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THE USE OF FORCE IN MASS EVICTIONS:

Prescribing The Conduct by Which Evictors Can Evict Unlawful Occupiers

LLM (Law) Dissertation by

Marc Barros Gevers

Student Number: 11041898

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Prof. G Muller

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## **Summary:**

This dissertation focuses on the use of force during evictions, particularly in the context of mass evictions (where mass evictions are defined as the eviction of a group of people from unlawfully occupied property).

The South African approach to the use of force during evictions is evaluated through an analysis of section 4(11) of the Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998. This section allows third parties to assist the sheriff in executing an eviction order. Based on the principles of subsidiarity, ancillary empowering legislation such as the Sheriff's Act 90 of 1986, the South African Police Service Act 68 of 1995, and the Private Security Industry Regulation Act 56 of 2001, are also considered in this analysis. A determination is then made on whether said legislation adequately provides for the use of force in evictions.

Where such framework is found to inadequately provide procedural and substantive protection, this dissertation analyses the international and foreign framework of laws as they relate to the use of force and evictions in order to provide guidance as to the shortcomings and possible solutions to any inadequacies in the current South African approach. Thus, better providing the necessary procedural and substantive safeguards for the use of force in evictions.

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# 1. Introduction

## 1.1. Introduction

In *South African Human Rights Commission & Others v The City of Cape Town & Others*<sup>1</sup> (*SAHRC v Cape Town*), the applicants approached the court for relief against a number of evictions and demolitions that had occurred during the 2020 COVID-19 national state of disaster.<sup>2</sup> Perhaps the most striking of these evictions and demolitions were the demolitions that occurred at Ethembeni Informal Settlement, Khayelitsha on 1 July 2020 during Alert Level 3 (the Ethembeni Evictions), and the demolitions and evictions that occurred in Zwelethu, Mfuleni on 13 July 2020 (the Zwelethu Evictions).<sup>3</sup> In all the cases, the applicants and the intervening parties opposed the eviction and demolition operations carried out by the City of Cape Town's Anti-Land Invasion Unit (ALIU), which occurred notwithstanding the regulations and without any court orders supporting such operations.

In the Ethembeni Evictions, the Cape Town City officials and ALIU demolished a number of structures at the Ethembeni Informal Settlement, one of which was occupied by the third applicant, Mr Bulelani Qolani. Without any court order and in a manner 'reminiscent of apartheid era brutal forced removals'<sup>4</sup> that involved pepper spray, intimidation through weapons, and physical violence, Mr Qolani's dwelling was forcibly entered, and he was dragged out of his dwelling naked by ALIU whilst his dwelling was demolished by ALIU.<sup>5</sup> While Mr Qolani may have been in unlawful

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<sup>1</sup> 2021 (2) SA 565 (WCC) (*SAHRC v Cape Town*). It is worth noting that the hearing of the referenced case was for Part A of the matter that dealt with the interdicting of the City from demolishing structures without a court order (which order was handed down on 25 August 2020), and Part B that dealt primarily with the constitutionality of the city's conduct and ALIU, which carried out the evictions and demolitions (which order was finalised on 5 November 2021).

<sup>2</sup> The national state of disaster was declared in terms of section 23(1)(b) of the Disaster Management Act 57 of 2002 with regard to the COVID-19 pandemic. Regulations were published in respect of Alert Levels 4 and 3, respectively Regulation 19 GN480 in GG 43258 (29 April 2020) and Regulation 36(1) GN608 in GG 43364 (28 May 2020) that *inter alia* suspended evictions during the Alert Level period until the last day thereof, unless a court decided otherwise on the basis of it being not just and equitable to evict. Furthermore, at the time of this hearing, Regulation 53(1) GN891 in GG 43620 (17 August 2020) of Alert Level 2 was applicable and expressly prohibited evictions and demolitions without a court order (collectively 'the Regulations').

<sup>3</sup> The other demolitions which occurred involved: the demolition and confiscation of property in Empolweni Informal Settlement, Makhaza Khayelitsha during Alert Level 4, the demolitions and evictions which occurred in Hangberg, Hout Bay on 19 June 2020 during Alert Level 3, and evictions and demolitions in Ocean View on 15 May 2020 during Alert Level 3.

<sup>4</sup> *SAHRC v Cape Town*, para 1.

<sup>5</sup> *SAHRC v Cape Town*, paras 17-18.

occupation, as averred by the City,<sup>6</sup> his dignity was violated. Mr Qolani was treated in a cruel, inhumane and degrading manner due to the conduct of ALIU, which was captured on video footage.<sup>7</sup>

In the Zwelethu Evictions, it was contended by the applicants that the residents of Zwelethu had been subject to a number of unlawful evictions. These evictions were carried out in the absence of a court order, in clear violation of section 26 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).<sup>8</sup> The evictions and demolitions that occurred in Zwelethu began in May 2020 and six more cases were carried out by ALIU throughout June and July of 2020. On each of these six cases, ALIU was accompanied by the Metro Police of the City of Cape Town and the South African Police Service (SAPS).<sup>9</sup> According to the applicants, ALIU arrived armed in the early hours of the morning<sup>10</sup> (without any prior engagement with the residents) and did not produce any court order or documentation. ALIU, allegedly, began demolishing the dwellings regardless of whether they showed occupation or not, both damaging and confiscating property and building materials.<sup>11</sup> In this instance, the City contended that demolitions only occurred in respect of unoccupied property. The City's opposition to the settlement was that such unlawful occupation of the area would interfere with water mains located under the property.

The applicants *inter alia* sought interim relief.<sup>12</sup> This interim relief included an interdict of evictions from, and demolitions of, occupied and unoccupied structures

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<sup>6</sup> Although, in this case, and all the other evictions and demolitions at issue, the City's main contention against the relief sought was essentially that no evictions occurred and all the demolitions were carried out on unoccupied structures, which thus, as the City argued, meant that no protection is afforded in terms of Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 (PIE) or section 26(3) of the Constitution as these dwellings, either completed or still being erected, were not occupied and thus not homes or shelters as envisaged by PIE and the Constitution.

<sup>7</sup> For further reading on dignity and humane treatment see Currie and De Waal *The Bill of Rights Handbook* 5ed (2010) 272, Woolman and Bishop *Constitutional Law of South Africa* 2ed (2013) Vol. 3 Chap. 36, and *Daniels v Scribante & Another* 2017 (4) SA 341 (CC) (of particular note are the remarks at paras 2, 110, and 160).

<sup>8</sup> *SAHRC v Cape Town*, para 26.

<sup>9</sup> *SAHRC v Cape Town*, para 28.

<sup>10</sup> It is worth noting, as will be discussed further in Chapter 3, that there are specific prohibitions as to when an eviction may take place and whether evictions may take place with the use of force and firearms contained within the United Nations' *The Basic principles and guidelines on development-based evictions and displacement*, UN Doc A/HRC/18, specifically paras 48-49.

<sup>11</sup> *SAHRC v Cape Town*, para 29.

<sup>12</sup> *SAHRC v Cape Town*, para 2.



without a court order during the national state of disaster.<sup>13</sup> Where evictions and demolitions were to occur in terms of a court order, it was pleaded that such should occur in a lawful manner respecting the dignity of those evicted. Additionally, in such instances, excessive force and wanton destruction and confiscation of the evictees' property and building materials should be expressly prohibited. In instances of evictions and demolitions authorised by court order, where SAPS is present, it was pleaded that SAPS be directed to ensure that such evictions and demolitions are done lawfully and in accordance with the Constitution. Furthermore, an interdict from considering or awarding any bids or tenders for the demolition of illegal, and formal and informal, structures in the city of Cape Town was also sought as part of the interim relief.<sup>14</sup>

The court found that the respondents' conduct during all of the evictions and demolitions was not adequately refuted by the respondents. The applicants had evinced 'a *prima facie*, if not a clear right, to the interdictory relief in respect of occupied structures'.<sup>15</sup> On a purposive interpretation of PIE, read with the Bill of Rights,<sup>16</sup> the court further found that the unoccupied structures were afforded protection under PIE against evictions and demolitions without a court order during the state of disaster.<sup>17</sup> Further, the court found that the City failed to provide a substantial response as to how it or ALIU determined which dwellings were unoccupied and were apparently 'singled out for demolition in an arbitrary, capricious and unfettered manner'.<sup>18</sup> The court continued by finding that the conduct of ALIU clearly evidenced excessive force and that the rights to dignity, security and freedom of person and life were clearly infringed thereby.<sup>19</sup>

Regarding the tender bid that was opposed by the applicants, this was opposed on the basis that the payments and penalties structure 'creat[ed] a perverse incentive

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<sup>13</sup> The Applicants relied on four clear rights: the provision of section 8(1) of PIE, which states that 'no person may evict an unlawful occupier except on the authority of an order of a competent court'; section 26(3) of the Constitution; section 34 of the Constitution, which states that 'everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before court or where appropriate another independent and impartial tribunal or forum', and; the Regulations.

<sup>14</sup> Tender Bid 308S/2019/20.

<sup>15</sup> *SAHRC v Cape Town*, paras 41–45.

<sup>16</sup> The Constitution of the Republic of South Africa (the Constitution), Chapter 2.

<sup>17</sup> *SAHRC v Cape Town*, paras 47 and 55.

<sup>18</sup> *SAHRC v Cape Town*, para 50.

<sup>19</sup> *SAHRC v Cape Town*, para 62. The rights being infringed being those contained in the Constitution under sections 10, 12, and 11, respectively.

for the successful tenderer to demolish as many structures as quickly as possible'. Further, that no clear guidelines existed to determine whether or not a structure was occupied, nor express provision that a successful tenderer should comply with the provision of PIE.<sup>20</sup> Given the *prima facie* failings of the tender and the already evident failings of ALIU, the court found that should the tender be awarded, the affected occupiers would, in all likelihood, continue to suffer irreparable harm. Such harm would be due to the violation of their constitutional rights to *inter alia* dignity and housing as a result of the arbitrary and unwarranted conduct that was occurring without judicial oversight.<sup>21</sup>

## 1.2. Background

A prevalent area of concern, as a result of the current socio-economic climate in South Africa,<sup>22</sup> is the field of eviction and, more specifically, the evictions of unlawful occupiers. While PIE was enacted to provide for such evictions in a lawful manner,<sup>23</sup> there has been a rise in social discourse and legal disputes on how evictions of unlawful occupiers should occur, particularly when considering mass evictions.<sup>24</sup> This is not to say that evictions have no place in society but rather that PIE is intended to maintain a balance between illegal eviction and unlawful occupation.<sup>25</sup> However, to interpret PIE effectively its context needs to be considered fully, such that it is not only:

...a legislative mechanism designed to restore common law property rights...Nor is it just a means of promoting judicial philanthropy in favour of the poor...PIE has to be understood, and its governing concepts of justice and equity have to be applied. Within a defined and carefully calibrated constitutional matrix.<sup>26</sup>

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<sup>20</sup> *SAHRC v Cape Town*, para 71.

<sup>21</sup> *SAHRC v Cape Town*, paras 74–75.

<sup>22</sup> South Africa faces many socio-economic challenges such as: high unemployment rates (approx. 40%); poverty (approx. 55% of the population living under national poverty line); and high levels of inequality (approx. 50% of income share held by richest 10%). <<https://hdr.undp.org/en/countries/profiles/ZAF>, accessed on 1 May 2022>

<sup>23</sup> Preamble of PIE.

<sup>24</sup> For the purpose of this dissertation, mass eviction can be defined as the eviction as the lawful or unlawful eviction of more than one person or family from a property that is being lawfully or unlawfully occupied by such persons or people. This definition includes mass evictions that require a third party, such as the police force or private security, to assist the sheriff of the court in effecting such a mass eviction order.

<sup>25</sup> This issue is dealt with rather extensively by Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*).

<sup>26</sup> *PE Municipality*, para 14.

PIE was enacted and has been utilised to protect both the landowners' rights and the occupiers' rights, and has attempted to create a balance between the two.<sup>27</sup> However, an already tenuous and contentious balance becomes even more strained in the case of mass evictions. While PIE was put in place for such a reason, it is becoming dangerously apparent that something fundamental is lacking when it comes to ensuring this balance and protecting the dignity, safety, and equal treatment of South African citizens and residents when mass evictions occur.<sup>28</sup> The legislative mechanisms introduced by PIE, along with PIE's spirit and purport, need to be analysed in the context of mass evictions. This analysis would determine the shortcomings of PIE and determine the best possible manner in which to redress such shortcomings.

The remedy of eviction is one which many countries provide for, and can often be the final avenue to protect owners' rights. However, like any law that has the potential to do harm it is necessary that evictions are carried out legally. Most importantly, evictions should be conducted in a just manner, taking into consideration human dignity, privacy, the right not to be arbitrarily deprived of property, and many other fundamental human rights.<sup>29</sup> The importance of access to adequate housing, with the ensuing rights and obligations, and its link to the inherent dignity of a person, has been emphasised by South African courts.<sup>30</sup> It has been further stated that to have a home,<sup>31</sup> which one can call one's own, even in the most basic of circumstances can

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<sup>27</sup> See *PE Municipality* para 23, where Sachs J states:

...the Constitution [and thus PIE in giving effect to section 26] ...counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home...The judicial function in these circumstances [being]...to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant...

<sup>28</sup> The Constitution, sections 9, 10 and 12.

<sup>29</sup> Including, obviously, the rights to housing (section 26 of the Constitution), and the rights to freedom and security of person (section 12 of the Constitution). Further, the effect of evictions can be extended over numerous other socio-economic rights, such as the right to health, and the rights of children. For a more expansive discussion on these rights, see Currie I De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> Ed (2013, Juta & Co).

<sup>30</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), para 83.

<sup>31</sup> On the importance and meaning of a home see: Csikszentmihalyi M and Rochberg-Halton E "The home as symbolic environment" in Csikszentmihalyi M and Rochberg-Halton E *The Meaning of Things - Domestic Symbols and the Self* (Cambridge: Cambridge University Press: 1981) 121-145; Dovey K "Home and homelessness" in Altman I and Werner CM (eds) *Home Environments* (New York: Plenum Press, 1985) 33-64; Fox L "The idea of home in law" (2005) 2 *Home Cultures* 1-25; Fox L "The meaning of home: A chimerical concept or a legal challenge?" (2002) 9 *Journal of Law and Society* 580-610; Fox L *Conceptualising Home - Theories, Laws and Policies* (Oxford: Hart, 2007); Lawrence RJ "Deciphering

be one of the 'most empowering and dignifying human experience[s]'.<sup>32</sup> Thus, it is not a surprise that evictions run the risk of leading to violations of rights.

Contextually, it is essential to analyse the current framework and situation with regard to the Constitution, specifically sections 25 (Property) and 26 (Housing).<sup>33</sup> A significant source in such an approach is the doctoral dissertation of Muller.<sup>34</sup> Muller's dissertation focuses on the housing rights of unlawful occupiers in South Africa under the Constitution. His dissertation provides a robust discussion on the international framework to provide substance to section 26, as well as evaluates the process for eviction disputes.

The key provisions for the just and equitable protection of the owner's rights, with regard to evictions, are undoubtedly those provided for in section 25,<sup>35</sup> which specifically state that:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property

...

- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

It is thus in terms of section 25(1) that an owner's rights are infringed by an unlawful occupation. The key provisions for housing rights of the occupier undeniably come from section 26 of the Constitution, which provides that:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

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home: An integrative historical perspective" in Benjamin DN (ed) *The Home: Words, Interpretations, Meanings and Environments* (Aldershot: Ashgate, 1995) 53-68; Porteous JD "Home: The territorial core" (1976) 66 *Geographical Review* 383-390; Rapoport J "A critical look at the concept 'home'" in Benjamin DN (ed) *The Home: Words, Interpretations, Meanings and Environments* (Aldershot: Ashgate, 1995) 25-52; Sebba R and Churchman A "The uniqueness of home" (1986) 3 *Architecture and Behaviour* 7-24; and Somerville P "Homelessness and the meaning of home: Rooflessness or rootlessness?" (1992) 16 *International Journal of Urban and Regional Research* 529-539.

<sup>32</sup> *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), para 39.

<sup>33</sup> The Constitution Section 25 and 26. Other sections of note are Section 9 (Equality), Section 10 (Human dignity), Section 12 (Freedom and security of the person), Section 33 (Just administrative action), Section 34 (Access to courts), and Section 36 (Limitation of rights).

<sup>34</sup> Gustav Muller 'The impact of Section 26 of the Constitution on the eviction of squatters in South African law' (2011).

<sup>35</sup> See Van der Walt AJ *Constitutional Property Law* 3rd edition (2011).

- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

While the state bears the obligation to ensure that everyone has access to adequate housing, in terms of section 26(2), until the hopeful yet unlikely complete realisation of this provision, there will arguably always be those without adequate housing and the resultant unlawful occupation of property and, or, land.<sup>36</sup> As such, there is a want and need for evictions in order to protect the property rights,<sup>37</sup> and other rights, of the owner of the property and, or, land.

Section 25 and section 26 of the Constitution form the overarching provisions for the rights of access to land, access to adequate housing, and protection from the unlawful deprivation thereof. These provisions clarify the obligation of the government to 'foster conditions which enable citizens to gain access to land on an equitable basis'.<sup>38</sup> Accomplishing this through reasonable legislative and other measures, to 'achieve the progressive realisation of [the right of access to adequate housing]'.<sup>39</sup> Thus, in order for evictions to be valid in terms of section 26(3) and to balance the rights of the landowners with the unlawful occupiers, it is important to establish how evictions should be approached in terms of the Constitution.

In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*), Sachs J clarified the creation of new obligations and rights by the Constitution not previously recognised by the common law, in terms of property and eviction. It is in terms of these new constitutional protections (such as use, possession, and occupation) that ownership rights must be balanced against the 'equally relevant right not to be deprived of a home'.<sup>40</sup> Sachs J further expands that it is the:

...judicial function...not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the right of ownership over the rights not to be dispossessed of a home, or *vice versa*. Rather it is to balance

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<sup>36</sup> It should be noted that there are 7 characteristics of adequacy in terms of the right to housing: security of tenure, services, access, affordability, habitability, location and cultural appropriateness. There is a gradual transition from weak access to strong access to this right. For the purposes of this dissertation, the focus on adequacy of housing is more focused on the aspects of security of tenure and access, or the lack thereof.

