 1951.

<sup>21</sup> Prevention of Illegal Squatting Act 52 of 1951.

<sup>22</sup> G Glover *Kerr's law of sale and lease* (4<sup>th</sup> ed 2014) 482.

<sup>23</sup> Sec 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.



Section 4 of PIE regulates evictions of unlawful occupiers by an owner or person in charge of land, while section 6 of the Act regulates eviction of unlawful occupiers by an organ of state. The main theme in both these sections is that the eviction must be just and equitable, after considering all the relevant circumstances. In terms of section 4(1) of PIE a person in charge of land or property or an owner thereof, may apply for an order to have an unlawful occupier evicted in terms of the Act.<sup>24</sup> Section 4(2) stipulates that the court must at least 14 days before the proceedings have commenced, serve a written notice to the unlawful occupier and the municipality that has jurisdiction in that area.<sup>25</sup> Section 4(5) of the Act stipulates the prerequisites that must be met in order for a notice of proceedings to be served, what the applicant has to comply with in order for a notice to be served on the respondent.<sup>26</sup> The prerequisites are as follows: the notice must state that proceedings are being instituted in terms of the provisions of the Act, indicate the date and time of the proceedings, set the grounds for the proposed eviction as well as state that the unlawful occupier has the right to appear in front of the court of law and may apply for legal aid if they are eligible.<sup>27</sup> The court cases discussed on this dissertation relay the standard set by section 4(6) of PIE, which stipulates that where an unlawful occupier has occupied the land for less than six months at the time when proceedings are being instituted, a court of law may grant an order of eviction if it is of the opinion that it is just and equitable to do so.<sup>28</sup> The court must consider all relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.<sup>29</sup>

Section 4(7) stipulates that if the occupier has occupied the land for more than six months, a court of law may grant an order if it is just and equitable to do so and it has considered the relevant circumstances which include whether the land has been made available or can be reasonably be made available by the municipality, the organ of state or any other land owner in question for the relocation of the unlawful occupier.<sup>30</sup>

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<sup>24</sup> S 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>25</sup> S 4 (2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>26</sup> S 4(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>27</sup> S 4(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>28</sup> S 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>29</sup> S 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>30</sup> S 7 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Section 6 of PIE relates to evictions in the instance of an organ of state. Section 6(1) stipulates that an organ of state has the power to institute proceedings for the eviction of unlawful occupiers from land which falls within its area of jurisdiction.<sup>31</sup> The court may then grant such an order if it is of the opinion that it is just and equitable to do so, after all the relevant considerations have been taken into account.<sup>32</sup> Section 6(3) gives a list of the relevant circumstances to be considered in order to declare an eviction just and equitable. The court needs to regard the following: the circumstances under which the unlawful occupier occupied the land and erected a structure, the period in which the unlawful occupier and his family have resided on the land and lastly, the availability to the unlawful occupier of alternative accommodation.<sup>33</sup>

### **3.3.3 Conclusion**

In conclusion, PIE protects the conflicting sections in the Constitution which are section 25 and 26(3) by prohibiting arbitrary deprivation of property and demolition of homes without a court order. PIE finds a balance in that it regulates evictions in South Africa in a manner that looks after the interests of the owner and the unlawful occupier, the mechanism it provides meet both parties halfway. Muller notes that the courts should determine whether there is alternative accommodation available in order for the courts to come to a conclusion that it is just and equitable to evict unlawful occupiers.<sup>34</sup> As Pienaar and Muller state: “legislation indicates that evictions and demolition of homes cannot take place on the basis of an administrative decision alone, but only on the authority of a court order and after all relevant circumstances have been taken into account.”<sup>35</sup> I commend the enactment of PIE, because it brought about change and fairness, it introduced hope and restored faith on the justice system. The courts have been entrusted with the task to evaluate the circumstances of unlawful occupiers as well as property owners, and therefore PIE is in place to give guidance to the courts. Muller is of the opinion that PIE was put in place to establish a framework for evicting unlawful occupiers and as legislation to support the current

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<sup>31</sup> S 6(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>32</sup> S 6(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>33</sup> S 6(3) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>34</sup> Muller “Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa” (2015) 132 *SALJ* 616-638 637.

<sup>35</sup> Pienaar & Muller “The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework” (1999) 10 *SLR* 370-396 380.

constitutional provisions.<sup>36</sup> However, I am of the opinion that PIE was introduced to serve as guidance for our judiciary.

### **3.4 Case-by-case approach to evictions in South Africa**

In *Port Elizabeth Municipality v Various Occupiers*,<sup>37</sup> the residents of Lorraine, in Port Elizabeth, signed a petition for the eviction of 68 adults and children who lived in shacks in their neighbourhood for a period ranging from two to eight years. The petition was sent to the Port Elizabeth Municipality to evict the occupiers.<sup>38</sup> The Municipality subsequently filed an eviction application and the order was granted by the court.<sup>39</sup> The occupiers filled an application for leave to appeal the decision of the High Court and the application was successful. The matter went up to the Supreme Court of Appeal.<sup>40</sup> The Municipality argued that it was not constitutionally obligated to provide suitable alternative accommodation when seeking an eviction order.<sup>41</sup> Sachs J explained the importance of section 26(3), stating that the Constitution provides that no one should be evicted from their home or have such home demolished without an order that has considered all relevant circumstances.<sup>42</sup> He further explained the importance of section 6 of PIE and the instances under which the Municipality may apply for the eviction of occupiers.<sup>43</sup> The court stated that the period in which the occupiers had occupied the land was lengthy, the land was not going to be used for anything productive, the occupiers were such a small group and the Municipality had failed to consider the problems of the occupiers.<sup>44</sup> The court took into account a number of factors when deciding on this matter: the long period that the occupiers were on the land for with no objection, the fact that both the landowner and the municipality were not in a hurry to use the land, they failed to engage the occupiers in a meaningful manner and lastly, the occupiers were a small group of people.<sup>45</sup> The

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<sup>36</sup> Muller “Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa” (2015) 132 *SALJ* 616-638 637.