<sup>37</sup> Section 25 of the Constitution.

<sup>38</sup> Section 25(5) of the Constitution.

<sup>39</sup> Section 26(2) of the Constitution.

<sup>40</sup> *PE Municipality* para 23.

out and reconcile the opposed claims in as *just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.*<sup>41</sup>

[own emphasis added].

*PE Municipality* identified three key characteristics for evictions to be effected in line with the Constitution that will assist in maintaining a constitutional balance between the rights of the landowners and those of the unlawful occupiers.<sup>42</sup> First, the rights contained in sections 25(5) and 26(1) of the Constitution are not absolute and unqualified. Accordingly, such rights cannot and do not permit arbitrary seizures of land or claims for land and adequate housing on demand. Rather, it is the responsibility of the government to achieve the progressive realisation of these rights in an orderly manner and within its means.<sup>43</sup> Second, while section 26(3) does not preclude the remedy of evictions, courts should be hesitant to grant an eviction of unlawful occupiers unless there is at least temporary alternative accommodation made available subsequent to the eviction.<sup>44</sup> Third, the provision of section 26(3) of the Constitution requires all relevant circumstances be considered prior to the granting of an eviction. This means that the courts have a wide discretion in terms of section 26(3) to consider whether it is just and equitable to evict the unlawful occupiers.<sup>45</sup>

These key characteristics are fundamental to ensure, or, at the very least, attempt to maintain, a just and equitable balance of rights in the eviction process, in terms of the Constitution. However, the Constitution itself is not enough, nor was it intended to provide the means and manner in which to effect evictions.

Further, it was held in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*<sup>46</sup> that:

the courts are *required*, when considering the granting of an eviction order in terms of [PIE], *to strike a balance between two competing interests and constitutional rights*. On the one hand there is the right of an owner of land not to be arbitrarily deprived of the use of his property and on the other the right of an occupant not to have his or her home demolished without an order of court.<sup>47</sup>

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<sup>41</sup> *ibid*

<sup>42</sup> Muller (n 34) 73-74.

<sup>43</sup> *PE Municipality* para 20.

<sup>44</sup> *PE Municipality* para 21.

<sup>45</sup> *PE Municipality* para 28.

<sup>46</sup> 2001 (4) SA 759 (E).

<sup>47</sup> *ibid* 770.

[own emphasis added]

Thus, it is in terms of the above, with specific heed being paid to section 26(3) and the principles of justice and equity, that PIE is intended to provide for the means and manner in which a lawful eviction of unlawful occupiers can be effected.

South Africa has a sordid history when it comes to the violations of the rights of marginalized people. During apartheid, the government had legislated and legalised many such violations through the evictions and forced removal of people through acts such as the Prevention of Illegal Squatting Act 52 of 1951 (PISA), the Black Laws Amendment Act 42 of 1964, and the Group Areas Act 36 of 1966.<sup>48</sup>

The evictions and removals that were carried out during apartheid and in terms of some of the laws as mentioned above, targeted the already marginalised black community and were flagrantly lacking in both administrative and procedural fairness. These often occurred 'without prior notice, usually involved the demolition of buildings... and occurred without a court order that considered the personal circumstances of the unlawful occupiers'.<sup>49</sup> Black people residing outside of the formally allocated black locations as defined in the Black Land Act, the Development Trust and Land Act, and the Group Areas Act, were regarded as squatters under PISA.<sup>50</sup> In terms of PISA, all that was essentially needed for an eviction order was to determine if the occupation was unlawful. The unlawful occupiers then faced not only summary eviction but were also criminally liable, even if they had permission from a previous owner to occupy that land that was withdrawn by new owners.<sup>51</sup> In the case of *S v Peter*,<sup>52</sup> which led to an amendment of PISA,<sup>53</sup> the deviation from regular procedure was asserted as necessary to effectively combat the 'epidemic' of shacks being erected and people (read black people) moving into urban areas.<sup>54</sup> This clause was replaced by another amendment to PISA,<sup>55</sup> following the case of *Fredericks v*

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<sup>48</sup> Also, of particular note in relation to these Acts are the Black Land Act 27 of 1913, and the Development Trust and Land Act 18 of 1936 which prescribed only 13% of the land in South Africa for the African majority.

<sup>49</sup> Gustav Muller 'Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa' (2015) 132 SALJ 616–638.

<sup>50</sup> *PE Municipality* para 9.

<sup>51</sup> Section 3 of PISA, see also *PE Municipality* para 8.

<sup>52</sup> 1976 (2) SA 513 (C).

<sup>53</sup> The Prevention of Illegal Squatting Amendment Act 92 of 1976.

<sup>54</sup> *Ibid* section 3B, which allowed local authorities, as well as landowners, to demolish the shack of these squatters after a seven-day notice period.

<sup>55</sup> The Prevention of Illegal Squatting Amendment Act 72 of 1977.

*Stellenbosch Divisional Council*.<sup>56</sup> However, this amendment was equally problematic as it prevented squatters from applying to the court for an order to prevent their removal unless they were able to prove a right to the land.<sup>57</sup>

The likes of such legislation allowed for even more violations based on a racial divide and allowed for the perpetuation of the unjust treatment and unequal status of those violated and marginalized people.<sup>58</sup>

Such disregard for fundamental human rights and procedural fairness may not be unexpected considering the context of apartheid. However, when simplified and written as above, such conduct has shockingly stark comparisons that can be drawn to certain evictions and removals in post-apartheid South Africa, such as in the case of *SAHRC v Cape Town*. The current cause for concern should be evident in light of many other recent mass evictions that include both those conducted privately, as seen in regular headlines about companies like the Red Ants,<sup>59</sup> and those conducted publicly by the State.<sup>60</sup>

*Tswelopele Non-Profit Organisation & Others v City of Tshwane Metropolitan Municipality & Others*<sup>61</sup> (*Tswelopele v COT*) dealt with unlawful evictions and the conduct of three governmental agencies that violated the rights of the unlawful occupiers in this case. The applicants' property had been wantonly destroyed during the course of an eviction, followed by a second, later eviction and demolition by a larger joint group of government officials, and threats of arrest levied.<sup>62</sup> In the appeal court, the respondents acknowledged that their actions were 'unlawful' and 'unacceptable'.<sup>63</sup> The court found that the occupiers' right to personal security was violated '[by] the implicit menace with which the eviction was carried out'.<sup>64</sup> Yet, while

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<sup>56</sup> 1977 (3) SA 113 (C).

<sup>57</sup> Muller (n 49) fns 8 & 9.

<sup>58</sup> Muller (n 49) 617.

<sup>59</sup> There are many headlines involving mass evictions which highlight this concern, a few are: Manda S 'Metros pay millions to "Red Ants"', *Mail & Guardian*; Pillay K 'Ugly scenes at housing evictions', IOL; Nqola R 'SAHRC vows to take legal action against red ants "If needs be"', Eyewitness News.

References made in this dissertation to the Red Ants are a placeholder for any private security firm/removal specialists whose services are enrolled to assist in an eviction.

<sup>60</sup> See, for example: *Tswelopele Non-Profit Organisation & Others v City of Tshwane Metropolitan Municipality & Others* 2007 (6) SA 511 (SCA); *Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another* 2017 (3) All SA 276 (GJ), and; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* CCT 37/11 (*Blue Moonlight Properties CC*).

<sup>61</sup> 2007 (6) SA 511 (SCA).

<sup>62</sup> *Tswelopele v COT* paras 1–3, 11, and 15.

<sup>63</sup> *Tswelopele v COT* para 8.

<sup>64</sup> *Tswelopele v COT* para 15.



the eviction was found to be unlawful in terms of section 8(1) of PIE<sup>65</sup> as an eviction without a court order, and the court made an effort to note the previous harassment (by a private security company),<sup>66</sup> there was no effort made to comment on prescribing at least a minimum degree of conduct during evictions.

In *Pheko & Others v Ekurhuleni Metropolitan Municipality*<sup>67</sup> (*Pheko v EMM*), which dealt with an eviction and demolition of property conducted by the Red Ants, the court found that:

[t]here can be no doubt that the rushed destruction of the applicants' homes by the "Red-Ants" at the instance of the Municipality not only infringed their right under section 26(3) but also their right under section 10 [of the Constitution].<sup>68</sup>

However, there was again no effort made by the court to provide any consistent minimum in order to prescribe conduct during evictions.

*Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another*<sup>69</sup> (*Ngomane v COJ*), which follows the ruling of *Tswelopele*, evidences conduct by SAPS during a forced removal.<sup>70</sup> To appreciate the challenge against their conduct and the courts' actions, it is necessary to provide a brief explanation of the matter before the courts. The applicants are a group of destitute people who occupied and made a home underneath a highway bridge in the business district of the City of Johannesburg Metropolitan Municipality. Their property (allegedly comprising of many personal effects such as identity documents, clothing, money, and various materials used to construct their makeshift shelters at night) was routinely packed away every morning when they would go about in search of food and work.<sup>71</sup> On the day in question, their property was removed by the Johannesburg Metropolitan Police Department (JMPD) officials during a 'clean-up' operation.<sup>72</sup> It was further alleged that JMPD officials had insulted and assaulted some of the applicants in an attempt to drive

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<sup>65</sup> *Tswelopele v COT* para 18.

<sup>66</sup> *ibid.*

<sup>67</sup> 2015 (5) SA 600 (CC.)

<sup>68</sup> *Pheko v EMM* para 44.

<sup>69</sup> 2017 (3) All SA 276 (GJ).

<sup>70</sup> It is worth noting that in terms of section 205(3) of the Constitution and the SAPS Act, the objects of SAPS is to *inter alia* maintain public order, to protect and secure the inhabitants of South Africa and their property, and to uphold and enforce the law.

<sup>71</sup> *Ngomane v COJ* paras 1–5.

<sup>72</sup> Conducted under The City of Johannesburg Metropolitan Municipality Public Health By-Laws (Published under Notice No 830 in *Gauteng Provincial Gazette Extraordinary* No 179 dated 21 May 2004).

them away from the location (although there was no evidence in support of such allegations of violence, it was held that their conduct was a violation of the applicants' rights to privacy and dignity).<sup>73</sup>

The court ruled that the conduct of the JMPD officials was unlawful. However, the court failed to develop the common law remedy of *mandament van spolie* to adequately restore the respondents' property. While this remedy was not at discussion, their failure to develop such is indicative of the attitude of the courts to avoid dealing with issues not expressly and directly challenged by the parties before the court.<sup>74</sup>

The court avoided having to deal with the potential implications of such conduct in terms of an eviction by holding that PIE did not apply, as the property did not comply with the definition of a 'building or structure' in terms of section 1 of PIE.<sup>75</sup> Thus, in the court's ruling, no eviction occurred. While such an interpretation cannot be challenged, the court failed in its duty to develop the law by refusing to even provide an *obiter dictum* on how such conduct (which is increasingly prevalent in terms of evictions) should be expressly bound by PIE, in the same way the court failed in its duty to develop the common law.

While these cases, *Tswelopele v COT* and *Ngomane v COJ*, dealt mostly with the conduct of state officials when effecting evictions and forced removals, *Pheko v EMM* markedly dealt with the conduct of a private security firm in effecting a forced removal of people and the destruction or demolition of property. All three cases evidence a lack of willingness by the court to grapple with pertinent issues that, while not necessarily challenged by the applicants, are arguably inconsistent with the Constitution and the spirit and purport of PIE.

In light of such, there is perhaps one major area of concern within PIE – section 4(11) of PIE. This section allows the sheriff ordered to effect an eviction, at the consent and authorisation of the court, to utilise any person to assist such sheriff in carrying out the eviction order.<sup>76</sup> Thusly, this allows security services (so-called 'eviction

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<sup>73</sup> *Ngomane v COJ* paras 21 & 22.

<sup>74</sup> For further reading on the *mandament van spolie* see: G Muller *et al* in *Silberberg and Schoeman's The Law of Property* 6ed (2019) 326-327 and 337-346.

<sup>75</sup> *Ngomane v COJ* para 16 & 17.

<sup>76</sup> Following the *Modderklip* cases (n 190, n 191, and n 193 below), and the unwillingness of SAPS to assist therewith, there has been a growing call for the assistance of eviction specialists to assist in evictions, particularly in the case of mass evictions.

specialists') to lend their services to the sheriff and landowner in effecting the eviction. In neither section 4(11) nor PIE as a whole is there a prescribed way in which such evictions should be carried out, nor are there specific prohibitions on certain conduct by the State or other third parties during evictions. Given this inadequate protection in PIE, it could be assumed that a reading of PIE together with the South African Police Services Act (SAPS Act), the Sheriffs Act, and Private Security Industry Regulatory Authority (PSIRA), would provide some guidance as to the prescribed conduct during mass evictions. However, should this reading together still fail to properly address the inadequacies of PIE in this regard, there would be little comfort for those facing evictions where the conduct violates their rights.

The issue made clear in both recent and old cases is that the occurrence of deliberate destruction, violence, and intimidation or in broader terms, the use of force in carrying out such evictions, is a pressing issue. The use of force:

refers to the use of physical means to coerce or influence behaviour or damage property. Such means may be kinetic in nature, as well as chemical, electrical, or other. The use of force may injure and even, in certain instances, kill. A weapon may be used to apply force without it being discharged, for example by pointing it at a person with the threat to discharge it unless he or she engages in or refrains from certain behaviour.<sup>77</sup>

To determine when the use of force is appropriate, for the purpose of this dissertation, it is necessary to consider a plethora of sources.<sup>78</sup> Although the use of force is necessary in certain circumstances, shown by its provision in the law, it is a slippery slope that can, and has, very easily led to flagrant violations of victims' rights. Thus, such conduct is fraught with potential violations of occupiers' rights; those who are often members of society with already little protection and access to justice. This flies in the face of the Constitution and the purpose of PIE. The lack of provision to curb

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<sup>77</sup> Office of the United Nations (UN) High Commissioner for Human Rights (OHCHR) 'United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement' (2019, advanced unedited version) (Guidance on Less-Lethal Weapons), 33.

<sup>78</sup> In order to guide this definition, the following are particularly noteworthy:  
Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly Resolution 34/169. The resolution was adopted without a vote on 17 December 1979;  
Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, welcomed by UN General Assembly Resolution 45/166. The resolution was adopted without a vote on 14 December 1990;  
OHCHR, Human Rights and Law Enforcement, A Manual on Human Rights Training for Law Enforcement Officials, 2019, Chap. 5 (Human Rights and the Use of Force);  
UNODC/OHCHR, *Resource Book on the Use of Force and Firearms*, United Nations, New York, 2017.

such conduct is contrary to the needs of society, and the spirit and purport of a democratic society based on the principles of justice, equality, and human dignity.

The existing legal remedy against unlawful occupations, one which has been identified as potentially problematic given that there is no legislated control over how evictions should be conducted, is concerning not only for the occupiers but also for the landowners themselves. The practical nuances of an eviction, particularly of mass evictions, leave the landowners in a tenuous position. They are often unable to protect their rights through an eviction order alone and are likely forced to bear even greater costs, in an already costly process, by having to engage the professional services of removal specialists such as the Red Ants. As a result of this, the risk of violations increases and the violations of unlawful occupiers' rights would leave the eviction, granted in favour of the landowner, challengeable.

The noteworthy issue within PIE regarding mass evictions is one that is intrinsically linked with an already confusing and arbitrarily located myriad of provisions for the use of force in South Africa.<sup>79</sup> It is this issue that this dissertation aims to clarify.

When reviewing this issue, the point of departure should be section 4(11) of PIE, which reads:

A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court. Provided that the sheriff must at all times be present during such eviction, demolition or removal.

While this section envisages that the court may order other people to assist the sheriff in the execution of an eviction order, it is not made clear how such assistance should operate. The principles of justice and equitability are of paramount importance in the granting of an eviction order, however, they should play an equal role in the execution of the eviction itself. It is through this lens, and an analysis of the regulations and legislation surrounding sheriffs, SAPS, and private security, that it can be determined

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<sup>79</sup> Which include the Regulation of Gatherings Act 205 of 1993 (Gatherings Act); the South Africa Police Services Act 68 of 1995 (SAPS Act), the Firearms Control Act 60 of 2000 (FCA); and the Riotous Assemblies Act 17 of 1956 (Riot Act). See also Muller (n 49) for a discussion on alternative methods used that skirt PIE and provide a myriad of other legislative means of removal (particularly by the government). These alternative methods such as those seen in *Occupiers of 51 Olivia Road, Berea and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) or in *Pheko v Ekurhuleni Municipality* 2012 (2) SA 598 (CC) should be held to the same standard as that to be discussed in this dissertation, although the legislation relied upon in those cases will not be focused on here.

whether the current regime adequately provides sufficient provision for conduct during an eviction, specifically with regard to the use of force.

The courts have missed the opportunity time and time again to consider, and curb, the violations of the rights of the unlawful occupiers as a result of the use of force. Rather than focusing on those violations, the courts have instead focused on their own reputation, the needs of the landowner, and the employees of these bodies which assist in mass evictions. There must be measures put in place to prescribe this conduct; measures that ensure that those parties whose conduct unjustly violates occupiers' rights, or is responsible for unreasonable damage and injury, are held appropriately accountable.

### 1.3. Research problem

The issues identified above show that there exists a prevalent threat of unlawful violations to occupiers' rights during evictions in which third parties assist the sheriff. Further, that evictions of unlawful occupiers are inadequately regulated to provide protection of the rights contained in the Bill of Rights. Specifically, that there exist no provisions or guidelines to govern the use of force in evictions, particularly by third parties who assist the sheriff. Due to the lack of guidelines such as these, the problem alleged is that the current regulatory framework as prescribed by PIE is inadequate. Therefore, based on the principle of subsidiarity, as discussed above, it is possible to directly challenge the constitutional validity of PIE by relying on section 26(3) of the Constitution.

This section mandates the need for a court order for an eviction, and that arbitrary evictions are also not permitted. Due to the lack of guidelines on the use of force in evictions, it is proposed that the use of force may be arbitrary despite the presence of a court order.

The research problem challenged in this dissertation is how best to provide guidelines for the use of force in evictions, particularly when third parties assist the sheriff. The purpose of such guidelines being to provide adequate protection of the rights contained in section 26(3) and section 10 of the Constitution. This protection would ensure a more just and equitable balance of unlawful occupiers' and owners' rights during an eviction.

#### 1.4. Research question, hypothesis, and methodology

As per the preamble, PIE specifically states that it was enacted:

To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers [and]...that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognizing the right of landowners to apply to a court for an eviction order in appropriate circumstances.<sup>80</sup>

This fundamental purpose is consistent with the spirit and purport of the Bill of Rights,<sup>81</sup> however due to the inadequacies highlighted above, the fundamental question raised by and grappled with in this dissertation is as follows:

Can unlawful occupiers be afforded more substantive and procedural protections through a transformative interpretation of the use of force during the execution of eviction orders?

This fundamental question raises ancillary questions that I will attempt to grapple with. The first question raised is whether the current regulatory framework provided by PIE and other complementary statutes on the use of force and the conduct of certain bodies strikes the appropriate balance between the private interests of owners and the public interests of the unlawful occupiers? The second being, if it is found that PIE and the complementary statutes do not appropriately strike this balance, whether specific regulations under each, or under PIE alone, could avoid a constitutional challenge of PIE? The final question being, how should such regulations be drafted in order to adequately strike this balance and provide the necessary substantive and procedural protections?

The core hypothesis of this dissertation on the use of force in evictions has been adequately developed above in the introduction and research problem. In summary, the hypothesis is such that the current regulatory framework provided by PIE and the complementary statutes is inadequate, as it fails to provide the necessary procedural and substantive protection for unlawful occupiers. Thus, due to the first principle of subsidiarity, without proper amendments or regulations in place, a direct constitutional challenge of PIE would be possible. It is hypothesized that section 4(11) of PIE needs to be amended to provide guidelines on the use of force in evictions, *alternatively* that regulations be issued in terms of PIE to provide such guidelines.

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<sup>80</sup> N 23.

<sup>81</sup> N 16.

Further *alternatively*, that regulations be issued in terms of the complementary statutes to provide the necessary safeguards and protection. These guidelines and, or, regulations would prescribe the conduct of parties effecting and executing an eviction order, paying specific note to the use of force, and the consequence of non-compliance.

The current manner in which evictions are carried out is unsustainable and susceptible to gross violations of the principles of justice and the rights of the evicted. This has thus resulted in a system fraught with problems and burdensome costs.

Neither the rights of the occupiers, nor those of the landowners, automatically trump the other.<sup>82</sup> For any such conflict, there must be a balance struck between the two, based on the spirit and purport of the Constitution. Through these desired characteristics, it promotes that neither the right of ownership nor the right not to be evicted arbitrarily is more important than the other.<sup>83</sup> In order to rule on any such conflict, it is necessary to then promote the principles of dignity, equality, administrative justice, and access to justice while striking the balance between the public and private interests in such a way as to not lead to arbitrary deprivations or constitute arbitrary evictions.<sup>84</sup> PIE and section 26(3) of the Constitution exist for such a reason, and rather than mandating an adherence to due process only, their intent is also substantive justice. With such conflicts, in promoting these characteristics and goals, it is possible to achieve substantive justice.<sup>85</sup>

This hypothesis is built on a number of assumptions that deserve brief mention. Firstly, PIE was enacted to regulate eviction procedure, but it has failed to do so, and it is assumed that this is due to the fact that evictions on the current scale were unforeseen. Secondly, there is an inadequate system available for unlawful occupiers to challenge forceful evictions. Thirdly, a not inconsequential problem is that South African legislation has no single and consistent piece of legislation that provides for and prescribes the use of force. Fourthly, due to the nature of their status, private removal specialists are the greatest concern when it comes to violations by the use of force in evictions, as it is harder to hold them accountable than the State, i.e., the police. The final assumption is that amending PIE in such a manner will allow for

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<sup>82</sup> AJ van der Walt *Property and Constitution* (2012, Pretoria) PULP.

<sup>83</sup> *Property and Constitution* 156.

<sup>84</sup> *Property and Constitution* 153–168.

<sup>85</sup> *Ibid.*

greater justice to all parties, and result in a more efficient and less costly procedure. This is why it becomes necessary to read PIE, together with the Sheriffs Act, SAPS Act and PSIRA, for private eviction specialists.

This dissertation will employ desktop research on the use of force in evictions in South Africa. This will be done critically, through a transformative evaluation of case law, legislation, and the Constitution, and by referring to relevant international law sources as a benchmark against which South Africa's position can be evaluated.

It will also be necessary to conduct a limited comparative study on the use of force in the context of the European human rights system, specifically in relation to the Revised European Social Charter (RESC), and the example of the Roma people.

### 1.5. Chapter overview

This dissertation consists of four chapters of which this chapter serves as the introductory one outlining the background, research problem, research question, hypothesis, and the methodology that the dissertation will follow. Chapter 2 of the dissertation provides an overview of the South African legal framework around evictions through a systematic analysis of PIE, the Sheriffs Act, the SAPS Act, and PSIRA, as they relate to evictions in terms of section 4(11) of PIE and the use of force. This chapter begins with a general discussion on the principle of subsidiarity, followed by a detailed discussion of section 26 of the Constitution, section 4 of PIE, the Sheriffs Act, the SAPS Act and PSIRA. These constitutional and legislative provisions provide the groundwork for understanding the role-players in the eviction process, and aid in determining the guidelines therefor. This is followed by a brief discussion of evictions conducted in terms of section 5 of PIE. The intention of this chapter is to determine whether PIE, read with its complementary statutes in terms of section 4(11) evictions, is inadequate in providing the necessary procedural and substantive safeguards against the use of force during the execution of eviction orders.

Chapter 3 of the dissertation is focused on determining the objective higher-order norms and principles governing evictions and the use of force from the United Nations (UN) and international law bodies, and the principles from foreign law that can guide South African law. The chapter begins with a general discussion of the rights of occupiers and the current status-quo. This is followed, through section 39(1)(b) of the Constitution, by a detailed analysis of international law, specifically the Universal



Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The chapter progresses to discuss the applicable general comments, guidelines and other treaties issued by the UN, while considering the relevant connection with the treaties on torture and lethal force. This chapter continues with a discussion of foreign law, by way of section 39(1)(c) of the Constitution, with specific focus on the RESC and comparative analysis with the treatment of Roma as it relates to evictions in Europe compared with unlawful occupiers in South Africa.

Finally, chapter 4 of this dissertation provides the conclusions of the aforementioned chapters and recommendations based on the lessons learnt therefrom.

## 2. Regulatory Framework for Eviction in South Africa

### 2.1 Introduction:

A legal order that is based on a single system of law is intended to create a system where no single source of law is isolated from another. That is to say that the common law is not an island exclusive of statutory law or a constitution or *vice versa*. In such a system, there should be a core spring from which the other sources of law inherit their force and legitimacy.

Modern South African law is based on this principle of a single system of law shaped and governed by the Constitution. This system is particularly effective in South Africa as the Constitution can be described as a living document; it is not immune to evolution nor to challenge, and it is constantly developing and evolving as the needs of society evolve. In the South African context, the single system of law principle is most strongly associated with the case of *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa (Pharmaceutical Manufacturers)*.<sup>86</sup> The principle in *Pharmaceutical Manufacturers* is best explained where the Constitutional Court stated that:

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.<sup>87</sup>

Through this principle, the relationship between the Constitution and other sources of law transitioned 'away from the "binary notions of autonomy, rivalry and conflict" [and it] also shifted the emphasis about the effect of the Constitution and its transformative goals on vested property rights.'<sup>88</sup>

This extract evidences, as set out by Van der Walt when first describing the concept of a single system of law and the principles of subsidiarity,<sup>89</sup> that it is from this single system of law that the court developed the two subsidiarity principles.<sup>90</sup> In essence, these principles provide for guidance on resolving conflict when there has been an alleged infringement of a right contained within the Constitution, specifically

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<sup>86</sup> 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*).

<sup>87</sup> *Pharmaceutical Manufacturers* para 44.

<sup>88</sup> Muller (n 49) 622.

<sup>89</sup> *Property and Constitution* 20, 35-39, and AJ Van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77.

<sup>90</sup> Muller (n 49) 621.

Chapter 2 (the Bill of Rights). It thus becomes necessary to establish which source of law will be relied upon in order to institute legal action thereon. It is these subsidiarity principles that are intended to be used to determine the outcome of such conflict.

The first of these two subsidiarity principles is intended to provide for alleged infringements on a right contained within the Bill of Rights, where there exists legislation enacted for the purpose of protecting that specific right. This first principle, in simple terms, deals with a choice between the Constitution and legislation as the source of law. This principle provides that where there exists legislation specifically enacted to protect a right in the Bill of Rights that has been infringed, then a litigant must rely on that legislation rather than directly on the provision within the Bill of Rights when instituting action to protect that right.

However, this first principle contains the proviso that direct reliance on the provision within the Bill of Rights can occur where a litigant is attacking the specific legislation as either being unconstitutional or being inadequate to protect the right at issue.<sup>91</sup>

In order to determine if the proviso applies, an analysis of the constitutional right and the legislative protection must be conducted through both a formal and a substantive evaluation, considering the wording and intention of the provision within the Bill of Rights. It is important that these subsidiarity principles:

...should not be construed as limiting the powers of courts to engage in constitutional review, interpretation of legislation, or the development of the common law. The purpose of these principles is to avoid the establishment of fragmented, parallel property systems and to ensure maximum coherence with the principle of a single system of law.<sup>92</sup>

The second principle of subsidiarity states that where there has been an alleged infringement of a right within the Bill of Rights, reliance must be had on the legislation that was specifically enacted to protect such right. This reliance may not be had directly on the common law when instituting legal action to protect that right. The proviso to this principle is that a litigant may rely directly on the common law if the legislation does not cover the specific area, insofar as the common law does not or cannot be

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<sup>91</sup> *Property and Constitution* pgs 101,104 and 115.

<sup>92</sup> Muller (n 49) 622.

interpreted in such a way that it does not conflict with the Bill of Rights or the existing legislation.<sup>93</sup>

## 2.2. The legal framework for eviction and its role-players

### 2.2.1. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

#### 2.2.1.1. Introduction

In a clear shift from PISA, the principal purpose of PIE is evident from its title, long title,<sup>94</sup> and preamble.<sup>95</sup> PIE is intended to prevent both illegal evictions from land *and* the unlawful occupation of land. The preamble of PIE provides that:

...no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property;

...no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances; [and]

...it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances...

It is evident that PIE aims to redress past inequalities and the systemic discriminatory and racist 'obsolete laws' such as PISA. Furthermore, PIE was enacted to balance the interests of the constitutional and common law property rights of the landowners with the housing rights of the unlawful occupiers. While aiming to achieve such substantive goals, PIE proposes to provide procedural means for evictions with the 'procedural protections for occupiers who occupy land without the permission of an owner or the person in charge of such land.'<sup>96</sup>

According to the principles of subsidiarity, if a party raises a challenge that their property or housing rights have been violated, as the case may be, then that party must rely on PIE as the specific legislation enacted to protect these constitutional rights. Only in relying on PIE will this party be able to successfully proceed with an

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<sup>93</sup> *Ibid.*

<sup>94</sup> The long title of PIE clearly expands the overarching purpose of PIE as:

To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto.

<sup>95</sup> Muller (n 34) 103.

<sup>96</sup> *Ibid.*

action or defence for the procedural and substantive protection of these constitutional rights.

In order for eviction proceedings to be instituted in terms of PIE, there must be a residential occupation of the property or land by an unlawful occupier. An unlawful occupier is a person who occupies property or land with neither a right in law to occupy such land, nor the consent of the owner or person in charge of such land.<sup>97</sup>

In the case of *Ndlovu v Ngcobo; Bekker & Another v Jika*<sup>98</sup> (*Ndlovu*) the court clarified the application of PIE to all occupations of property. This applies to occupations of property without the express or tacit consent of the owner or person in charge at the time eviction proceedings are instituted, and where the buildings or structures are used as a home or as a form of shelter.<sup>99</sup> It is essential for both landowners and unlawful occupiers to understand that, as a key element for the reliance on PIE, there must be a structure in place that the unlawful occupiers reside in.<sup>100</sup> While there exist other remedies for the landowner to rely on, such as those discussed later in terms of the common law, instituting proceedings or defending against such legal actions with the incorrect authority can easily spell out defeat before the battle even begins.

PIE provides for the institution of eviction proceedings of the eviction of unlawful occupiers in three distinct circumstances. First, where a private owner or person in charge of land institutes eviction proceedings in the ordinary course,<sup>101</sup> '[n]otwithstanding anything to the contrary contained in any law or the common law'.<sup>102</sup> Second, where a private owner, or person in charge, of land institutes *urgent* eviction proceedings.<sup>103</sup> Third, where an organ of state institutes eviction proceedings,<sup>104</sup> and this section additionally requires that an eviction order in terms thereof must be in the public interest before a court may grant such order.<sup>105</sup>

For the purposes of this dissertation, the focus is on evictions in terms of section 4 of PIE, and the just and equitable balance of rights during such evictions.

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<sup>97</sup> Section 1 of PIE.

<sup>98</sup> 2003 (1) SA 113 (SCA).

<sup>99</sup> *Ndlovu* paras 11-16.

<sup>100</sup> *Ngomane* paras 16-17.

<sup>101</sup> Section 4 of PIE.

<sup>102</sup> Section 4(1) of PIE.

<sup>103</sup> Section 5 of PIE.

<sup>104</sup> Section 6 of PIE.

<sup>105</sup> Section 6(1) of PIE; and Muller (n 49) 633.

#### 2.2.1.2. Section 4 of PIE

PIE is principally concerned with the proper regulation of eviction procedures as they apply to unlawful occupiers. Its strategy is *inter alia* to not only ensure that the eviction of unlawful occupiers takes place when it is just and equitable to do so, but also to ensure that such evictions occur only in a fair, equitable, and controlled manner.<sup>106</sup> However, given that PIE does not necessarily cover all eventualities to be faced in an eviction, the main protective measure prescribed by PIE is that evictions should be conducted only under a court order.<sup>107</sup>

In order for a private owner, or person in charge of a property, to institute proceedings for the eviction of an unlawful occupier the provisions of section 4 of PIE, which govern the procedure for such, must be complied with. This section also provides key substantive considerations that the court must evaluate, before granting such an order. Further, it outlines some procedural and substantive requirements that such an order must provide for.

Certain procedural requirements that are provided for by PIE include those requirements for notice,<sup>108</sup> and those regarding service of notices or court papers related to such an application.<sup>109</sup>

Substantive requirements included within section 4 are generally aimed at the consideration the court must pay to the unlawful occupier. In determining whether to grant an eviction order, if the unlawful occupation has been for a period of less than six months at the time the eviction proceedings have been instituted, the court must consider:

...if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.<sup>110</sup>

Further, if the unlawful occupation has been for a period of more than six months then the court must, in addition to the above, consider:

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<sup>106</sup> van der Walt AJ *Constitutional Property Law* 1<sup>st</sup> Ed (2005) Juta & Co, 326-327.

<sup>107</sup> Section 8 read with section 4 of PIE.

<sup>108</sup> Section 4(2) of PIE provides that, subsequent to the application being made, and at least fourteen days before the set down for hearing of the eviction proceedings, written and effective notice of the proceedings must be served on the unlawful occupier(s) and the respective municipality with jurisdiction over such matter.

<sup>109</sup> Sections 4(3)-(5) of PIE.

<sup>110</sup> Section 4(6) of PIE.

whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier[/s]].<sup>111</sup>

In both *PE Municipality*,<sup>112</sup> and *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*,<sup>113</sup> it was made clear that the term 'just and equitable' relates to both the property rights and interests of the landowners, and the housing rights and interests of the unlawful occupiers. The courts are required to 'go beyond their normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.'<sup>114</sup>

It is only when the court is satisfied that all the requirements of section 4 have been complied with, and that the unlawful occupier has failed to raise a valid defence, that the court must grant the eviction order. The court must establish a just and equitable date by which the occupier must vacate the land, and the date that an eviction order may be carried out if the unlawful occupier has not vacated the land.<sup>115</sup>

Only after conducting an enquiry into granting an eviction order does the court consider the conditions that may be attached to the eviction order,<sup>116</sup> as well as the date upon which the eviction order would take effect. It is here that the principles of just and equitable should return to the forefront of the court's mind.

Other than the date of the eviction order, and potentially the demolition or removal of the building or structure,<sup>117</sup> this section of PIE fails to provide any other guidelines for the actual eviction and leaves such at the discretion of the court.<sup>118</sup> However, Sachs J in *PE Municipality* clearly stated that one of the main objectives of PIE remained to '[overcome]...abuses and ensur[e] that eviction[s]...took place in a manner consistent with the values of the new constitutional dispensation'.<sup>119</sup>

That being said, the courts do bear an onus, as aforesaid and clearly stated in the aforementioned cases, to go beyond their normal functions and ensure a just and equitable eviction both procedurally and substantively. It is not made clear, or rather it

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<sup>111</sup> Section 4(7) of PIE.

<sup>112</sup> *PE Municipality* para 35.

<sup>113</sup> 2000 (2) SA 1074 (SECLD).

<sup>114</sup> *PE Municipality* para 36.

<sup>115</sup> Section 4(8) of PIE.

<sup>116</sup> JM Pienaar *Land Reform* (2014, Juta and Co.), 751.

<sup>117</sup> Section 4(10) of PIE.

<sup>118</sup> Section 4(12) of PIE.

<sup>119</sup> *PE Municipality*, para 11.

is not expanded on adequately in PIE itself, what would constitute just and equitable, or fair and dignifying conduct, during an eviction. As such, the conduct of those effecting an eviction order is left to the court's discretion of including same in the court order, alternatively, if not dealt with by the court, at the discretion of those conducting the eviction.

The only person authorised to effect an eviction order in terms of section 4 of PIE is a sheriff of the court. The sheriff may request authorisation for any other person to assist them in carrying out the eviction order, so long as the sheriff is present during the eviction.<sup>120</sup> However, there are no provisions herein for the conduct of these sheriffs or third parties, neither for their conduct during evictions (towards the property or the unlawful occupiers) nor for their fee structures or administrative charges levied against the owner (or against whom such charges are leviable).