<sup>37</sup> 2004 (12) *BCLR* 1268 (CC) para 1.

<sup>38</sup> Para 1.

<sup>39</sup> Para 1.

<sup>40</sup> Para 5.

<sup>41</sup> Para 29.

<sup>42</sup> Para 20.

<sup>43</sup> Para 25.

<sup>44</sup> Para 61.

<sup>45</sup> T C Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* 2016 LLM thesis University of Stellenbosch 85.

court stated that the state had a duty to provide suitable alternative accommodation.<sup>46</sup> Sachs J stated that it is not only the dignity of the poor that is affected when homeless people are being driven from pillar to post, but the entire society is demeaned when the marginalised are treated in a painful manner as such.<sup>47</sup> To a certain extent everyone should be part of the conversation when issues of homelessness and evictions are brought up. This matter was the first eviction matter to be heard in constitutional court and today, it is one of the cases that writers and legal practitioners rely on to come up with conclusions and solutions. So the court made sure that in giving a verdict, a comprehensive explanation was given which encompassed the historical background of evictions and the reasons behind the promulgation of PIE.<sup>48</sup> Pienaar and Brickhill emphasise what the courts tried to illustrate in this matter; they reiterate that this case established a new approach to land law, this approach requires that when applying PIE one must take into cognisance the historical context of South African land relations.<sup>49</sup>

In *Residents of Joe Slovo Community v Thubelisha Homes* the occupiers had been living in the undeveloped settlement since the early 1990s.<sup>50</sup> The land was owned by the City of Cape Town (City).<sup>51</sup> During the course of their stay at the settlement, the City provided the occupiers with various needs, namely water, container toilets and cleaning facilities, refuse removal, roads, drainage and electricity.<sup>52</sup> Everyone has a right to basic needs in South Africa and the government has to provide these needs within the available means. The City had a housing development programme that was brought about by the N2 Gateway project. This project was targeted at the reconstruction of informal settlements including Joe Slovo.<sup>53</sup> The City then approached the occupiers of Joe Slovo to inform them of the plan and further persuade them to move from the settlement to facilitate the development.<sup>54</sup> There were efforts to persuade the residents to move but the residents complained that there were broken promises from the side of the City.<sup>55</sup> The City

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<sup>46</sup> Para 61.

<sup>47</sup> Para 18.

<sup>48</sup> Para 8-10.

<sup>49</sup> M Pienaar & J Brickhill *Constitutional law of South Africa* (2 ed 2014) 1-48.

<sup>50</sup> 2010 (3) SA 454 (CC) para 19.

<sup>51</sup> Para 19.

<sup>52</sup> Para 20.

<sup>53</sup> Para 27.

<sup>54</sup> Para 30.

<sup>55</sup> Para 31.

together with Thubelisha Homes approached the High Court for an eviction order and the application was successful.<sup>56</sup> In the Constitutional Court the court had two important questions to answer regarding the eviction order granted by the High Court. The first question was whether the applicants were unlawful occupiers within the scope of PIE, and the second was whether it was “just and equitable” to issue an eviction order.<sup>57</sup> The applicants argued that the City had consented to them being occupiers. They based their argument on the City providing certain services to the occupiers. They argued that this was consent provided “expressively or tacitly” by the City. Therefore, they could not be unlawful occupiers.<sup>58</sup> The court then broke down the meaning of section 6 of PIE and stated that suitable alternative accommodation was provided because the homes that were promised were indeed provided.<sup>59</sup> They further argued that the reasons for the relocation were justifiable for better living conditions for all occupiers.<sup>60</sup> Therefore, the court concluded that the eviction and relocation were indeed appropriate and that the eviction was dignified and humane.<sup>61</sup>

In *ABSA Bank v Murray*,<sup>62</sup> the court stated that the rights that would generally be relevant when dealing with evictions would include the right to human dignity, and protection against being treated in a cruel, inhumane or degrading manner. The constitutional rights of children and the availability of alternative accommodation within the context of the state’s obligation to provide access to them is also taken into account and great consideration must be afforded to them.<sup>63</sup> The court noted that PIE made the granting of an eviction order subject to the exercise of a judicial discretion that had obliged the court to come to a conclusion that strikes a balance between the property rights of the owner and the basic human rights of the occupier.<sup>64</sup> The court also noted that raising the just and equitable standard as a defence for the refusal of an eviction would mean that the parties need to prove the validity of the justification as a defence.<sup>65</sup> The court also noted the importance of time, in that the parties knew one year in advance that the bank would evict them, they had been in occupation of the

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<sup>56</sup> 2009 ZACC 16 para 2.

<sup>57</sup> Para 66.

<sup>58</sup> Para 64.

<sup>59</sup> Para 99.

<sup>60</sup> Paras 107-108.

<sup>61</sup> Para 114.

<sup>62</sup> (8946/02) [2003] ZAWCHC 48 (18 September 2003) para 28.

<sup>63</sup> Para 29.

<sup>64</sup> Para 15.

<sup>65</sup> Para 20.

property for more than six months when the proceedings were initiated.<sup>66</sup> With that being said, when applying PIE it is vital that the time frame be observed as it helps with giving the final verdict on court orders being given for evictions. The application of section 26(3) of the Constitution read with PIE gives a twofold effect: imposes a duty on courts to investigate and verify that no one gets evicted from their home and also affords the judiciary power to impinge on the property owner's common law right to obtain possession of the property.<sup>67</sup> In deciding whether it is just and equitable to grant an order of eviction, the court is required to consider all relevant circumstances as stipulated in the Act.<sup>68</sup>

### 3.5 Conclusion

In conclusion, as per this dissertation, evictions in South Africa take place in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.<sup>69</sup> PIE applies to all types of land and occupiers in the Republic, whereas some only apply to certain aspects. As Muller states: "whether PIE is the most appropriate source of law for evicting unlawful occupiers depends on the ability and likelihood of PIE to promote the spirit, purport and objects of the Bill of Rights".<sup>70</sup> The Constitution remains the most important source of law and all spheres have to be in line with the Constitution. Municipalities play a vital role, in that they play a central and complex role in the determination of whether or not the courts will grant an order of eviction.<sup>71</sup> It is important to note that the circumstances of unlawful occupiers are unique and should be noted on a case to case basis. When instituting proceedings, one has to use application proceedings as opposed to action proceedings, this is one of the changes that were brought by PIE as opposed to the common law option that existed during the pre-constitutional dispensation. The procedure that has to be followed when carrying out service is set out in section 4(1) and 4(5) of PIE as well as Rule 6 of the uniform rules of court.

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<sup>66</sup> Para 48.

<sup>67</sup> Para 17.

<sup>68</sup> Para 21.

<sup>69</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 52.

<sup>70</sup> Muller "Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa" (2015) 132 *SALJ* 616-638 633.

<sup>71</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 54.

## Chapter 4

# The responsibility to take care of the homeless: right to adequate housing

### 4.1 Introduction

The most vital question is whether who bears the responsibility to take care of the homeless. This chapter will give a critical analysis of the obligation stipulated in the Constitution regarding the right to adequate housing. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*<sup>1</sup> the court pointed out that the city's position is that it is neither obliged nor able to provide accommodation in those circumstances. Those circumstances being the condition the City found itself in, there were no resources or means. The aim is to focus on socio-economic rights, particularly the section on housing. This chapter leads to the conclusion of this research and is aimed at finding possible solutions for all parties involved. In *Government of the Republic of South Africa and others v Grootboom*,<sup>2</sup> the court stated that human dignity, freedom and equality are the most fundamental values and denying people shelter is inconsistent with the Constitution. All people should be afforded their chapter two rights and, South Africa needs to work towards a country that fulfils its duties in terms of socio-economic rights. Realising these rights contributes to the advancement of race and gender equality.<sup>3</sup> The court held that the government should at least strive to provide temporary shelter to those who have no access to land.<sup>4</sup> It is important that one considers the development of South African law, in that there has been a development of South African constitutional and statutory jurisprudence regarding the right to adequate housing for all.

### 4.2 Constitutional approach

The right to adequate housing forms part of Socio-economic rights in South Africa and is one of the fundamental rights as stipulated in the Bill of Rights. This right cannot just

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<sup>1</sup> 2012 (2) SA 104 (CC) para 92.

<sup>2</sup> 2000 (11) BCLR 1169 (CC) para 23.

<sup>3</sup> Para 23.

<sup>4</sup> Para 93.

exist on paper, there needs to be action taken towards the realisation of this right. Section 7(2) of the Constitution states that the state must promote, protect, respect and fulfil the rights stipulated in the Bill of Rights. The Constitution is the highest law of the land and therefore courts must adhere to these principles when applying the law and municipalities as state entities must also adhere to these values. Section 9(1) of the Constitution states that everyone is equal before the law and that everyone should be given the same protection by the law.<sup>5</sup> Therefore, as stated before both the landowner's and the unlawful occupiers deserve to be protected and treated equally before the law. Section 10 of the Constitution stipulates that everyone has inherent dignity that must be protected and respected. The provision of adequate housing protects the human dignity of the homeless, because evictions lead to homelessness. Section 26 (2) of the Constitution puts a positive obligation on the government to obtain reasonable and legislative measures or any other measures practically obtainable to achieve the progressive realisation of the right to adequate housing with its available resources and means. Section 26(1) is read together with section 26(3) in protection of those who stand the risk of being evicted. Section 26(1) states that everyone has a right to adequate housing and section 26(3) states that no one may be evicted from their home or have their home demolished without an order of court. Section 28(1) (c) of the Constitution stipulates that every child has the right to shelter. Section 28(2) goes on to state that the best interests of a child are of paramount importance in every matter concerning a child. One of the requirements to be looked at when considering granting an order of eviction in terms of PIE is whether there are children involved, the Constitution affords children protection against unlawful evictions.