There are procedural requirements in place to obtain an eviction order, and there is the overarching principle of justice and equity in determining whether or not to grant an eviction order. It is apparent from the above discussion, however, that PIE remains deafeningly silent on whether this principle should extend to the execution of eviction orders and the manner in which such evictions can be executed. As discussed above, this becomes particularly problematic when assistance is required in the execution of an eviction order. PIE's provision in section 4(11) that, at the request of a sheriff, the court may authorise any person to assist the sheriff in the execution of the eviction order, is arguably where the problem lies.

On a purportive interpretation of PIE,<sup>121</sup> one could assume that the principles of justice and equity would apply to the execution, at least to the extent that the eviction should be conducted in a 'fair' manner. There is no further mention within PIE as to how evictions must be executed or conducted, nor is there any mention within PIE's listed offences as to what a contravention of a 'fair' eviction would entail.<sup>122</sup>

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<sup>120</sup> Section 4(11) of PIE.

<sup>121</sup> Guided by the Preamble of PIE which *inter alia* provides: 'it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognizing the right of land owners to apply to a court for an eviction order in appropriate circumstances.'

<sup>122</sup> Section 8 of PIE provides *inter alia* that the only offences in terms of PIE are:

- (1) No person may evict an unlawful occupier except on the authority of an order of a competent court.
- (2) No person may wilfully obstruct or interfere with an official in the employ of the State or a mediator in the performance of his or her duties in terms of this Act.
- (3) Any person who contravenes a provision of subsection (1) or (2) is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment.



Consequently, it would appear that PIE alone is inadequate and it becomes necessary to look to other legislation and regulations to find an answer to the problem of how an eviction should be conducted, particularly with regard to the use of force.

It is through the power of section 4(11) of PIE that SAPS, private security, and, or removal specialists such as the Red Ants can legally assist a sheriff in carrying out evictions.

### 2.2.2. Sheriffs' role during evictions

Given the provisions of section 4(11) of PIE, the point of departure in establishing the prescribed conduct for an eviction is the role and responsibilities of a sheriff during such evictions.

Section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 provides the authority to a sheriff of the magistrates' court to execute a court order for the payment of money. section 43(1) of the Superior Courts Act 10 of 2013 empowers and instructs sheriffs to 'execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff.' The authority of a sheriff to execute eviction orders is derived from section 4(11) of PIE, section 66 of the Magistrates Courts Act, and section 43(1) of the Superior Courts Act.<sup>123</sup> However, the governance of the sheriffs' conduct and the prescribed rules they must follow in their judicial and administrative duties are governed more closely by the Sheriffs Act, and the governing body, incorporated thereby, the South African Board For Sheriffs (SABFS).

The SABFS issues a number of ancillary documents to better codify the rules and obligations of sheriffs which include the Code of Conduct,<sup>124</sup> the Codified

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(4) Any person whose rights or interests have been prejudiced by a contravention of subsection (1) has the right to institute a private prosecution of the alleged offender.

<sup>123</sup> See: Van Loggerenberg DE *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 10<sup>th</sup> Ed (2012, Juta & Co), and; Herbstein and van Winsen *The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* 5<sup>th</sup> Ed (2009, Juta & Co).

<sup>124</sup> Code of Conduct for Sheriffs Issued in terms of Section 16(k) of the Sheriffs Act (the Code of Conduct). Sheriffs are required to sign a Service Level Agreement prepared by SABFS (6 January 2014,) that binds them to the Sheriffs Act and the Code of Conduct. According to the then Deputy Minister of Justice and Constitutional Development in 2014, John Jeffery, this code of conduct was last updated in 1990, and was not, for almost 20 years, in line with the Constitution. While acknowledging that the sheriff's role is a critical component of the justice system, it is odd that the governing legislation for such an institution was for so long non-compliant with the Constitution. Further, it was only in terms of the 2014 Code of Conduct that sheriffs were expected to undertake a pledge that bound them to *inter alia* uphold the constitutional rights of all citizens. It is little wonder, given the duration in which a

Instructions,<sup>125</sup> the Disciplinary Code and Procedures,<sup>126</sup> the Eviction Guide for Sheriffs,<sup>127</sup> and the Sheriffs' Fees and Tariffs.<sup>128</sup>

The Sheriffs Act is intended to provide for the appointment of sheriffs, the establishment of the SABFS, and the conduct of sheriffs. Key to the eviction process are the provisions therein that regulate the conduct of sheriffs.<sup>129</sup> Rather than outlining what is proper conduct, section 43(1) of the Sheriffs Act specifically outlines what is improper conduct; the key portions thereof in terms of evictions are as follows:

- (1) A sheriff shall be guilty of improper conduct if-
  - (a) he is negligent or dilatory in the service or execution of any process;
  - (b) he makes a false return in respect of the service or execution of any process;
  - (c) he demands payment of more than the fees or expenses prescribed by or under any law;
  - (d) he contravenes or fails to comply with a provision of the code of conduct referred to in section 16(k);
  - (e) he fails to take all reasonable steps to prevent his deputy sheriff from committing a deed of improper conduct as contemplated in paragraph (a), (b), (c) or (d);
  - ...
  - (g) he or she commits an offence in terms of this Act, or any other offence in respect of which violence, dishonesty, extortion or intimidation is an element;
  - (h) he or she makes use of fraudulent or misleading representations, including-
    - (i) the simulation of legal procedures;
    - (ii) the use of simulated official or legal documents;
    - (iii) representation as a police officer; or

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constitutionally non-compliant document was in force, that the public lost faith in the institution. Despite the new code of conduct, and given that the violations and shortcomings faced during evictions discussed in this dissertation, I would argue that the institution of sheriffs has a long way to go to uphold this pledge and to better instil faith in the public. <<https://www.derebus.org.za/new-code-conduct-sheriffs/>, accessed on 13 April 2022>

<sup>125</sup> Department of Justice, *Codified Instructions*, SABFS.

<sup>126</sup> SABFS, *Disciplinary Code and Procedures for Sheriffs*.

<sup>127</sup> SABFS, *Eviction Guide for Sheriffs*, 2017.

<sup>128</sup> Department of Justice and Correctional Services, *Rules Board For Courts of Law Act 107 of 1985, Amendment of the Ruled Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (Part 1 and Part 2)*, Government Gazette No:44142, 2017 (Sheriffs' Tariffs and Fees).

<sup>129</sup> Chapter IV of the Sheriffs Act.

(iv) the making of unjustified threats to enforce rights.

Despite the fact that the above should apply in all conduct of a sheriff, there is no specific provision for conduct while effecting an eviction nor a court order in general. Section 43(1) does, however, require that a sheriff not commit an offence of which violence or intimidation is an element.

The Code of Conduct referred to in section 16(k) of the Sheriffs Act seeks to further provide regulation for the manner in which sheriffs perform their functions. In terms of the Code of Conduct, sheriffs are required to respect the dignity and rights of the citizens of South Africa.<sup>130</sup> A sheriff and his deputies are bound by the Service Level Agreement and the Code of Conduct to ensure that they 'at all times act in an impartial, unbiased and fair manner and with discretion towards all parties'.<sup>131</sup> Furthermore, the sheriff and his deputies must ensure that they act in a manner that does not jeopardize or bring the 'good name and esteem of the office of the sheriff in particular and the administration of justice in general into disrepute...'<sup>132</sup>

When it comes to the charging of fees for their services, sheriffs are bound to ensure that their charges are in accordance with the prescribed and applicable tariffs as established in the Sheriffs' Tariffs and Fees.<sup>133</sup>

In an event that the Code of Conduct is not adhered to or contravened, the Disciplinary Code and Procedures for Sheriffs would apply.<sup>134</sup> There are a number of contraventions which lead to disciplinary action against the offender.<sup>135</sup> The most pertinent contraventions to this discussion, which lead to immediate disciplinary action, include assault (threatened or verbal), intimidation or victimisation of members of the public, committing an offence of which violence, dishonesty, extortion or intimidation is an element, and the making of unjustified threats to enforce rights. In the event that a sheriff is found guilty by a disciplinary panel, the sheriff can *inter alia* face a fine of up to R10,000.00, have their fidelity fund certificate cancelled, or be removed from office.<sup>136</sup>

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<sup>130</sup> Clause 1 of the Code of Conduct.

<sup>131</sup> Clause 7.8. of the Code of Conduct.

<sup>132</sup> *Ibid.*

<sup>133</sup> Clause 8 of the Code of Conduct.

<sup>134</sup> Clause 1 of the Disciplinary Code and Procedures provides that the purpose of the Disciplinary Code and Procedures is *inter alia* to promote acceptable conduct; to avert and correct unacceptable conduct; and to prevent arbitrary or discriminatory actions.

<sup>135</sup> Contained within Annexure 'A' of the Disciplinary Code and Procedures.

<sup>136</sup> Clause 13 of the Disciplinary Code and Procedures.

The right conferred by section 4(11) of PIE is one reserved for the sheriff, which means that the landowner has no authority to force the sheriff to apply for assistance in an eviction. However, in practice it is often the case that security companies/removal specialists such as the Red Ants are contracted by the landowner/applicant.<sup>137</sup> However, should the sheriff not apply for assistance under section 4(11) the sheriff remains the sole person responsible. Should the Court, upon application, authorise a person to assist the sheriff, that person becomes a party to the eviction order. As such, the person is liable for any potential damages caused during the eviction, and the sheriff can only be held liable if he acts negligently.<sup>138</sup>

In the case of mass evictions, the Eviction Guide provides some guidance to sheriffs as to how to proceed with the ejectment of such people, and highlights the risk of injury to persons, death, riots or damage to property.<sup>139</sup> However, other than highlighting the aforementioned clauses of the Code of Conduct,<sup>140</sup> the Eviction Guide does little in prescribing the conduct and use of force during the actual eviction. It rather provides guidance as to the preparations prior to the eviction order and ejectment being effected.<sup>141</sup> The Eviction Guide does, however, advise that the sheriff should not take part in the actual ejectment process unless specifically ordered, in which case SAPS or a third party will be effecting the actual ejectment.<sup>142</sup> The sheriff should at all times do everything in their power to ensure that the conduct taking place in terms of statutory provisions such as section 4(11) of PIE, takes place in a manner that is in line with the applicable fundamental rights.<sup>143</sup>

Therefore, while the sheriff is ultimately in charge of the execution of the eviction order and oversees the process (particularly in the context of mass evictions), the sheriff is usually not the party effecting the actual ejectment as they are often assisted by SAPS or third parties.

It should be evident from the above that neither the Sheriffs Act, nor the Code of Conduct, nor the Eviction Guide, adequately provide for the use of force or conduct during evictions. While sheriffs may pledge to uphold the constitutional rights of all

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<sup>137</sup> Clause 2.3.3.3 of the Eviction Guide.

<sup>138</sup> *Ibid.*

<sup>139</sup> Clause 4.3 of the Eviction Guide.

<sup>140</sup> Clause 4.1 of the Eviction Guide.

<sup>141</sup> Clauses 4.3.1 to 4.3.3 of the Eviction Guide.

<sup>142</sup> Clause 5.1 of the Eviction Guide.

<sup>143</sup> Clause 6 of the Eviction Guide.

citizens residing in South Africa, and although they may be broadly required to respect the dignity and rights of citizens, there is little to guide their conduct during an eviction. Such an omission creates a space wherein the rights of those facing evictions are jeopardised and inadequately protected. Furthermore, it would appear that in terms of the conduct during evictions, the sheriffs' liability becomes something that is avoided. From an analysis of the Eviction Guide, it would appear that sheriffs are rather guided to ensure that any third party assisting them in an eviction in terms of section 4(11) be held accountable for the conduct, despite the onus for effecting evictions resting on the sheriffs' shoulders.

Given the inadequate protection afforded by the governing legislation and regulations of sheriffs, it becomes necessary to analyse the statutes and regulations that regulate SAPS and other such third parties, in an effort to try obtaining clarity as to the conduct of evictors during an eviction. Further, it is necessary to determine whether there is adequate protection of the rights of evictees during an eviction with regard to the use of force.

### 2.2.3. South African Police Services Act

Often, particularly during mass evictions, members of SAPS are required to assist the sheriff in effecting an eviction. While SAPS does not necessarily require court approval in terms of section 4(11) of PIE, or a court order, as it is duty bound to assist the sheriff, SAPS' involvement and role during evictions is strengthened if it is ordered by the court to assist the sheriff.<sup>144</sup>

The conduct of SAPS is largely governed by the SAPS Act,<sup>145</sup> and the Constitution, which provides that:<sup>146</sup>

- (1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
- (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

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<sup>144</sup> Eviction Guide, Clause 2.3.3.3

<sup>145</sup> SAPS Act, Preamble, Sections 13 and 17.

<sup>146</sup> The Constitution Section 205.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law...

However, while the conduct of SAPS may be more easily challenged when resulting in an illegal eviction through the use of force due to the above, what is just and legal conduct by assisting parties is not expressly provided within the PIE. The lack of such a provision has the potential to erode the balance that PIE was enacted to promote. The only 'conditions' PIE mandates as to how the eviction is to be carried out, are those conditions made in the eviction or demolition order and as deemed reasonable by the court.<sup>147</sup>

The SAPS Act was enacted to give effect to sections 205-208 of the Constitution, and specifically to provide for the establishment, organisation, regulation and control of SAPS and to provide for matters in connection therewith. According to these sections, SAPS is needed to *inter alia* uphold and safeguard the fundamental rights of every person as guaranteed by chapter 3 of the Constitution.<sup>148</sup>

In general, members of SAPS, giving regard to the fundamental rights of every person, may exercise the powers and perform the duties and functions conferred on them by law or assigned to such member.<sup>149</sup> Further, every member of SAPS has the power and competency to serve and, or execute any summons, warrant or other process.<sup>150</sup> This provision empowers members of SAPS to, *inter alia*, execute eviction orders. In executing their duties, every member of SAPS is mandated to perform such duty in a manner that is reasonable given the circumstances. Where authorised to use force, such a member shall only use the minimum force reasonable in the circumstances.<sup>151</sup>

Therefore, any member of SAPS assisting in executing an eviction and ejection of people, in terms of PIE read with the SAPS Act, is bound in terms of section 205 of the Constitution and section 13 of the SAPS Act to act in a reasonable manner, utilising only the minimum force necessary (if authorised), in such a way so as to still respect the fundamental rights of those effected by such an eviction. While

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<sup>147</sup> Section 4(12) of PIE.

<sup>148</sup> SAPS Act, Long Title and Preamble.

<sup>149</sup> Section 13(1) of SAPS Act.

<sup>150</sup> Section 13(4) of SAPS Act.

<sup>151</sup> Section 13(3) of SAPS Act.

the SAPS Act does not specifically deal with evictions, it is clear that members of SAPS are bound to a certain broad level of conduct while acting in their official capacity and performing their official duties when assisting with an eviction.

The Minister for Police provided regulations in terms of which misconduct by members of SAPS is defined and provided for.<sup>152</sup> Where a member of SAPS is guilty of misconduct,<sup>153</sup> they will face certain disciplinary procedures including written warnings,<sup>154</sup> suspension,<sup>155</sup> and termination of employment. These regulations, while broad, provide some repercussions for a member of SAPS failing to adhere to the conduct as prescribed by the SAPS Act.

Despite these overarching provisions and broadly defined levels of conduct, there is significant evidence showing that members of SAPS have often conducted themselves in a manner inconsistent with same. As evidence of such failings, one only needs look at the mass evictions carried out by the City of eThekweni during the COVID-19 lockdown.<sup>156</sup> During April 2020, the City, the South African National Defence Force (SANDF), the eThekweni Metro Police and SAPS effected numerous evictions and demolitions of informal settlements, with an estimated 900 people affected. During these evictions and demolitions, two people were shot with live ammunition, tear-gas was utilised, and people were attacked with bladed weapons by security forces.<sup>157</sup>

There are a number of cases that deal with unlawful evictions and forced removals that evidence violence, threats, or other unwarranted forms of the use of force by people assisting the sheriff. However, the courts have failed to adequately and comprehensively address these issues and make a decision accordingly. Rather, they appear to have left such conclusive decisions to future cases to expressly

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<sup>152</sup> Regulations for the South African Police Service, Discipline Regulations, 2016.

<sup>153</sup> In terms of section 5(3) of the Discipline Regulations, where a member of SAPS is guilty of misconduct if such member *inter alia*:

(a) fails to comply with, or contravenes an Act, regulation or legal obligation;

...

(t) conducts himself or herself in an improper, disgraceful and unacceptable manner;

...

Further, in terms of subsection 4, a member of SAPS is also guilty of serious misconduct where *inter alia* committing assault with intent to do grievous bodily harm, and malicious damage to property of a serious nature.

<sup>154</sup> Section 7 and 8 of the Discipline Regulations.

<sup>155</sup> Section 10 of the Discipline Regulations.

<sup>156</sup> See note 2 above which provides the regulations for the lockdown.

<sup>157</sup> Draper, Philpott, Ntseng and Butler 'Durban shack dwellers illegally evicted' *New Frame* <<https://www.newframe.com/ethekweni-shack-dwellers-illegally-evicted/>, accessed on 3 May 2022>.

challenge the use of force, and by such omission failed to proactively address a growing area of concern.

It thus becomes apparent that, while there are certain overarching rules of conduct prescribed, there is inadequate provision for conduct during evictions, and little recourse for those affected. It is odd that while SAPS is duty bound to uphold the law and to protect the constitutional and fundamental rights of those within the Republic, there would appear to be omissions on the exact degree and nature of their conduct during something so fraught with potential violations as evictions. Perhaps, given the fundamental role that SAPS is intended to have in enforcing the law and ensuring rights are not violated, one could argue that specific provisions be made to regulate conduct during activities such as evictions.

#### 2.2.4. Private Security Industry Regulation Act 56 of 2001

##### 2.2.4.1 Introduction

PSIRA was enacted to provide for the regulation of the private security industry, to establish an authority for that purpose, and to provide for matters connected therewith.<sup>158</sup> This Act, and the effect thereof, is of particular importance for owners attempting to enforce and protect their property rights through the use of private security firms, which have proven to be particularly effective in the case of mass evictions or evictions of occupiers that pose a danger to the owner.

PSIRA in its preamble provides that:

WHEREAS the adequate protection of fundamental rights to life and security of the person as well as *the right to not be deprived of property, is fundamental to the well-being and to the social and economic development of every person;*

AND WHEREAS security service providers and the private security industry in general play an important role in protecting and safeguarding the aforesaid rights;

...

AND WHEREAS it is necessary to achieve and maintain a trustworthy and legitimate private security industry which *acts in terms of the principles contained in the Constitution and other applicable law*, and is capable of ensuring that there is greater safety and security in the country<sup>159</sup>

[own emphasis added]

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<sup>158</sup> PSIRA, Long Title.

<sup>159</sup> PSIRA, preamble.



The Authority established by PSIRA is obligated to:<sup>160</sup>

- (a) promote a legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law;
- (b) ensure that all security service providers act in the public and national interest in the rendering of security services;
- (c) promote a private security industry which is characterized by professionalism, transparency, accountability, equity and accessibility;
- ...
- (f) determine and enforce minimum standards of occupational conduct in respect of security service providers;
- (g) encourage and promote efficiency in and responsibility with regard to the rendering of security services;
- ...
- (n) ensure that compliance with existing legislation by security service providers is being promoted and controlled through a process of active monitoring and investigation of the affairs of security service providers;
- (o) protect the interests of the users of security services...

It is important to note that any person or company attempting to render a security service must be registered in terms of PSIRA, with the exception of a Security Service contemplated in section 199 of the Constitution.<sup>161</sup>

#### *2.2.4.2 PSIRA Code of Conduct*

It is thus in terms of the objects of section 3(f) of PSIRA that private security providers such as the Red Ants, must operate and conduct themselves, in addition to the requirements and obligations imposed by the Constitution and other applicable legislation. PSIRA also provides for a Code of Conduct to prescribe such conduct of security service providers, whether or not they are registered under PSIRA.<sup>162</sup>

In terms of the PSIRA Code of Conduct, security service providers must comply with PSIRA and all other legal provisions and obligations (whether based on or from common law or statute) that are applicable to: practising the occupation, rendering a security service, or performing any other act or function that is subject to PSIRA.<sup>163</sup>

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<sup>160</sup> Section 3 of PSIRA.

<sup>161</sup> Section 20 of PSIRA.

<sup>162</sup> Section 28 of PSIRA and the Code of Conduct for Security Service Providers, 2003 (PSIRA Code of Conduct).

<sup>163</sup> Regulation 5 of the PSIRA Code of Conduct.

Furthermore, security providers have a number of other obligations towards the public and their clients.<sup>164</sup> In terms of Regulations 8 and 9 of the PSIRA Code of

<sup>164</sup> Regulations 8 and 9 of the PSIRA Code of Conduct, which provides that:

**General obligations towards the public and the private security industry**

8. (1) A security service provider must at all time act in a manner which -
  - (a) does not threaten or harm the public or national interest;
  - ...
  - (c) promotes good discipline in the private security industry;
  - (d) maintains and promotes the status of the occupation of security service provider; and
  - (e) promotes efficiency in and responsibility with regard to the rendering of security services
- (2) A security service provider *may not infringe any right of a person as provided for in the Bill of Rights and, without derogating from the generality of the foregoing -*
  - ...
  - (b) *may not break open or enter premises, conduct a search, seize property, arrest, detain, restrain, interrogate, delay, threaten, injure or cause the death of any person, demand information or documentation from any person, or infringe the privacy of the communications of any person, unless such conduct is reasonably necessary in the circumstances and is permitted in terms of law.*
- (3) Every security provider must ... *effectively protect persons and property and refrain from conducting himself or herself in a manner which will or may in any manner whatsoever further or encourage the commission of an offence or which may unlawfully endanger the safety or security of any person or property.*
- (4) A security service provider *may only use force when the use of force as well as the nature and extent thereof is reasonably necessary in the circumstances and is permitted in terms of law.*
- ...
- (6) A security service provider *may only possess or carry a firearm...or a weapon, or possess or use any equipment if such conduct is lawful.*
- ...
- (12) A security service provider rendering a security service -
  - ...
  - (b) *may not incite, encourage or help any person to use force unlawfully or commit any unlawful act; and*
  - (c) *may not use abusive language or language may be reasonably construed as the advocacy of hatred or contempt that is based on race colour, ethnicity, sex, religion, language or belief.*

**General obligations towards clients, and issues related thereto**

9. ...
  - (3) A security service provider *may not -*
    - ...
    - (b) render or purport to render a security service or perform any function that requires a legal power, licence, permit, authorisation, accreditation, level of training, skill, knowledge, qualification, registration...capacity or premises, which he or she does not have;
    - ...
    - (e) make a contractual offer to or conclude a contract with a client containing any term, condition or provision that excludes or limits or purports to exclude or limit any duty on the security service provider in terms of the Act or this Code or any right which a client has in terms of [PSIRA] or [the PSIRA Code of Conduct], or which constitutes or purports to constitute a waiver of any such right by the client;
  - ...
  - (5) A security service provider -
    - ...
    - (b) must render the security service for which he or she has bound himself or herself contractually, and *perform any related function or work, with such a degree of skill, diligence and care as may be expected of a reasonable, competent and qualified security service provider in the circumstances;*
    - ...

Conduct, it becomes clear that, in carrying out their duties, security service providers may not *inter alia* infringe any rights of a person as contained in the Bill of Rights. This is the case unless such infringement is reasonably necessary and is permissible under the law, and they should conduct themselves in a manner that will not unlawfully endanger the safety or security of any person or property. Of particular note regarding the use of force, security providers may only use force where it is reasonably necessary and lawful to do so. Such use of force should be proportional and reasonable in the circumstances.

Contrary to the PSIRA Code of Conduct, one can find many examples of security services utilising excessive force and destroying property during evictions, some of which have resulted in hospitalisation and death.<sup>165</sup> Such flagrant violations only highlight the necessity that a security service provider must at all times act reasonably and with due care towards a client and a client's interests. Further, a security service provider must not act unlawfully or in such a manner as to cause unlawful harm to any person or property.

In addition to any necessary criminal charges, as the case may be, any failure to adhere to, and contravention of or non-compliance with, the PSIRA Code of Conduct by a security service provider constitutes improper conduct. Improper conduct will result in a penalty as contemplated in Regulation 25 of the PSIRA Code of Conduct.<sup>166</sup> Furthermore, improper conduct in terms of the PSIRA Code of Conduct also constitutes a criminal offence and on conviction, the offender is liable to a fine of up to R10,000.00 or imprisonment of up to 24 months, or both.<sup>167</sup>

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- (8) A security service provider *must protect the rights and legally recognised interests of a client in a reasonable manner, in accordance with all applicable law and with due regard to the rights and legally recognised interests of all other parties concerned.*
  - (9) A security service provider *may not in rendering a security service make any person available or use or permit the use of any firearm, ammunition, weapon or equipment if this exposes the client or any other person to any unlawful harm, or the unreasonable risk of unlawful harm, of which the security service provider is aware or should reasonably be aware.*

...

[own emphasis added]

<sup>165</sup> See for example: Ndabeni K 'Lenasia calm after violent clashes between Red Ants and residents' *Times Live*; Lindeque M 'Red Ants member arrested after shooting during an eviction in Thokoza' *Eyewitness News*; Bornman J 'City of Joburg's heartless Red Ants demolitions' *New Frame*; Sibanda N 'Red Ants evict occupants living illegally at Bompas Road property' *Rosebank Killarney Gazette*

<sup>166</sup> Regulation 24 of the PSIRA Code of Conduct.

<sup>167</sup> Regulation 28 of the PSIRA Code of Conduct.

The actions highlighted above, by groups like the Red Ants, SAPS, or any other government body during evictions, are a problem noted quite prominently in a report on access to housing by the South African Human Rights Commission (SAHRC).<sup>168</sup> In the 2014/2015 financial year, the SAHRC received over 260 complaints regarding the right of access to adequate housing. Many of the common trends of violations identified, which were further identified by the SAHRC during the Lwandle Ministerial Enquiry in 2014 and the evictions in Lenasia in 2013, included:<sup>169</sup>

- a) excessive use of force when conducting evictions
- b) the use of inadequately trained independent contractors such as the so-called “Red-Ants” by Sheriffs when executing [eviction] orders
- ...
- d) disregard for the safety and well-being of children and other vulnerable groups... [during evictions]
- e) use of derogatory or racist language [by those executing evictions]

A number of the complaints have detailed the brutal conduct of the sheriff, usually with the assistance of the Red Ants, when executing eviction orders, and while not all evictions are conducted in such a manner there is much to evidence that not all evictions are just.<sup>170</sup> Following complaints over four specific evictions between May 2017 to May 2019 (Tembisa in May 2017; Lenasia South in September 2017 where two people were killed; Vereeniging in April 2019, and Alexandra in May 2019), the Red Ants were suspended by the Private Security Industry Regulatory Authority (PSIR Authority) from providing services for evictions.<sup>171</sup> The Red Ants were ‘accused of theft, malicious damage to property, grievous bodily harm and unlawfully firing a weapon in a public area’.<sup>172</sup> However, this suspension was challenged and recently overturned by the Pretoria High Court, where the court put focus on the 12 000 employees that would be affected, the legal fees being demanded back, and the evictions that are being unable to be effected.<sup>173</sup> It was noted by the court that their

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<sup>168</sup> SAHRC 'The South African Human Rights Commission Investigative hearing report: Access to housing, local governance and service delivery' (2015).

<sup>169</sup> *ibid* 15–16.

<sup>170</sup> SAHRC (n 168) 65.

<sup>171</sup> Evans J 'Red Ants back on the eviction march as court lifts suspension' (2019) *News24*.

<sup>172</sup> *Ibid*.

<sup>173</sup> *Ibid*.

own reputation was being negatively impacted due to the issuing of eviction orders 'which could not be carried out'.<sup>174</sup>

This report, in stark comparison to the provisions of PSIRA and the PSIRA Code of Conduct, evidences massive failings in the private security industry and in PSIR Authority's capabilities in ensuring compliance with the provisions of the legislation and its regulations. This is assuming that PSIRA and the PSIRA Code of Conduct adequately prescribe the allowable conduct of private security bodies, which it arguably does not.

PSIRA and the PSIRA Code of Conduct may prescribe certain conduct of private security members and limits the use of force where proportional and reasonable. However, considering the very real examples of violations, it would not appear that same adequately provides for and, or, prescribes, the use of force and other conduct particularly in the case of mass evictions. Arguably, PSIRA and its Code of Conduct provide little more in the way of guiding conduct in general than either the Sheriffs Act or the SAPS Act. However, it is clear that the current state of affairs is insufficient and inadequate when it comes to prescribing conduct for any such body during an eviction.

#### 2.2.5. Conclusion on the Sheriffs Act, SAPS Act, and PSIRA

From the above analysis of the Sheriffs Act, the SAPS Act, and PSIRA, and their respective regulations and guidelines, it appears that there is inadequate provision for, and prescription of, the conduct allowable by any such member or body, specifically during an eviction. It also becomes apparent that there is little in the way of remedy for the victims of an eviction should there be a breach of their rights as a result of the conduct of any such body or member thereof.

The oft-cited *Fose v Minister of Safety and Security*<sup>175</sup> (*Fose*) aptly provided that there is an imperative call to protect the values of the Constitution, in that:

...without effective remedies for breach [or effective provision to protect the values and rights therein], the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those

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<sup>174</sup> *Ibid.*

<sup>175</sup> 1997 (3) SA 786 (CC).

occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.<sup>176</sup>

Further, provided by section 172 of the Constitution, that:

- (1) When deciding a constitutional matter within its power, a court –
  - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

It is thus arguably true that there is inadequate and insufficient protection of constitutional rights during an eviction. Accordingly, it often falls to courts to have to interpret and attempt to provide some remedy when a matter comes before them dealing with such situations. However, not only is such a *modus operandi* inefficient but it only assists those who have managed to realise there was a violation of their rights, and those with the resources to approach the court.

Therefore, it becomes apparent that the current legal regime is inadequate to offer the protection necessary. There is a definite need to better provide for the conduct of the sheriff and any assisting third party, in terms of section 4(11) of PIE, during an eviction in order to properly uphold and enhance the rights entrenched in the Constitution.

### 2.3. Section 5 PIE – Urgent evictions

While still bound by the overarching principle of 'justice and equity', PIE also permits an owner or person in charge of land (notwithstanding the provisions of section 4) to institute urgent eviction proceedings. These urgent proceedings are usually done on an *ex parte* basis and are followed by a final eviction hearing where the court will confirm or revoke the eviction order granted in the *ex parte* hearing, if the court is satisfied that:<sup>177</sup>

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

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<sup>176</sup> Fose para 69.

<sup>177</sup> Section 5(1) of PIE.

As is the case with PIE in general, it is not a simple task to evict an unlawful occupier, especially under urgent conditions. However, while presenting some procedural challenges to an owner, PIE is not intended to completely prevent the eviction of unlawful occupiers (as this would equate to unlawful deprivation), which would be contrary to and in breach of section 25 of the Constitution.<sup>178</sup>

### 2.3.1. *Groengras, and Nduna*

In order to understand the practical application of section 5 of PIE there are two cases that serve to provide such illustration, namely *Groengras Eiendomme (Pty) Ltd & Others v Elandsfontein Unlawful Occupants & Others*<sup>179</sup> (*Groengras*), and *Nduna v ABSA Bank Ltd & Others*<sup>180</sup> (*Nduna*).

In *Groengras* a large number of people took occupation of the land in question.<sup>181</sup> The applicants in the urgent eviction application included the owner of the land, Transnet, and Eskom (both organs of state), who put forth that the occupation of the land was both rapid and organised. The dwellings that the occupiers were erecting were located under and next to Eskom's power cables, and in some cases, on top of fuel pipelines. The applicants sought an eviction in terms of section 5 read with sections 4 and 6 of PIE. They put forth an argument that the land was not fit for habitation as it had no infrastructure, no water supply, no ablution facilities and no waste disposal facilities. The intolerable living conditions contributed to a consequent high risk of disease, and contamination of the stream running through the property that eventually fed into a dam acting as a water source for a nearby town. Furthermore, the applicants argued that there was a risk of the entire property becoming occupied if the influx was not halted, as well as a risk to the first applicant's crops. The court held that, in order to grant an interim eviction order, the factors mentioned in section 5(1)(a),(b) and (c), must be present.<sup>182</sup> However, the duration of the occupation is not necessarily a relevant factor for such urgent evictions.<sup>183</sup> Given the risks to the

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<sup>178</sup> *Groengras Eiendomme (Pty) Ltd & Others v Elandsfontein Unlawful Occupants & Others* 2002 (1) SA 125 (T) (*Groengras*) at para 24.

<sup>179</sup> 2002 (1) SA 125 (T)

<sup>180</sup> 2004 (4) SA 453 (C).

<sup>181</sup> This case also deals with how health and safety considerations play a role in evictions, specifically with regard to evictions in terms of section 6 of PIE.

<sup>182</sup> *Groengras* at para 27.

<sup>183</sup> This is of particular note when considered in comparison to *Fischer a quo*, *Fischer SCA*, *Denel* and *Setjwetla*.

occupiers,<sup>184</sup> and to the applicants, as well as the risk to the public interest,<sup>185</sup> the court held that it was in the interests of justice to uphold the rule of law by condemning any land invasions. The court found that the requirements of section 5(1) of PIE were met, and granted the interim eviction order. *Groengras*, which was decided exclusively in terms of section 5(1) of PIE, 'simultaneously confirms the exclusivity of urgent evictions in terms of section 5 and the normality of courts engaging in a substantive analysis of the rights and needs of vulnerable people in terms of sections 4 and 6.'<sup>186</sup>

In *Nduna*, the court *inter alia* grappled with the appropriate manner in which to institute urgent eviction proceedings. *In casu*, the respondent (the registered owner of the property) had brought an application for eviction of the applicant in terms of section 5 of PIE in the magistrate's court. The applicant was applying to have the granted eviction order reviewed and set aside on the basis that the magistrate's court lacked the requisite jurisdiction, and further, that the respondent should have used action proceedings for the urgent eviction. In the first instance, the court held that, in terms of section 9 of PIE, the magistrate's court did in fact have jurisdiction to hear applications for ejectment on motion proceedings.<sup>187</sup> Secondly, the court pointed out that the only appropriate manner in which to institute urgent eviction proceedings was by way of application, and any failure to allow application proceedings for evictions would frustrate the objects of PIE.<sup>188</sup>

### 2.3.2. *Modderklip*

While it may sometimes appear that an owner should utilise the provisions of section 5 of PIE to institute urgent eviction proceedings, this is not always the case given that the owner must fulfil the very specific requirements as provided for in section 5(1). This was the case in *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae) (Modderklip CC)*,<sup>189</sup> where one can note the other remedies/avenues attempting to be utilised by the landowner, and the obligation on the state to assist and uphold the rule of law.

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<sup>184</sup> More fully expanded upon by Muller (n 34) at 133-135.

<sup>185</sup> More specifically the effect that allowing such illegal land-grabs would have on the economy and security of other countries, see *Groengras* at para 30.

<sup>186</sup> *Muller* (n 34) 135.

<sup>187</sup> *Nduna* paras 7-8.

<sup>188</sup> *Nduna* paras 10-11.

<sup>189</sup> 2005 (5) SA 3 (CC).