### **4.3 Legislation**

There are pieces of legislation that specifically deal with the provision of housing for people, namely the Housing Act 107 of 1997 and the National Housing Code 2009 with its emergency housing programme.<sup>6</sup> The interpretation by the courts, especially the Constitutional Court, of legislative provisions relating to both evictions and unlawful occupation has created a framework within which municipalities must act when dealing

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<sup>5</sup> S 9(1) of the Constitution of the Republic of South Africa, 1996.

<sup>6</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 69.



with evictions.<sup>7</sup> Evictions in terms of PIE occur more often in the local government sector as compared to other sectors and they are often problematic.<sup>8</sup> The availability of alternative accommodation is widely regarded as the most important factor a court should consider in determining whether it is just and equitable to evict unlawful occupiers.<sup>9</sup> The occupiers do not want to end up homeless and the property owners need their property to generate income.

Section 2(1) of the National Housing Act 107 of 1997 provides that the national, provincial and local spheres of government must at all times give priority to the needs of the poor people with regard to housing development. Section 4 of the Act makes provision for a national housing code to be established. The code must have a housing policy that will establish the implementation and application of the code, and the code must be given to the spheres of government and municipalities for thorough implementation and application. Section 9(1) of the Housing Act states that local government must make sure that the people in their areas have access to adequate houses on a progressive basis, set appropriate and attainable delivery goals for their respective areas of jurisdiction, identify safe and appropriate land for housing development and initiate a plan, co-ordinate, facilitate and promote adequate housing development in their area. Materially, the practical application of this section lies within the realisation of the instructions given as per the Act. Local government being at Municipal level has more information regarding the areas that can be targeted under their jurisdiction, that are safe and appropriate to develop housing. The municipalities have the power and means to engage communities by hosting meetings and also requesting concerns to be brought forward. The facilitation of the developments start from the meetings up to the actual construction of the houses, local government has to issue out tenders for construction.

#### **4.4 Case-by-case approach**

In *Government of the Republic of South Africa and others v Grootboom*, Yacoob J put an emphasis on three aspects upon which he stated that the positive obligation on the

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<sup>7</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 52.

<sup>8</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 53.

<sup>9</sup> Muller "Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa" (2015) 132 *SALJ* 616-638 633.

government had a limitation: government could only take reasonable and other legislative measures, government had to enable progressive realisation of the right and lastly, that could only be done to the extent upon which resources were available and allowed it.<sup>10</sup> He stated that the positive obligation on the government by section 26(2) of the Constitution does not impose an absolute or unqualified obligation to provide access to adequate housing.<sup>11</sup> The obligation on the government will always rest on the availability of resources and the correct application of policies and obligations. In *Government of the Republic of South Africa v Grootboom*,<sup>12</sup> the court emphasised the importance of section 26 of the Constitution read with section 28(1) (c). Section 26 relates to housing rights in that everyone has a right to adequate housing, section 28(1) (c) states that every child has the right to shelter.<sup>13</sup> At a time in our country where human trafficking is at its peak, it is important that children are always safe and sheltered under the supervision of an adult. Eviction cases impose an immediate threat to individuals involved.<sup>14</sup> The court stated that neither section 26 or 28 of the Constitution entitles respondents to claim shelter or housing immediately upon demand, this right still rests upon the availability of resources.<sup>15</sup> This matter shows the desperation of thousands of people living in this country, the Constitution obliges the state to act positively to ameliorate these conditions.<sup>16</sup> This matter gave a clear indication of how the limitations in constitutional rights exist.

In *Port Elizabeth Municipality v Various Occupiers*<sup>17</sup> the constitutional court found that the unlawful occupiers could be given an opportunity to continue occupying private land while the government was making means to cater to their needs. Initially the high court had granted an eviction order for a group of 68 people, including 29 children, from privately owned land in Port Elizabeth municipality.<sup>18</sup> The SCA set aside the eviction order granted by the high court on the basis that, many of those that were evicted before, were indeed entitled to expect that they would not be evicted again

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<sup>10</sup> 2000 (11) BCLR 1169 (CC) para 38.

<sup>11</sup> Para 38.

<sup>12</sup> Para 70.

<sup>13</sup> Para 70.

<sup>14</sup> Para 71.

<sup>15</sup> Para 95.

<sup>16</sup> Para 94.

<sup>17</sup> 2004 (12) BCLR 1268 (CC)

<sup>18</sup> Para 1.

after their move to Walmer.<sup>19</sup> In essence, in terms of PE Municipality the court outlined that, whether it is just and equitable to grant an order of eviction in terms of PIE depends on whether the unlawful occupier can find alternative accommodation and if not, the state has a duty to provide accommodation to the people.