The facts of the case are as follows: during May 2000, the owner's property was invaded and unlawfully occupied by a significantly large number of people following their eviction by the Ekurhuleni Metropolitan Municipality (EMM) from a nearby informal settlement. The owner did not institute eviction proceedings, believing that it was the responsibility of EMM to do so, and instead laid criminal charges of trespassing against the occupiers. These criminal charges were ultimately unsuccessful as the occupiers that were prosecuted just returned to the property. The owner eventually instituted eviction proceedings in terms of section 4(6) of PIE, which by such time, the population of the occupiers had increased more than twenty-fold. The court granted the eviction order and, due to the large scale of the eviction, the sheriff required assistance to execute the eviction.<sup>190</sup> This assistance was rejected by SAPS, meaning that the sheriff would have had to enlist the service of private security providers to assist at the significant cost of R1,8 million. This cost was unbearable by the owner who subsequently sought an order against the State to immediately take steps to execute the eviction order.<sup>191</sup> The court granted the order, holding that the State's 'refusal to exercise their respective powers collectively threatened the preservation of the democratic dispensation and undermined the Constitution. This is because the State prevented the provision of appropriate relief to the [owner] to vindicate the violation of its property rights'.<sup>192</sup>

This decision was appealed by the State<sup>193</sup> where the court found *inter alia* that the eviction order could not be executed humanely by the sheriff without the local authority providing land for the resettlement of the unlawful occupiers.<sup>194</sup> This was an unlikely scenario as the local authority had no emergency or other housing programme in place, which would have amounted to a violation of the occupiers' rights to adequate housing.<sup>195</sup> The order of *Modderklip a quo* was set aside and replaced with an order declaring the State's failure to provide land to the unlawful occupiers as a violation of

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<sup>190</sup> *Modderklip Boerdery (Pty) Ltd v Modder East Squatters & Another* 2001 (4) SA 385 (W) (*Modderklip*).

<sup>191</sup> *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika & Andere* 2003 (6) BCLR 638 (T) (*Modderklip a quo*).

<sup>192</sup> Muller (n 34) 119 and *Modderklip a quo* para 51.

<sup>193</sup> *Modderklip Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) (*Modderklip SCA*).

<sup>194</sup> *Modderklip SCA* para 26.

<sup>195</sup> *Modderklip SCA* para 22 and 25.

section 25(1) and 26(1) of the Constitution. The court order further mentioned that the owner was entitled to receive constitutional damages from the Department of Agriculture and Land Affairs, and that the occupiers could remain on the property until such time as alternative land was made available.<sup>196</sup> This order was taken on appeal to the Constitutional Court by the State, in *Modderklip CC*.

In *Modderklip CC*, *inter alia*, the court held that section 1(c) of the Constitution<sup>197</sup> placed an obligation on the State to uphold the rule of law by providing the necessary mechanisms for citizens to resolve disputes arising between them.<sup>198</sup> Furthermore, this obligation was held to go beyond the provision of mechanisms alone. This obligation also imposes the duty to take reasonable steps to ensure that 'large-scale disruptions in the social fabric' do not occur in the execution of court orders which would undermine the rule of law,<sup>199</sup> as was the case with the State's initial eviction of the unlawful occupiers. The eviction order granted in *Modderklip* was essentially unenforceable as the unlawful occupiers had nowhere else to go. The court in *Modderklip CC* further held that it was unreasonable to expect a private entity to bear the State's responsibility of providing the occupiers with accommodation. The court also provided that such large scale invasions threatened not only the private rights of private landowners but also the stability of the country and public peace.<sup>200</sup> Further, it was held that the State's failure to assist in the eviction or to expropriate the property violated these obligations.<sup>201</sup>

It was further held by the court that while the owner of the property bore the primary responsibility to take the reasonable steps to protect their property, that is to institute eviction proceedings, the owner *in casu* could not rely on urgent eviction proceedings in terms of section 5. This is because the owner was not basing its case for relief on any of the requirements contained therein. The court essentially upheld the order of the Supreme Court of Appeal (SCA).

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<sup>196</sup> *Modderklip SCA* para 52.

<sup>197</sup> Which provides that:

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

...  
(c) Supremacy of the constitution and the rule of law

<sup>198</sup> *Modderklip CC* para 39.

<sup>199</sup> *Modderklip CC* para 42–43.

<sup>200</sup> *Modderklip CC* para 45.

<sup>201</sup> *Modderklip CC* paras 47–51.

These four judgments all confirm that the government 'cannot abdicate its responsibility to respect, protect, promote and fulfil rights when a dispute arises between private parties because the government may often hold the key to resolving the dispute'.<sup>202</sup> The final judgment confirms that section 5, while an effective remedy, is only available where the owner can fulfil the requirements contained therein.

These cases further evidence how courts are required to, with regard to the intertwined relationship between the parties and the State, balance the property rights of the landowners and the housing rights of the unlawful occupiers.<sup>203</sup>

## 2.4. Further Evidence of a Need for Change

It has been elucidated by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 (2) SA 104 (CC), that:

In determining whether the eviction of the Occupiers will be just and equitable, it is necessary to address—(a) the rights of the owner in a constitutional and PIE era;... and (e) an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues. The South African constitutional order recognises the social and historical context of property and related rights. The protection against arbitrary deprivation of property in section 25 of the Constitution is balanced by the right of access to adequate housing in section 26(1) and the right not to be evicted arbitrarily from one's home in section 26(3). This Court noted in FNB: 'The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.' ... Apartheid legislation undermined both the right of access to adequate housing and the right to property. Section 25 prohibits arbitrary deprivation of property, but also addresses the need to redress the grossly unequal social conditions. Section 26 highlights the transformative vision of the Constitution. PIE was adopted with the manifest objective of overcoming past abuses like the displacement and relocation of people. It acknowledges their quest for homes, while recognising that no one may be deprived arbitrarily of property. The preamble quotes sections 25(1) and 26(3) of the Constitution. In *PE Municipality* it was stated that the court is required 'to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all of the interests involved and the

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<sup>202</sup> Muller (n 34) 122.

<sup>203</sup> Muller (n 34) 124.

specific factors relevant in each particular case.' Unlawful occupation results in a deprivation of property under section 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by law of general application and if not arbitrary. Therefore PIE allows for eviction of unlawful occupiers only when it is just and equitable.<sup>204</sup>

The principle of 'just and equitable' evictions extends not only to the granting of an eviction but, given the spirit and purport of both PIE and the Bill of Rights, also to the manner in which an eviction must be conducted. Anything less would undermine the rights of the persons concerned and the historical injustices that the Act seeks to redress and prevent.

South African courts, through the wide discretion afforded to them, are often able to interpret the application of legislation (such as PIE) in line with the spirit and purport of the Bill of Rights, in order to redress any violations suffered by the people concerned. In many cases the violation and damage has already been suffered, and this does little to redress the concerns of those who are suffering such violations without knowledge of, or access to, judicial redress. Thus, by adapting PIE and incorporating specific provisions that regulate the conduct during evictions, it is more likely that fewer people will suffer unjustified and unlawful violations to their rights during evictions.

Through a number of eviction cases, whether conducted by the State or privately, the violations of the rights of those affected and the judicial redress afforded to them can clearly be seen, and evidence the need for adaptation.

#### 2.4.1. *Tswelopele v COT*

As aforementioned, *Tswelopele v COT* dealt with unlawful public evictions, and the conduct of three governmental agencies that violated the rights of the unlawful occupiers. It involved an eviction without a court order of approximately one hundred people by the City of Tshwane, the immigration control office of the Department of Home Affairs, and SAPS – who were also accompanied by the local community policing forum.<sup>205</sup>

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<sup>204</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 (2) SA 104 (CC), paras 34-38.

<sup>205</sup> *Tswelopele v COT*, paras 1-2.

In a joint operation, the three governmental agencies evicted these people from their shelters and demolished the structures. The building materials were set alight and many of the evicted persons' personal belongings were destroyed as a result of this eviction and demolition. When challenged, none of the agencies were able to provide any authorisation by way of a court order to conduct such an eviction. As a result of this unlawful eviction and demolition, an urgent application was brought before the Pretoria High Court by Tswelopele Non-Profit Organisation (Tswelopele NPO), along with twenty-three of the named residents who had been evicted. The applicants sought *inter alia* the restoration of possession of the occupiers.<sup>206</sup> In the court *a quo*, the three agencies gave differing and opposing rationales for their conduct.<sup>207</sup> On presentation of the facts, the application was dismissed on the basis that restoration of possession was not possible in the circumstances as the occupiers' property had been destroyed.<sup>208</sup> On appeal, the court saw fit to order that the occupiers have their shelter returned, and due to the fact that the property was destroyed, the respondents were ordered to replace the materials with those that afford habitable shelter.<sup>209</sup>

There is arguably an error in the approach of the court, in that instead of developing the common law, and without any development or amendment of the legislation by the legislature, the court decided to rather provide a parallel constitutional remedy.<sup>210</sup>

However, of note in this case as it relates to the context of this dissertation, is the *obiter* made by Cameron JA (as he then was) that:

...the wanton destruction of the occupiers' dwellings violated the Constitution [indisputably]...The governmental agencies violated not merely the fundamental warrant against unauthorised eviction, but (given the implicit menace with which the eviction was carried out) the occupiers' right to personal security, and their right to privacy. It infringed not only the occupiers' property rights...but trampled on their feelings and affronted their social standing...And it is not for nothing that the constitutional entrenchment of the right to dignity emphasises that everyone has

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<sup>206</sup> *Tswelopele v COT*, para 4.

<sup>207</sup> Tshwane claimed they were present only to eradicate alien vegetation; Home Affairs claimed they were solely present to identify non-documented foreigners; SAPS described their presence as a crime fighting operation.

<sup>208</sup> *Tswelopele v COT*, para 6.

<sup>209</sup> *Tswelopele v COT*, para 28.

<sup>210</sup> *Property and Constitution*, 86.

inherent dignity, which must be respected and protected. Historically, police actions against the most vulnerable in this country had a distinctly racial trajectory... The racial element may have disappeared, but what has not changed is the exposure of the most vulnerable in society to police power and their vulnerability to its abuse.<sup>211</sup>

This clearly evidences South Africa's recognition of the overlapping rights associated with housing rights and emphasises the dignity that even unlawful occupiers should be afforded during an eviction. Further, the evident threat of violation at the hands of law enforcement officials during an eviction is clearly noted and reprimanded. However, while this judgment provides the necessary relief in the form of restoration of property (even when destroyed), it does little in the way of prescribing more humane and dignifying conduct during evictions despite such violating conduct being noted by the court.

#### 2.4.2. *Pheko v EMM*

In *Pheko v EMM*, which involved the use of the Red Ants to assist in a forced removal, an eviction was arguably effected under the auspices of the Disaster Management Act (DMA).<sup>212</sup> In this case, the unlawful occupiers were occupying a large swathe of privately-owned land. This land was identified to have a severe risk of sinkholes, and a report conducted on behalf of the municipality found that the area was unstable and recommended that the area should not be utilised for mass housing.<sup>213</sup> Following subsequent reports and recommendations that the occupiers be relocated, the municipality declared the area a local state of disaster in terms of the DMA.<sup>214</sup>

The municipality issued a notice in light of this state of disaster and the applicants were faced with a forced eviction, without a court order. The occupiers *inter alia* requested that an appropriate eviction order be produced, or that the eviction be halted; alternatively they would approach the court for urgent relief.<sup>215</sup> However, the municipality contended *inter alia* that the relocation was not an eviction as it was an alleged temporary relocation.<sup>216</sup> The municipality attempted to proceed with the forced removal of the occupiers but the relocation was resisted by the occupiers, and thus

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<sup>211</sup> *Tswelopele v COT*, paras 15-16.

<sup>212</sup> Act 57 of 2002.

<sup>213</sup> *Pheko v EMM*, paras 5-6.

<sup>214</sup> *Pheko v EMM*, para 8.

<sup>215</sup> *Pheko v EMM*, para 9.

<sup>216</sup> *Pheko v EMM*, para 10.

the municipality enlisted the services of the Red Ants to demolish the homes of the occupiers.<sup>217</sup>

In the court *a quo*, the occupiers sought urgent interdictory relief to restrain the municipality from unlawfully evicting them, demolishing their homes, and intimidating them to vacate the area. It was argued by the occupiers that as a result of the unlawful and forceful evictions and the demolition of their homes, without a court order, their constitutional rights to housing and dignity were violated. They further argued that the conduct of the municipality and the Red Ants was contrary to PIE, and constituted intimidation.<sup>218</sup> The municipality contended that the occupiers were being evacuated and that the relocation was temporary and authorised under the DMA. The court *a quo* dismissed the occupiers' application on the grounds of lacking urgency, PIE being inapplicable, and that the duty to protect the occupiers' lives justified the relocation.<sup>219</sup>

The occupiers appealed directly to the Constitutional Court, having been denied leave to appeal, and *inter alia* contended that the court *a quo*'s decision to authorise the conduct of the municipality essentially authorised an unlawful eviction and demolition, thus violating their constitutional rights to housing and dignity. It was argued on behalf of the occupiers that the DMA was improperly engaged and that the situation ought to have been dealt with in terms of PIE.<sup>220</sup> The municipality, *inter alia*, justified the removal of the occupiers as an evacuation as a result of a disaster and thus not an eviction, as alleged; the removal was argued to be an administrative act requiring no court order and that the relocation was temporary.<sup>221</sup>

On an interpretation of the DMA, the court found that a wide interpretation of section 55(2)(d)<sup>222</sup> would result in an adverse effect on section 26 of the Constitution. Further, it found that such an interpretation would not authorise an eviction without a court order, and that an evacuation by very definition is temporary.<sup>223</sup> Additionally, it found that the conduct of the Red Ants and the demolition of the homes negated the temporary nature of the supposed evacuation, but also infringed the occupiers rights

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<sup>217</sup> *Pheko v EMM*, para 11.

<sup>218</sup> *Pheko v EMM*, para 12-13.

<sup>219</sup> *Pheko v EMM*, para 14-15.

<sup>220</sup> *Pheko v EMM*, paras 16-18.

<sup>221</sup> *Pheko v EMM*, paras 19-21.

<sup>222</sup> Where section 55(2)(d) of the Disaster Management Act provides that where a local state of disaster is declared, a municipality may issue bylaws or directions concerning evacuation to temporary shelters of the population from the area if such action is necessary for the preservation of life.

<sup>223</sup> *Pheko v EMM*, paras 34-39.

in terms of section 26(3) and section 10 of the Constitution.<sup>224</sup> As a result of this finding, however, the court chose not to decide on the application of PIE.<sup>225</sup> The court accordingly ordered *inter alia* that the municipality's removal and relocation of the occupiers and the demolition of their homes were unlawful.<sup>226</sup>

It is clear from this case that the conduct of the municipality and the Red Ants was unlawful, and this was noted by the court. While a certain level of justice was done in favour of the occupiers, perhaps the court's unwillingness to grapple with PIE left open room for future misconduct during evictions. It is evident that courts are often unwilling to expand the scope of the matter before them or alternatively, the argument of the matter brought before them. However, there is a clear pattern of misconduct during evictions and without the court or the legislature getting involved to prescribe such conduct, violations will continue.

#### 2.4.3. *Ngomane v COJ*

In another forced removal and demolition conducted by the State, where force was used to achieve the ends of evicting unlawful occupiers, we have the case of *Ngomane v COJ*.<sup>227</sup> *In casu*, the applicants, a group of destitute homeless people who had made a home for themselves on a traffic island in Johannesburg, had been forcefully removed from such land by the respondents, the City of Johannesburg and JMPD. The applicants' personal belongings and building materials were confiscated and destroyed, resulting in the applicants being left in a more precarious position than before.<sup>228</sup>

Due to their personal circumstances, the applicants had been forced to live on the traffic island where they had stored their property (including identity documents) and the building materials for their homes. However, each morning the applicants would dismantle their makeshift structures, and pack their material and belongings and leave these behind at the traffic island as they attempted to find food and work.<sup>229</sup> On

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<sup>224</sup> *Pheko v EMM*, paras 40 and 44.

<sup>225</sup> *Pheko v EMM*, para 46.

<sup>226</sup> *Pheko v EMM*, para 53.

<sup>227</sup> For a more in-depth, critical analysis of this judgment see, for example, ZT Boggenpoel 'Revisiting the Tswelopele remedy: a critical analysis of *Ngomane v City of Johannesburg Metropolitan Municipality*' (2020) 137 SALJ 424.

<sup>228</sup> *Ngomane v COJ*, para 1.

<sup>229</sup> *Ngomane v COJ*, para 2.



the day in question, JMPD officers arrived at the traffic island with a convoy of vehicles including waste-removal trucks. During the operation, and in an attempt to drive the occupants from the location, JMPD allegedly hurled insults and physically attacked a number of the occupiers.<sup>230</sup> The occupiers' belongings and materials were subsequently loaded onto the trucks and carted away.

The operation, according to the respondents, was a 'clean-up' operation in terms of the City's bylaws,<sup>231</sup> and not an eviction. This is because the officials only removed materials and rubbish that was found unattended or abandoned, denying that there were any personal effects.<sup>232</sup> Based on video footage of the incident, the court *a quo* found that the respondents were well aware that people were residing at the location and that the materials were those that were used to construct the temporary shelters of the applicants. However, the court *a quo* rejected the allegation that the shelters were demolished, as the shelters were dismantled by the applicants every morning.<sup>233</sup> The court *in casu* concurred and found (in line with the court *a quo*) that an eviction did not occur in terms of PIE, as even on the broadest interpretation the materials could not constitute a building or shelter in terms of PIE. As the 'shelters' had been dismantled by the applicants, there were no structures that could be demolished and as such, technically, there was no eviction.<sup>234</sup>

The court found that the respondents' conduct was a violation of the applicants' rights to dignity and property, and the respondents were ordered to make restitution for the damaged and destroyed property.<sup>235</sup>

It should be noted that the applicants had not sought relief based on PIE. However, the court took it upon itself to interpret and apply the provisions of PIE so as to allay any queries the applicants may have had as to why an eviction in terms of PIE, and thus protection therefrom, did not apply.<sup>236</sup> This is noteworthy because the court's use of its discretion to broaden the scope of the matter before it to include an interpretation of PIE evidences the court's powers. Powers to interpret and develop

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<sup>230</sup> *Ngomane v COJ*, para 3.

<sup>231</sup> Note 72 above.

<sup>232</sup> *Ngomane v COJ*, paras 4-5.

<sup>233</sup> *Ngomane v COJ*, paras 6-9.

<sup>234</sup> *Ngomane v COJ*, paras 16-17.

<sup>235</sup> *Ngomane v COJ*, para 27.

<sup>236</sup> *Ngomane v COJ*, para 15.

issues that those seeking relief may not fully comprehend and thus, *mero motu*, the court is able to use its discretionary powers to further the objects of justice.