In *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg Metropolitan Municipality*,<sup>20</sup> the City of Johannesburg Metropolitan Municipality applied to the High Court for an eviction order of over 400 occupiers who occupied buildings in the city the application was due to the buildings being unhealthy and unsafe. The court denied the eviction application and held that the city had to remedy its housing programme.<sup>21</sup> The City then applied to the Supreme Court of Appeal and the court upheld the appeal of the City with the condition that it would provide alternative accommodation to those who were homeless due to the eviction order.<sup>22</sup> The occupiers then appealed the decision of the Supreme Court of Appeal to the Constitutional Court. Prior to giving judgment, the Court gave the parties an opportunity to engage with each other to find a solution to the living arrangements or find alternative accommodation.<sup>23</sup> The parties had agreed that the City would provide accommodation and that the occupiers would not be evicted and the City would upgrade the buildings and would in the meantime provide alternative accommodation.<sup>24</sup> This agreement was made an order of court by the Constitutional Court.<sup>25</sup>

Section 26(2) places an obligation on the state to take reasonable and legislative measures to ensure that everyone is afforded the right to adequate housing, the Supreme Court of Appeal in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*<sup>26</sup> outlined the legal framework to be put in place to regulate the responsibilities of the different governmental spheres with regard to housing. The court outlined the importance of the city's obligation to provide accommodation for the unlawful occupiers and emphasised the importance of the Bill of Rights and that there

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<sup>19</sup> Para 5.

<sup>20</sup> 2008 (3) SA 208 (CC) (19 February 2008).

<sup>21</sup> Para 1.

<sup>22</sup> Para 2.

<sup>23</sup> Para 34.

<sup>24</sup> Para 34.

<sup>25</sup> Para 54.

<sup>26</sup> 2011 (4) SA 337 (SCA) (30 March 2011)

is no doubt that the term state refers to the local spheres of government in this matter.<sup>27</sup> The matter escalated to the constitutional court and the court confirmed the SCA's findings in all material aspects.<sup>28</sup> Therefore, private land owners cannot be expected to provide land to the unlawful occupiers.

## 4.5 Conclusion

The one entity that has important information is the Municipality, from the availability of alternative accommodation options to what stands as just and equitable in the court of law, the municipalities have enough data in their possession.<sup>29</sup> Courts would not be able to grant orders of eviction without all the necessary information they obtain from the Municipalities, because it is inhumane to throw people out with no plan in place. Van Wyk notes that in most instances, unlawful occupiers do not have the means to afford legal representation and in other instances it is difficult to obtain information from the municipality or organs of state.<sup>30</sup> Currie and De waal emphasise that the right of access to adequate housing has to be in line with the reasonableness criterion as discussed by administrative law.<sup>31</sup>

In *Government of the Republic of South Africa and others v Grootboom*<sup>32</sup> the court noted that reasonableness would be judged against the notion as to whether or not the measures that have been adopted are reasonable, it is vital to note that there is a large variety of measures that the state could possibly adopt to meet its obligations. As mentioned above, the circumstances regarding granting an eviction order must be reasonable as well, therefore, the reasonableness criterion is vital. With the number of cases relating to the right to adequate housing and the level of action that has taken place, Muller notes that we have a limited and indirect understanding of what the scope of section 26(1) is in terms of which the reasonableness of the government measures must be tested.<sup>33</sup> There is substantial jurisprudence in place,

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<sup>27</sup> Para 42-43.

<sup>28</sup> 2012 (2) SA 104 (CC) para 102.

<sup>29</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 J 58.

<sup>30</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 58.

<sup>31</sup> I Currie and J De Waal *Bill of Rights Handbook* (6<sup>th</sup> ed 2013) 577-584.

<sup>32</sup> 2000 (11) BCLR 1169 (CC) para 56.

<sup>33</sup> G Muller "Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to reasonableness review model" (2015) *SAPL* 71-93 72.

however, there is room for development in terms of the law and the practical application by the government. In *Grootboom*, the constitutional court relied on an interpretative approach where section 26(1) and (2) were read together and on the other hand sections 26(1) and (3) were read together, consequently coming to a conclusion that the enforcement of these rights requires more than just bricks and mortar, but instead action that includes the acquisition of land, the actual construction of the house and the provision of municipal services.<sup>34</sup> In terms of *Grootboom*<sup>35</sup> the state is obliged to take positive action to meet the needs of the people who live in extreme, inhumane conditions of poverty, those who are homeless or with intolerable housing. This is indeed a huge task that puts immense pressure on the government. However, it is not directed at one sphere. All spheres of government need to work together by providing the necessary skills and delegation to each other, the national government has to delegate the duties to provincial government and the provincial government to the local government according to policies and availability of resources. Local government needs to promote a healthy and safe environment at all times.<sup>36</sup>

Section 152(1) (d) of the Constitution states that the objects of the local government are to promote a safe and healthy environment. A safe and healthy environment is directly linked to the provision of adequate housing. Our law needs to develop a strategy to define what is adequate housing and what exactly entails reasonable accommodation standards at face value. Muller states that, section 26 of the Constitution gives an impression that there is a clear link between negative obligations to prevent people from enjoying their current access to housing, and the positive obligation to provide access to adequate housing.<sup>37</sup> Consequently, there is a level of deprivation on land owners when unlawful occupiers continue to occupy their land, on the other hand, unlawful occupiers must be afforded the adequate housing right as stipulated in the Constitution. Muller notes that the wording in terms of section 26(2) implies that there should be some sort of standard against which government's social programmes can be measured.<sup>38</sup> The practical application of section 26(1)

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<sup>34</sup> Para 13.

<sup>35</sup> Para 24.

<sup>36</sup> J van Wyk "The role of local government in evictions" (2011) *Potchefstroom Electronic Law Journal* 14(3) 49-83 77.

<sup>37</sup> G Muller "Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to reasonableness review model" (2015) *SAPL* 71-93 74.

<sup>38</sup> G Muller "Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to reasonableness review model" (2015) *SAPL* 71-93 74.

means that people can express their housing needs in terms of certain characteristics and standards that prove the need for adequate housing for them. Viljoen concludes that the high level of deference observed in cases like *Port Elizabeth Municipality v Various Occupiers* results in situations that are unlawful and generally in contravention of the Bill of Rights.<sup>39</sup> The state has plans and policies in place, but there is clear proof that these programmes that are in place to address violation have failed due to non-compliance by the officials.<sup>40</sup> Viljoen suggests that structural interdicts are the only form of redress that can allow courts to retain jurisdiction, oversee state actions and hold the government accountable for non-compliance.<sup>41</sup> I am of the opinion that the government should be held accountable for the homeless.

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<sup>39</sup> S Viljoen VILJOEN S “The systemic violation of section 26(1): An appeal for structural relief by the judiciary” (2015) *SAPL* 42-70 69.

<sup>40</sup> S Viljoen VILJOEN S “The systemic violation of section 26(1): An appeal for structural relief by the judiciary” (2015) *SAPL* 42-70 69.

<sup>41</sup> S Viljoen VILJOEN S “The systemic violation of section 26(1): An appeal for structural relief by the judiciary” (2015) *SAPL* 42-70 69.

# Chapter 5

## Conclusion

### 5.1 Introduction

One of the main aims of this dissertation is to contribute towards the ongoing development of eviction law. Jurists, practitioners and legal scholars have been in pursuit of a clear and concise jurisprudence for the past fifteen years. As it stands, the courts have long answered the question of whether to enforce the right to adequate housing and the protection against evictions, now the issue lies within the enforcement of the above mentioned rights.<sup>1</sup> In the pre-constitutional South Africa, courts relied mostly on a common law remedy that is *rei vindicatio* to enforce evictions, the owner had to prove ownership from his/her side and lack of consent from the unlawful occupier's side.<sup>2</sup> In the current constitutional dispensation courts rely mostly on the Constitution as well as statute to adjudicate over illegal occupation of land and illegal eviction cases. Mechanisms should be put in place to ensure that no one is prejudiced in the process of coming to a common ground and all circumstances should be taken into account. The debate that strikes the question of property rights is about striking a balance between section 25(1) and section 26(3) of the Constitution, because there is a notable tension between these two rights. Landowners feel entitled to their right to use and enjoy their land and therefore see the need to remove people who disturb this right to use and enjoyment. Hence, landowners apply for eviction orders from courts of law.<sup>3</sup> Section 25(1) of the Constitution stipulates that no one may be deprived of property unless the deprivation is in terms of law of general application, it goes on to state that no law may permit arbitrary deprivation of property. It is important to note that this section has a dual function: firstly, it recognises that the state has power to regulate property entitlements for a public purpose, and secondly, it sets two

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<sup>1</sup> G S Dickinson "Blue moonlight rising: Evictions, alternative accommodation and comparative perspective on affordable housing solutions in Johannesburg." (2011) *South African Journal on Human Rights* 27(3) 466-495 468.

<sup>2</sup> M Clark & Dugard J "Evictions and Alternative Accommodation in South Africa: An Analysis of The Jurisprudence and Implications for Local Government" *Socio-economic Rights Institute of South Africa* (2013) 1-63 7.

<sup>3</sup> G S Dickinson "Blue moonlight rising: Evictions, alternative accommodation and comparative perspective on affordable housing solutions in Johannesburg." (2011) *South African Journal on Human Rights* 27(3) 466-495 469.

requirements, namely law of general application and non-arbitrariness, against which regulatory interferences must be measured.<sup>4</sup> Granting of eviction orders in the best interests of the landowners, leaves the unlawful occupiers homeless and homelessness infringes on one's right to human dignity. As confirmed in *Blue Moonlight*, the most important factor to consider is whether an eviction order is just and equitable.<sup>5</sup> The Constitutional Court had to take into consideration a number of factors before deciding whether an eviction order would be just and equitable. The other notable development that this case introduced was the obligation on the state to provide adequate housing for all.

## 5.2 Responsibility to house

The state has been committed to realising the right to adequate housing through its range of state-subsidised housing programmes, but many poor households still remain unable to access some form of adequate housing.<sup>6</sup> This is due to the high employment rate in our country and a lot of households are within the low-income bracket. Section 26(1) and (2) of the Constitution state that the state has an obligation to take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of the right to adequate housing for all. Legislation that governs the right to adequate housing include the Housing Act, which gives an indication and guideline of how this duty is divided amongst the spheres of government. These spheres need to work hand-in-hand and cooperate with one another in good faith and mutual trust so that the best results can be achieved.<sup>7</sup> As pointed out by Strydom and Viljoen: "national and provincial government must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."<sup>8</sup> One sphere is mutually dependent on the other sphere for it to function to its full potential and attain its goals as set and

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<sup>4</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1220.

<sup>5</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* CC 2012(2) BCLR 150 (CC) para 98.

<sup>6</sup> M Clark & Dugard J "Evictions and Alternative Accommodation in South Africa: An Analysis of The Jurisprudence and Implications for Local Government" *Socio-economic Rights Institute of South Africa* (2013) 1-63 3.

<sup>7</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1216.