The matter may not necessarily have been an eviction, in terms of PIE, and it is true that the conduct of this removal operation and the confiscation and destruction of their property was found to be a violation of the applicants' property rights and their inherent right to dignity.<sup>237</sup> However, the court failed to use this power to prescribe conduct during such removals, demolitions or evictions, knowing full well the conduct of the respondents to be inconsistent with the Constitution, and therefore unlawful.<sup>238</sup>

## 2.5. Conclusion

As its full title suggests, PIE is intended to provide for the prevention of illegal evictions and unlawful occupation, and was enacted to give effect to section 26 of the Constitution. The first aim of PIE, being to prevent illegal evictions, is an undoubted necessity when one considers the extent to which persons' fundamental rights can be violated during a process as invasive as evictions. However, the question clearly arises as to whether PIE adequately provides for the substantive and procedural protection of occupiers' rights during evictions. Further, if there is a violation of rights for which PIE does not adequately protect, whether there exists a complementary framework that provides adequate protection therefor.

Based on the first principle of subsidiarity, where there is an infringement of a right or rights contained within the Bill of Rights, and there exists legislation enacted to give effect to that right, a challenge must be made against the legislation enacted, rather than a direct reliance on the Constitution. Accordingly, where evictions occur and rights are infringed as a result thereof, a challenge must be made on the empowering legislation, being PIE, and any complementary legislation before a direct constitutional challenge is allowed.

Clearly there is a risk to the violation of rights contained within the Bill of Rights when an eviction occurs, which includes the rights to housing, dignity, and safety and security of person. This is particularly the case in mass evictions, where the sheriff, as empowered by section 4(11) of PIE, is permitted to have third parties such as SAPS or private security assist in the execution of such an eviction. It is during such mass

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<sup>237</sup> *Ngomane v COJ*, para 21.

<sup>238</sup> *Ngomane v COJ*, para 22.

evictions, removals, and demolitions that the rights of unlawful occupiers are put at risk and oft violated.

Given that PIE, in section 4(11), remains silent as to how such evictions and assistance should be conducted, the risk of violations of rights contained within the Bill of Rights becomes of even greater concern, and such risk is increasing in both prevalence and volatility. While there are certain procedural and substantive safeguards existing within PIE, however, there are inadequate safeguards provided by PIE in circumstances involving the conduct of the sheriff and third parties during evictions. Accordingly, it is necessary to establish whether any of the complementary statutes adequately provide the necessary substantive and procedural safeguards against such violations during the execution of evictions.

It is evident from the above that neither the Sheriffs Act, nor the SAPS Act, nor PSIRA, provide for the specific conduct allowable during evictions, and in what circumstances force can be utilised. While broad provision is made in each Act (to a degree) as to what is unacceptable conduct in the respective profession and the offences and punishment related to such conduct, each falls significantly short. These pieces of legislation remain inadequate in providing for the conduct of any such official or member during an eviction and does little to provide for the use of force during such volatile incidents such as evictions.

Accordingly, it becomes necessary to determine in what way, if any, provision can be made for the adequate substantive and procedural protections against such unlawful conduct, and for the rights of unlawful occupiers during evictions. The provision could either be made through amendments to the respective Acts, or alternatively through Regulations published in terms of each Act, or both. In order to guide this approach, for an adequate and transformative interpretation and development of the existing framework, as provided for by the Constitution, an analysis of foreign and international law and sources could provide the appropriate lessons for such protection.

### 3. International and foreign framework for evictions and the use of force

#### 3.1. Introduction

It is undeniable that the previous regime, under apartheid, enabled and enforced racist and oppressive laws in South Africa. Laws that *inter alia* restricted the movement of black people and controlled where and how such people should occupy their spaces. These oppressive laws have had a long-lasting effect on the people of South Africa, and this effect can clearly be seen in the development of property and housing rights. PIE was, and still is, a progressive step forward in protecting the housing rights of unlawful occupiers. It did much to correct many of the dystopian laws that allowed for the forced removal of unlawful occupiers with ease and little to no consideration towards what was just or equitable. Unfortunately, PIE still has its shortcomings. The transition to a more just and equitable property law regime has been sorely needed, and welcomed. However, as unlawful occupations become more prevalent, the shortcomings within PIE become more evident. Particularly so in the case of mass evictions where the rights of so many are, understandably, at risk of being infringed upon, such as the rights to dignity,<sup>239</sup> equality,<sup>240</sup> housing,<sup>241</sup> and the security of the person.<sup>242</sup> It thus becomes necessary to evaluate PIE, and to determine the next step in the evolution of South African property law. This is done in order to better give effect to the spirit and purport of the Bill of Rights and the progressive realisation of the purpose of PIE.

In developing the interpretation and application of PIE, given that it is the legislation giving effect to section 26(3) of the Constitution, courts must promote the values underlying an open and democratic society based on human dignity, equality, and freedom,<sup>243</sup> and must promote the spirit, purport, and objects of the Bill of Rights.<sup>244</sup> An important part of legislative interpretation and development, is the constitutionally mandated obligation that every court must prefer any reasonable

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<sup>239</sup> Section 10 of the Constitution.

<sup>240</sup> Section 9 of the Constitution.

<sup>241</sup> Section 26 of the Constitution.

<sup>242</sup> Section 12 of the Constitution; particularly in this case subsections 12(1)(c)-(e), which provide for the right to be free from violence from public and private sources, not to be tortured, and not to be treated or punished in a cruel, inhuman, or degrading manner.

<sup>243</sup> Section 39(1)(a) of the Constitution.

<sup>244</sup> Section 39(2) of the Constitution.

interpretation of the legislation that is consistent with international law, over any interpretation that is inconsistent therewith.<sup>245</sup>

Therefore, this chapter will consider the principles of justice and equity for unlawful occupiers. The consideration of these principles will be in light of the obligations placed on courts to interpret legislation in a manner consistent with international law.<sup>246</sup> More importantly, how such international laws can assist in the development of PIE and the protection that is needed for unlawful occupiers. This chapter will go on to consider foreign law and the treatment of the Roma people in Europe, and the lessons that can be derived therefrom. The chapter will finish with an analysis of the current South African status quo for unlawful occupiers.

## 3.2. International Law

### 3.2.1. Introduction

Section 39(1)(b) of the Constitution provides that:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum -  
...  
(b) must consider international law.

This obligation on courts to consider international law is a significant entry point for the development of South African law and the import of same should not be lost, considering the influence comparative international instruments had on the formulation and finalisation of the Constitution. While this section only provides for the obligatory consideration and not necessarily development in line therewith, this section read with section 233 not only provides courts with the power to develop South African law from a variety of sources, but truly evidences the desire of South Africa to be a part of the international community and to abide by its normative standards.<sup>247</sup>

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<sup>245</sup> Section 233 of the Constitution.

<sup>246</sup> Where such international law includes all the sources recognised by article 38(1) of the Statute of the International Court of Justice 33 UNTS 993 being: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. See also *S v Makwanyane and Another (Makwanyane)* 1995 (3) SA 391 (CC) para 35, and Dugard J 'The role of international law in interpreting the Bill of Rights' (1994) 10 *SAJHR* 208-215 and Dugard J 'International law and the final Constitution' (1995) 11 *SAJHR* 241-251.

<sup>247</sup> Muller (n 34) 159. It should also be noted that South African law cannot only learn from international standards and practice, but South Africa's own experience and developments in the field of human

Section 39(1)(b) allows South Africa and South African constitutional law to be a part of the international human rights dialogue, that, when considering the spirit and purport of the Bill of Rights, allows for an interpretive approach influenced by a multicultural international human rights dialogue.<sup>248</sup> This approach is particularly useful in the context of evictions. This is because it provides South African courts with the ability and instruction to engage with bodies that have already had to grapple with these issues, and the property and housing rights of other vulnerable groups.<sup>249</sup> This section is aimed at identifying the international instruments that can be considered by South African courts, in order to assist in the development of a more substantively just and equitable treatment of unlawful occupiers.

### 3.2.2. International Bills of Rights

The UN has adopted three important documents in the context of an international Bill of Rights, namely: the UDHR;<sup>250</sup> the ICCPR;<sup>251</sup> and the ICESCR.<sup>252</sup>

#### 3.2.2.1. Universal Declaration of Human Rights

The UDHR, which was adopted in 1948, assigned responsibility to the international community on the governing of citizens by their States and created a set of indivisible, inalienable, and interdependent rights.<sup>253</sup> Its core values being the:<sup>254</sup>

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [which] is the foundation of freedom, justice and peace in the world

...

[and] it is essential...that human rights should be protected by the rule of law...

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rights and transformation can contribute substantially to the field of international law. See also, in this respect, Liebenberg S *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 101.

<sup>248</sup> Muller (n 34) 159.

<sup>249</sup> Muller (n 34) 159.

<sup>250</sup> UN General Assembly Resolution 217 A (III).

<sup>251</sup> International Covenant on Civil and Political Rights 999 UNTS 171, concluded 16 December 1966 and entered into force 23 March 1976. South Africa signed the ICCPR on 3 October 1994.

<sup>252</sup> International Covenant on Economic, Social and Cultural Rights 993 UNTS 3, concluded 16 December 1966 and entered into force 3 January 1976.

<sup>253</sup> Gevers M & Muller G 'Unwholesome prison blues - a call to protect international prisoners' rights and standardize conditions of detention' 52 (2018) 1 *CILSA* 75-108.

<sup>254</sup> UDHR preamble.

What is of significance in this recognition of dignity and equality is that it should apply to all members of humanity, regardless of status, race, or creed. In addition to being born with equal dignity and rights,<sup>255</sup> the UDHR recognises a number of fundamental and inalienable rights that apply to all human beings, which include: the rights to security of person, life, and liberty;<sup>256</sup> that no person should be subjected to cruel, inhuman or degrading treatment;<sup>257</sup> that no person shall be arbitrarily deprived of their property;<sup>258</sup> and, that every person has the right to a standard of living adequate for the health and well-being of himself and of his family, including *inter alia* housing.<sup>259</sup>

Together, these rights form the structure of housing rights in terms of the UDHR, and such housing rights are arguably some of the most fundamental rights for the development of every human being.<sup>260</sup> These housing rights play a significant role in the socio-economic development of a person. If these rights are not protected and guaranteed, then not only would social and cultural rights suffer, but so too would basic civil and political rights.<sup>261</sup>

While the UDHR does not necessarily delve into the specifics of each of the aforementioned rights, it does form the foundation on which the international community is obligated to promote and enforce such rights and is the starting point of the international instruments dealt with below.

Furthermore, it is noteworthy (in addition to the recognition granted in Articles 3, 5, and 17) that the UDHR recognises the importance of housing and its correlation with a certain standard of living necessary for good health and well-being. It is with this guiding principle in mind that one should consider the below and evaluate the effect that evictions and forced removals can have on a person and their family.

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<sup>255</sup> Article 1 UDHR.

<sup>256</sup> Article 3 UDHR.

<sup>257</sup> Article 5 UDHR.

<sup>258</sup> Article 17(2) UDHR.

<sup>259</sup> Article 25 UDHR.

<sup>260</sup> Terminski B 'The right to adequate housing in international human rights law: Polish transformation experiences' 2 (2011) 22 *Revista Latinoamericana de Derechos Humanos* 219-241.

<sup>261</sup> See: Ellickson R 'The untenable case for an unconditional right to shelter' 1 (1992) 15 *Harvard Journal of Law & Public Policy* 17-34; and Michelman F 'The advent of a right to housing: A current appraisal' (1970) 5 *Harvard Civil Rights-Civil Liberties Law Review* 207-226.

### 3.2.2.2. *International Covenant on Civil and Political Rights*

The ICCPR, in furtherance of the UDHR's goals, provides for certain rights (deriving from the inherent dignity of the human person),<sup>262</sup> which rights (while not expressly related to housing rights) place an obligation on State Parties to adhere to certain minimum standards and to develop the law to give effect to these standards.<sup>263</sup> Of note are the provisions that no one should be subjected to cruel, inhuman, or degrading treatment,<sup>264</sup> and the right to not to have one's home arbitrarily or unlawfully interfered with.<sup>265</sup>

While this does not provide specifically for the context of housing, the ICCPR can be interpreted broadly to provide for a certain level of care and dignity with which each person should be treated, and this definitely extends to the context of evictions and forced removals.

There are a number of general comments published by the UN Human Rights Committee (HRC) that provide significant guidance as to the rights contained in the ICCPR. These comments, for the purpose of this dissertation, provide interpretive guidance as to the use of force as it relates to housing rights and, more specifically, to evictions.

#### 3.2.2.2.1. **General Comment No. 16: Article 17 (Right to privacy)**

The HRC adopted General Comment No. 16: Article 17 (General Comment No. 16: Article 17),<sup>266</sup> which provides that States are required to guarantee against any unlawful interferences to Article 17,<sup>267</sup> whether from State authorities or from natural or legal persons,<sup>268</sup> where unlawful means interference taking place outside of the law and, or, arbitrarily.<sup>269</sup> The HRC continues by providing that specific and relevant legislation needs to be implemented to specify the precise circumstances in which

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<sup>262</sup> Preamble ICCPR.

<sup>263</sup> Article 2(2) ICCPR.

<sup>264</sup> Article 7 ICCPR.

<sup>265</sup> Article 17(1) ICCPR.

<sup>266</sup> HRC, CCPR General Comment No.16: *Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988.

<sup>267</sup> Where Article 17 of ICCPR provides that every person is to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence, as well as against unlawful attacks on his honour and reputation.

<sup>268</sup> General Comment No. 16: Article 17, para 1.

<sup>269</sup> General Comment No. 16: Article 17, paras 3-4.



such lawful interferences may occur.<sup>270</sup> This obligation placed on State Parties clearly highlights further the sanctity of a person's home and their right to not have same interfered with. More specifically, that when such interference must occur, any such interference should be in line with legislative guidelines. General Comment No. 16: Article 17 clarifies that, in the case of evictions, the interference caused by evictions on a person's privacy, family, and home should be limited by legislative measures. Further, any attacks on honour or reputation should be prevented as well. However, as can be seen in the aforementioned cases, it is evident that many evictions exceed the intended legislative scope of an eviction and impede on the privacy and dignity of a person, their family, and their home. This is even more so when force is used during an eviction and a person's home, belongings, and person are attacked. According to HRC guidance, States would do well to implement specific legislative measures to specify precise circumstances where such interferences and infringements may occur.

#### **3.2.2.2.2 General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)<sup>271</sup>**

General Comment No. 20: Article 7 stipulates that it is the duty of State Parties to give effect to the provision of Article 7 of ICCPR,<sup>272</sup> and to afford every person protection from violations of their Article 7 rights through legislative or other means.<sup>273</sup> This General Comment goes on to describe the obligation on State Parties regarding reporting mechanisms. While generally associated with persons deprived of their liberty, it should be noted that this right to not be subjected to cruel, inhuman, or degrading treatment, extends to all persons, and against all such treatment. As this right extends to all persons, it stands to reason that such prohibition extends to persons in the case of evictions. In terms of Article 7, as guided by the General Comment No. 20: Article 7, States should ensure that they give effect to this right and prohibit any such use of cruel, inhuman or degrading treatment, which can clearly be applied in the case of evictions. When evictions or mass evictions occur, as highlighted

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<sup>270</sup> General Comment No. 16: Article 17, para 8.

<sup>271</sup> UN Human Rights Committee, CCPR General Comment No. 20: *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992 (General Comment No. 20: Article 7).

<sup>272</sup> The aim of which is the obligation to protect the dignity and the physical and mental integrity of the individual.

<sup>273</sup> General Comment No. 20: Article 7, para 2.

above, often times people are subjected to wanton violence and destruction of their property and are treated in such a manner so as to seem less than deserving of their dignity. States are obligated to ensure there are legislative, or other, measures in place to prevent such cruel, inhuman, or degrading treatment.

#### **3.2.2.2.3. General Comment No. 35: Article 9 (Liberty and security of person)**

In its General Comment No. 35,<sup>274</sup> the HRC states that the right to security of person (under Article 9 of ICCPR) is intended to protect individuals against the intentional infliction of bodily or mental harm. This right also places the obligation on States to take appropriate measures to protect individuals from threats to life or bodily harm as a result of any State or private actors.<sup>275</sup> When evictions occur, it is indisputable that, at the very least, mental harm is suffered by those evicted. Particularly so when evictions occur in a manner that disregards a person's dignity and other rights. As highlighted in the cases and reports above, it becomes clear that during mass evictions many people suffer both physical and mental harm as a result of the conduct utilised during such evictions, particularly when the use of force is present. It therefore rests on the shoulders of States to ensure that appropriate measures are put in place to protect individuals from threats to life, and bodily and psychological harm. States should be guided by this General Comment, particularly in the case of evictions, to implement adequate legislative or regulatory measures to protect individuals.

#### **3.2.2.2.4. General Comment No. 36: Article 6 (Right to life)**

In General Comment No. 36,<sup>276</sup> the HRC states that the right to life is a right that should be interpreted broadly, and concerns the entitlement of individuals to be free from acts or omissions intended to cause death, as well as to enjoy a life with dignity.<sup>277</sup> The HRC continues by expanding on the obligation placed on States to respect and protect the right to life. States are also required to ensure that due diligence is exercised to protect the lives of individuals against deprivations caused by the State or any other

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<sup>274</sup> HRC, General Comment No. 35: *Article 9 (Liberty and security of person)*, adopted 16 December 2014, CCPR/C/GC/35 (General Comment No. 35).

<sup>275</sup> General Comment No. 35, para 9.

<sup>276</sup> General Comment No. 36 Article 6: right to life, adopted by the HRC at its 124<sup>th</sup> session 2 November 2018, CCPR/C/GC/36.

<sup>277</sup> General Comment No. 36, para 3.

person or entity, extending to foreseeable threats and life-threatening situations.<sup>278</sup> It is acknowledged that the right to life is not absolute, as some deprivation of life may not be arbitrary, such as deprivations resulting from the use of force in self-defence.