<sup>8</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1216.



guided by the Housing Act. There is a shortage in affordable housing for low-income households in the inner city, which means that the government is also struggling to meet its housing obligation towards the people.<sup>9</sup> The constitutional right to adequate housing is contradictory to the pervasive realities of South Africa that include housing backlogs, evictions and removals; this is one of the reasons the right is being contested in many court cases.<sup>10</sup>

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others*<sup>11</sup> the court stressed that the South African Constitution deals expressly with the duties of councils towards the disadvantaged sections of our society. The court went on to stress that the objects of the local government include but are not limited to ensuring the provision of services to communities in a sustainable manner, promoting social and economic development, and that those municipalities must structure and manage their administration and budgeting and planning processes to give priority to basic needs in the communities.<sup>12</sup>

In terms of section 9(3)(a) of the Housing Act, a municipality may expropriate land by notice in the Provincial Gazette if it is required for housing development. The government bears the responsibility to provide housing to the people, as the government has the duty and authority to strategize and come up with possible solutions that serve the people as per the people's constitutional rights. Essentially, this section enables government to take action against deteriorating and ill managed buildings by demolishing the buildings and building better housing or by fixing the buildings and taking over management thereto. The Housing Act gives authority to the local government to identify land that should be used for housing development, the local government must manage the actual land use and development once they have procured the land.<sup>13</sup> In *Blue Moonlight*, the court made a ruling that the municipality has a general constitutional duty to ensure that accommodation is provided to people facing homelessness on eviction, the court further stated that it does not matter as to

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<sup>9</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1207.

<sup>10</sup> M Clark & Dugard J "Evictions and Alternative Accommodation in South Africa: An Analysis of The Jurisprudence and Implications for Local Government" *Socio-economic Rights Institute of South Africa* (2013) 1-63 3.

<sup>11</sup> 2010 (3) SA 454 (CC) para 348.

<sup>12</sup> Para 348.

<sup>13</sup> Ss 9(1) (a), 9(1)(c) and 9(1)(h) of the Housing Act 107 of 1997.

who or what is the causing the deprivation of property to those people.<sup>14</sup> It is important to note that the central question that can be deduced from the realisation of section 26 is whether the means chosen by the government are reasonably possible of facilitating the realisation of this right.<sup>15</sup> Consequently, there are a number of factors to look into when dealing with the responsibility to house the homeless, the most important factor to note is action taking place in that something needs to be done.

### 5.3 Findings

With regard to PIE and the *Blue Moonlight* case, it is evident that the inner-city struggle that surrounds property rights between landowners and land occupiers has left thousands of families living in deteriorated and abandoned buildings and landowners trying by all means to preserve their property rights.<sup>16</sup> PIE being the main statute of reference, has a number of questions to address. Any person who is an owner or is in charge of land can approach the court in terms of PIE, and the Act includes an organ of state in its definition of an owner. Section 6 of the Act deals with an eviction by an organ of state, therefore organs of state can be landowners for the purpose of seeking an eviction order. Another important question to address is whether a landowner can carry out the eviction process by themselves in the instance where the unlawful occupier refuses to vacate the premises as per the date granted by the court. The answer to the question is that the owners does not carry out the eviction process, but the sheriff of the court is the only person who may attend to the eviction of an unlawful occupier. Alternatively the court may appoint someone to assist the sheriff in carrying out the eviction order and that appointment would be at the request by the sheriff himself and the sheriff must prove that he will be present at all times during the proceedings.

The cases discussed above prove that there has been a development in eviction cases in South Africa, whether it is with regard to the unlawful occupiers or the property owners. One would expect aspects such as the landowner's identity, the previous use of the property, the future plans with regard to the property and the relationship with

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<sup>14</sup> 2012(2) BCLR 150 (CC) para 92.

<sup>15</sup> <sup>15</sup> G Muller "Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to reasonableness review model" (2015) *SAPL* 71-93 75.

<sup>16</sup> G S Dickinson "Blue moonlight rising: Evictions, alternative accommodation and comparative perspective on affordable housing solutions in Johannesburg." (2011) *South African Journal on Human Rights* 27(3) 466-495 466.

the occupiers to be some of the factors the court takes into a consideration when reaching a conclusion regarding an eviction.<sup>17</sup> However, courts will disregard these factors when they can see that there is an emergency situation and place the obligation to prevent an increase in homelessness on the local authorities.<sup>18</sup> In order for the courts not to leave people homeless and at the same time not infringe on the rights of the landowners, the courts put an obligation on the state to provide temporary accommodation to the evictees or alternative accommodation thereto.<sup>19</sup> Section 2(1) of the Housing Act puts an obligation on the national, provincial and local spheres of government to provide housing for people. They must give utmost priority to the needs of the poor with regard to housing developments. Essentially, the government spheres need to act as soon as possible with all the available resources they have to ensure that people have homes. The National Housing Code, as stipulated in section 4 of the Housing Act, makes provision for the effective implementation and application of the housing policy.

In *Government of the Republic of South Africa and others v Grootboom*,<sup>20</sup> it was confirmed that the court had an obligation to decide whether a nationwide housing programme would be sufficiently flexible to respond to those in desperate need in our society and cater appropriately for immediate and short term requirements. There is a housing problem in South Africa and it needs to be addressed as soon as possible. Municipalities bear the responsibility to address the housing issues in South Africa, because people have access to their offices and engage municipal officials in meetings held by the communities frequently. The court stipulated that the state's failure to have a housing policy in place that provides shelter for the homeless who find themselves in desperate need of shelter is a violation of their section 26(2) of the Constitution.<sup>21</sup> Evictions should at all times take place in a humane manner in light of the constitutional values of our country.<sup>22</sup> The people handling evictions should make

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<sup>17</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1215.

<sup>18</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1215.

<sup>19</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 2014 1215.

<sup>20</sup> 2000 (11) BCLR 1169 (CC) para 56.

<sup>21</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (4 October 2000) para 60.

<sup>22</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1207.

sure that vulnerable people are treated with care and concern and human beings are treated as human beings at all times.<sup>23</sup>

In *Blue Moonlight* the court introduced change in the legal sphere, the court set new standards, obligations were put in place and all stakeholders were expected to partake and perform accordingly.<sup>24</sup> A notable change that can be seen in this matter was the court giving unlawful occupiers time to temporarily occupy the property while negotiations were taking place to come up with a solution. The court has an important task to establish whether it is just and equitable to grant an eviction order.

The court has the authority to protect both the unlawful occupiers as well as the property owners. While the court can grant an extension in favour of the unlawful occupiers, the court cannot force landowners to bear the social burden. In essence, *Blue Moonlight* shows that it is within the court's power to delay an eviction, but it is important to note that the purpose of the delay is to ensure that when the eviction takes place, it is done in accordance with the values of our Constitution. The delay also gives time to local authorities to find suitable alternative accommodation for the evictees.<sup>25</sup>

From the analysed cases above, the only matter where it seems as though the court was willing to grant constitutional damages to protect the property rights was in the *Modderklip* case.<sup>26</sup> In *Fischer v Unlawful occupiers*<sup>27</sup> the court ordered that the city should enter into good faith negotiations with the applicants so that they can purchase their property within a certain period as agreed. Essentially, this matter proved that it is possible for the courts to grant damages on the side of the landowners. The question still stands as to where we should draw the line between the landowner's rights and those of unlawful occupiers. Our jurisprudence will continue to develop and there will always be room to make certain amendments. Kruger comments that to complete our jurisprudence, to ensure that there is an appropriate balance between conflicting rights and interests, rather than the creation of a hierarchical system, there should be one of

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<sup>23</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1207.

<sup>24</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1235.

<sup>25</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1238.

<sup>26</sup> J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: constitutional analysis of the rights and obligations involved" (2014) *PELJ* 1206-1261 1235.

<sup>27</sup> *Fischer v Unlawful Occupiers & others* 2018 (2) SA 228 (WCC) para 196.

the two options he proposes.<sup>28</sup> Either the courts should declare PIE unconstitutional, because it fails to give parties a compensatory remedy against the state for losses incurred in these types of eviction cases, or the courts or the legislatures must forge a novel constitutional remedy affording parties a right to claim some measure of damages from the state.<sup>29</sup>

In conclusion, the theme I have observed from the way the courts deal with cases and the application of law, is that the courts grant suspended eviction orders, relocation orders and further negotiations, while they force the state to provide emergency housing alternatives in the interim. Putting the burden on the state makes more sense to me as compared to expecting landowners to provide accommodation to unlawful occupiers in the interim. The courts in coming to these decisions have to take a number of factors into consideration, namely the rights of the children, disabled, elderly and households headed by women. I have noted a number of recurring problems or factors throughout this discussion, namely the contradictions between landowners and land occupiers, the statutory obligations, the constitutional right to housing and lastly, the impact of the above mentioned issues on the government's housing budget. I am of the opinion that the responsibility to grant adequate housing for the people rests on the government, particularly the municipalities heading the projects. Under no circumstances should landowners be burdened with the responsibility to provide housing. Twenty-six years into a democratic South Africa, as people we are still in pursuit of having our socio-economic rights met, government has a long way to go to ensure people's needs are met hence the constant development of policies. The South African government needs to act within its available means and resources to make sure everyone's rights are catered to. The PIE Act was enacted to give effect to section 26(3) of the Constitution, this has been achieved to a certain extent over the years, but there is plenty of room for improvements and developments. PIE repealed PISA and decriminalised squatting. PIE went on to make the eviction process subject to requirements designed to make sure that the homeless would be treated with much needed dignity, while they would be awaiting access to the new

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<sup>28</sup> M Kruger "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) *South African Law Journal* 131(2) 328-364.

<sup>29</sup> M Kruger "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) *South African Law Journal* 131(2) 328-364.

housing development programs.<sup>30</sup> Wilson states that as much as alternative accommodation is provided to evictees, it comes after a long fight for recognition that the evictees are human beings that should be afforded the right to adequate housing as well.<sup>31</sup> This is degrading and infringes on one's human dignity, because having to fight for a basic need may be detrimental to one's wellbeing. The Constitutional court may still be the best option to develop socio-economic rights through the conclusions in terms of case law, government may find case law to be more persuasive as this leads to more litigation problems and funds have to be used to manage the problem.

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<sup>30</sup> L A Williams "The right to housing in South Africa: an evolving jurisprudence" (2014) 45 *CHRLR* 816-845 825.

<sup>31</sup> S Wilson "Curing the Poor: State Housing Policy in Johannesburg after Blue Moonlight" (2014) *Constitutional Court Review* 31(3) 279-295 287.

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