As a rule, deprivation of life is arbitrary if it is inconsistent with international and domestic law.<sup>279</sup> However, the principles of reasonableness, necessity and proportionality all play a role in determining whether deprivation of life is arbitrary. General Comment No. 36 acknowledges that deprivation of life may not be arbitrary when the use of force is applied in self-defence but should, in the case of private persons, only be used as a method of last resort. Such force should be proportionate to the threat, carefully directed at the threat, and such threat should involve imminent death or serious injury to warrant such use of force.<sup>280</sup> Furthermore, in the case of law enforcement, potentially lethal use of force should only be used for the most extreme measures and only where strictly necessary to protect life or prevent serious injury.<sup>281</sup> States are expected to take all necessary measures to prevent such lethal use of force by law enforcement officials. In this regard, States should implement appropriate legislative controls for the use of lethal force by law enforcement officials, as well as providing *inter alia* less-lethal means in order to obviate the need to resort to lethal force.<sup>282</sup>

The HRC also advises that where private parties are empowered or authorised by a State to employ force with potentially lethal consequences, the State is under an obligation to ensure that such use of force complies with Article 6, and such State remains responsible for any failure to comply.<sup>283</sup> Lastly, of note, is that this duty to protect the right to life also implies that States should take the appropriate measures to address the general conditions in society that give rise to direct threats to life or prevent enjoyment of the right to life with dignity.<sup>284</sup> The importance of General Comment No. 36 on the use of force in evictions is clear. It clearly provides that States

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<sup>278</sup> General Comment No. 36, para 7. Of note is the fact that State Parties may even be in violation of Article 6 even if such threats or situations do not result in the loss of life. See also: *Chongwe v Zambia* (CCPR/C/70/D/821/1998).

<sup>279</sup> African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 2015, para 12.

<sup>280</sup> General Comment No. 36, para 12.

<sup>281</sup> *Ibid.*

<sup>282</sup> General Comment No. 36, para 13.

<sup>283</sup> General Comment No. 36, para 15.

<sup>284</sup> General Comment No. 36, para 26.

are ultimately liable for any potentially lethal use of force by law enforcement, or private parties authorised by the State to use force. States are obligated to take appropriate legislative, and other, measures to prescribe the use of force and prevent arbitrary deprivation of life or serious injury. Thus, any law enforcement or person authorised to assist in an eviction should conform to such a standard so as to limit any use of force to where such use of force is proportionate, necessary, and reasonable.

#### **3.2.2.2.5. General Comment No. 37: Article 21 (Right of peaceful assembly)**

While the right of peaceful assembly is not directly related to housing rights, the HRC's General Comment No. 37 provides some useful guidance as to the use of force by law enforcement (and by extension private persons).<sup>285</sup> Among other things, General Comment No. 37 provides clearly that law enforcement should seek to de-escalate situations that might result in violence and are obliged to exhaust non-violent means. Law enforcement is required to give prior warning if the use of force becomes absolutely necessary, and any such use of force has to comply with the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination.<sup>286</sup> These principles and guidelines should not be restricted to the right of peaceful assembly, and bear clear lessons for the use of force in evictions, such as that the use of force should not be used unless the situation has turned violent (and efforts should be made to de-escalate any situation from turning violent). An additional lesson is that the use of force in an eviction should only occur where absolutely necessary and must comply with the principles of legality, necessity, proportionality, precaution and non-discrimination.

#### **3.2.2.3. *International Covenant on Economic, Social and Cultural Rights***

The guiding international norm, with regard to evictions and housing rights,<sup>287</sup> is provided for by Article 11(1) of the ICESCR that sets forth that every person has the right to an adequate standard of living. Article 11(1) provides that:

The States Parties to the present Covenant recognize the *right of everyone to an adequate standard of living* for himself and his family, including adequate food, clothing

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<sup>285</sup> General Comment No. 37 on the right of peaceful assembly (Article 21), adopted by the HRC at its 129<sup>th</sup> session, 24 July 2020, CCPR/C/GC/37.

<sup>286</sup> General Comment No. 37, para 78.

<sup>287</sup> Muller (n 34) 161.

*and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

[own emphasis added]

This Article not only provides for the right to a certain standard of living (of which housing forms a part) but also clearly places the obligation on State Parties to realise this right and to not infringe thereupon. The UN Committee on Economic, Social and Cultural Rights (CESCR)<sup>288</sup> is the authoritative body responsible for advancing interpretations of what State Parties' obligations are in terms of the ICESCR through concluding observations and general comments.<sup>289</sup>

### 3.2.3. General Comments No. 4 & No. 7

Two of the general comments adopted by the CESCR that expand on the obligations of State Parties with regard to evictions, housing, and forced removals, are General Comment No. 4,<sup>290</sup> and No.7.<sup>291</sup> These comments, while not binding international law, provide considerable insight and guidance into the issue of forced evictions and the right to housing.

#### 3.2.3.1. General Comment No. 4

The CESCR begins by noting the strong correlation between housing and its central importance to the enjoyment of all economic, social, and cultural rights.<sup>292</sup> While there

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<sup>288</sup> The Committee consists of 18 experts with internationally recognised competence in the field of human rights and who serve in their personal capacity for a renewable four-year term. The primary task of the Committee is to assist the Economic and Social Council with its consideration of the reports that States Parties submit to the Secretary-General of the United Nations (article 16(2) of the ICSECR).

<sup>289</sup> *Ibid.* Note also that while General Comments are considered to be 'soft' international law, as they are neither treaties nor customary international law, and while not binding on South Africa, these General Comments can prove useful interpretive tools for South African courts in terms of section 39(1)(b) of the Constitution.

<sup>290</sup> CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), UN Doc E/1992/23, adopted at the sixth session of the CESCR on 13 December 1991 (General Comment No. 4).

<sup>291</sup> CESCR General Comment No. 7: The right to adequate housing (Art. (11)(1)): forced evictions, adopted at the sixteenth session of the CESCR, 1997, UN Doc E/1998/22 (General Comment No 7).

<sup>292</sup> General Comment No. 4, para 1.

are a number of international instruments that address the right to adequate housing, in one way or another,<sup>293</sup> arguably the most important is Article 11(1) of the ICESCR.<sup>294</sup>

The CESCR, while noting that the international community has frequently reaffirmed the value of the right to housing, notes that there still exists a substantial gap between the ideal of Article 11(1) and the reality of housing rights globally.<sup>295</sup> Accordingly, and based on the fact that there has been insufficient information and reporting from State Parties on this issue, the CESCR found it necessary to adopt this General Comment in order to identify the primary issues in relation to the right to housing,<sup>296</sup> a right that applies to every person.<sup>297</sup> Furthermore, the CESCR continues by commenting that the right to housing should not be interpreted narrowly, but rather that the right to housing should be interpreted as the right to live in security, peace and dignity. The right to housing is inherently linked to other human rights and the inherent dignity of a human being;<sup>298</sup> it cannot be viewed in isolation from other human rights.<sup>299</sup> This right should be afforded to everyone regardless of a person's income or access to economic resources.<sup>300</sup> In addition, and to be considered adequate, this right to housing should provide, *inter alia*, for: legal security of tenure; a certain degree of availability of services, materials, facilities and infrastructure; affordability; habitability; and accessibility.<sup>301</sup> In order to ensure the full realisation of this right, State Parties are instructed to take the necessary steps and measures needed, whether through internal policies, legislation and monitoring<sup>302</sup> or through international cooperation.<sup>303</sup>

The CESCR continues by urging States to implement the necessary legal remedies to prevent infringement of this right, including infringement through evictions

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<sup>293</sup> See Article 25(1) of UDHR, Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 10 of the Declaration on Social Progress and Development, and section III (8) of the Vancouver Declaration on Human Settlements, 1976 (*Report of Habitat: United Nations Conference on Human Settlements* (United Nations publication, Sales No. E.76.IV.7 and corrigendum, chap. I) as an example of these other instruments.

<sup>294</sup> General Comment No. 4, para 3.

<sup>295</sup> General Comment No. 4, para 4.

<sup>296</sup> General Comment No. 4, para 5.

<sup>297</sup> General Comment No. 4, para 6.

<sup>298</sup> General Comment No. 4, para 7.

<sup>299</sup> General Comment No. 4, para 9.

<sup>300</sup> General Comment No. 4, para 7.

<sup>301</sup> General Comment No. 4, para 8.

<sup>302</sup> General Comment No. 4, paras 10-14.

<sup>303</sup> Article 23 of ICESCR read with Article 11(1) of ICESCR.

and illegal evictions.<sup>304</sup> Most importantly the CESCR considers that forced evictions are *prima facie* incompatible with the ICESCR, except in the most exceptional of circumstances and only then should these occur following the principles of international law.<sup>305</sup>

The fact that the CESCR considers forced evictions as *prima facie* unlawful should be of considerable note to South African courts. Even when evictions are lawful it is perhaps more important to note that these forced evictions must be conducted in such a manner to be consistent with international law. These guiding principles will be discussed below. It should, however, be clear that forced evictions are already on tenuous footing when it comes to the legality thereof. While necessary in some situations, the ever-present risk these pose to a person's other rights should be evident from the viewpoint of the CESCR.

### 3.2.3.2. General Comment No. 7

General Comment No. 7 was adopted to provide further comment on evictions and how same should only be carried out in the most exceptional of circumstances, and in full accordance with international human rights and humanitarian law. This General Comment was intended to expand on the concluding paragraphs of General Comment No. 4, in that the right to housing's degree of security of tenure guarantees certain legal protections against forced eviction, harassment and other threats,<sup>306</sup> and, further, to clarify the implications of forced evictions on the obligations of State Parties.<sup>307</sup>

The CESCR notes that the term 'forced evictions' can be problematic.<sup>308</sup> For the purpose of General Comment No.7, it defines forced evictions as:

the permanent or temporary removal against their will of individuals, families, and/or communities from their homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.<sup>309</sup>

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<sup>304</sup> General Comment No. 4, para 17.

<sup>305</sup> General Comment No. 4, para 18.

<sup>306</sup> General Comment No. 7. para 1.

<sup>307</sup> Muller (n 34) 163.

<sup>308</sup> It is problematic in that it could be considered a tautology. However, the idea behind the utilisation of this term is to express a sense of arbitrariness and illegality.

<sup>309</sup> General Comment No. 7, para 3.

While the CESCR prohibits forced evictions, it notes that this does not apply to evictions carried out by force in terms of the law, and in conformity with the provisions of the International Covenants on Human Rights.<sup>310</sup>

The CESCR clearly states that, owing to the interrelationship and interdependence existing between all human rights, forced evictions often violate other human rights in addition to the rights to housing, such as the rights to life, security of the person, non-interference with privacy, family and home, and the right to peaceful enjoyment of possessions.<sup>311</sup> Furthermore, in all of the contexts in which forced evictions occur, the violation of rights is a prominent risk through the acts and, or, omissions of State Parties. Where it may become necessary that there is a limitation on any of the rights infringed, State Parties must ensure full compliance with Article 4 of the ICESCR.<sup>312</sup>

The CESCR goes on to state that forced evictions are not necessarily limited to heavily populated urban areas. However, forced evictions also occur when people are internally displaced during armed conflicts, as a result of refugee movements, and in the name of development.<sup>313</sup> It is noteworthy that the CESCR specifically comments on the strong association that forced evictions have with violence<sup>314</sup> and that vulnerable groups (such as children, minorities, the elderly, and women) suffer disproportionately when forced evictions occur.<sup>315</sup>

The obligations of State Parties, in terms of Article 11(1) read with Article 2(1), are such that State Parties and their agents or third parties conducting forced evictions, must be held accountable to the full enforcement of the law.<sup>316</sup> Furthermore, the CESCR impresses that the appropriate means by which to tackle forced evictions, and the infringement of the rights associated therewith, is by enacting legislation upon

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<sup>310</sup> *Ibid.* Note also that reference here to the 'International Covenants on Human Rights' refers, *inter alia*, to the UDHR, the ICCPR, and the ICESCR.

<sup>311</sup> General Comment No. 7, para 4.

<sup>312</sup> General Comment No. 7, para 5. Where Article 4 of ICESCR provides that any such limitation on rights must be 'determined by law only insofar as this may be compatible with the nature of these [economic, social and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society'.

<sup>313</sup> General Comment No. 7, paras 5 and 7.

<sup>314</sup> General Comment No. 7, para 6.

<sup>315</sup> General Comment No. 7, para 10. It is in violation of the non-discrimination provisions of Articles 2(2) and 3 of the ICESCR. These Articles impose additional obligations on State Parties to ensure that appropriate measures are taken during evictions such that no discrimination is involved.

<sup>316</sup> General Comment No. 7, para 8. This is reinforced by Article 17(1) of ICCPR.



which a system of effective protection can be built.<sup>317</sup> These pieces of legislation must include measures that provide security of tenure to the occupiers, conform with the ICESCR, and are designed to strictly control the appropriate circumstances under which evictions may be carried out. These measures must be enforceable against State Parties, their agents, and private persons or bodies.<sup>318</sup>

While some evictions may be justifiable, the relevant authorities are mandated to ensure that such evictions occur lawfully and in terms of the ICESCR, and that the affected persons have the appropriate legal remedies available to them.<sup>319</sup> Of particular note is that where evictions must occur, particularly in the context of mass evictions, the feasible alternatives must have been properly explored, and the use of force during any such eviction should be avoided, or at the least minimized.<sup>320</sup> Any justified evictions should be carried out in the strictest compliance with international human rights law and in accordance with the principles of reasonableness and proportionality.<sup>321</sup> Furthermore, where evictions are to take place, these evictions should not render individuals homeless or vulnerable to the violation of their other human rights.<sup>322</sup>

In 2007, the Special Rapporteur on adequate housing subsequently presented the Human Rights Council with a set of 'Basic principles and guidelines on development-based evictions and displacement' (*Basic Principles*).<sup>323</sup> It sets out the international human rights standards that must be upheld in the context of forced evictions.

#### 3.2.4. Basic principles and guidelines on development-based evictions and displacement

The *Basic Principles*, which is in line with General Comment No. 4 and General Comment No. 7, is aimed at expanding on the obligation of State Parties to refrain

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<sup>317</sup> General Comment No. 7, para 9.

<sup>318</sup> *Ibid.*

<sup>319</sup> General Comment No.7, para 11.

<sup>320</sup> General Comment No. 7, para 13.

<sup>321</sup> General Comment No. 7, para 14.

<sup>322</sup> General Comment No.7, para 16.

<sup>323</sup> *The Basic principles and guidelines on development-based evictions and displacement*, UN Doc A/HRC/18 (*Basic Principles*).

from, and protect against, forced evictions from both homes and land.<sup>324</sup> The *Basic Principles* addresses the human rights implications of development-based forced evictions and displacements in urban and, or, rural areas,<sup>325</sup> and makes note of the fact that forced evictions constitute gross violations of a wide berth of international human rights. These principles further link forced evictions to infringements on, *inter alia*, the rights to adequate housing; health; security of the person; security of the home; and freedom from cruel, inhuman and degrading treatment.<sup>326</sup> Furthermore, it is noteworthy that the *Basic Principles* clearly highlights the link between forced evictions and inequality, social conflict and segregation, which affect the poorest and most vulnerable members of society.<sup>327</sup>

In addition to providing for a number of general obligations,<sup>328</sup> it provides detailed guidelines and obligations as to what should happen prior to,<sup>329</sup> during,<sup>330</sup> and after evictions (as no mention is specified here as to forced evictions, these guidelines and obligations are in reference to permissible evictions).<sup>331</sup> It goes on to set out remedies against forced evictions.<sup>332</sup> It is noteworthy that in terms of the *Basic Principles*, the State bears the principal obligation and liability for applying human rights and humanitarian norms. This is to ensure that the rights enshrined in treaties and general principles of international law are respected.<sup>333</sup> Additionally, States are mandated to adopt legislative and policy measures that prohibit the execution of evictions that are incompatible with their international human rights obligations.<sup>334</sup>

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<sup>324</sup> The *Basic Principles*, para 4, defines 'forced evictions' as the:

acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.

[The prohibition of forced evictions does not apply to evictions carried out both in accordance with the law and in conformity with the provisions of international human rights treaties.]

<sup>325</sup> *Basic Principles* para 3.

<sup>326</sup> *Basic Principles* para 6.

<sup>327</sup> *Basic Principles* para 7.

<sup>328</sup> *Basic Principles*, paras 11–36.

<sup>329</sup> *Basic Principles*, paras 37–44.

<sup>330</sup> *Basic Principles*, paras 45–51.

<sup>331</sup> *Basic Principles*, paras 52–58.

<sup>332</sup> *Basic Principles*, paras 59–68.

<sup>333</sup> *Basic Principles*, para 11.

<sup>334</sup> *Basic Principles*, para 22.

### 3.2.4.1. Guidelines and obligations during forced evictions

During evictions, the *Basic Principles* mandates that in order to ensure that human rights standards are upheld, government officials or their representatives must be present during evictions. Such officials, and the persons conducting the eviction, must be identified to the people being evicted and must provide the formal authorisation for such evictions.<sup>335</sup> It is clearly stated that any evictions carried out should be conducted in such a manner as to not violate dignity and the human rights to life and security of the person.<sup>336</sup> Moreover, should it be necessary to utilise force, lawfully, it is necessary that:

any legal use of force must respect the principles of necessity and proportionality, as well as the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* and any national or local code of conduct consistent with international law enforcement and human rights standards.<sup>337</sup>

[own emphasis added]

It is also clearly provided that during evictions no person should be subjected to direct or indiscriminate attacks or other acts of violence, nor that any person is arbitrarily deprived of property or possessions as a result of demolitions, nor subject to deliberate destruction or negligence.<sup>338</sup>

Where evictions must take place, they should not occur, *inter alia*, during inclement weather, at night, during festivals or religious holidays, or prior to elections.<sup>339</sup> It is also quite interesting to note that the *Basic Principles* provides that persons being evicted should be given the option to demolish their own dwellings/structures, so as to facilitate salvaging of possessions and building materials.<sup>340</sup> It is made clear that evictions should only occur in the most humane possible manner and should not involve wanton violence or destruction. These guidelines, which South Africa would do well to learn from, provide relatively clear prescribed conduct during evictions by those conducting such evictions, which if followed would better protect the interlinked rights of those evicted.

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<sup>335</sup> *Basic Principles*, para 45.

<sup>336</sup> *Basic Principles*, para 47.

<sup>337</sup> *Basic Principles*, para 48.

<sup>338</sup> *Basic Principles*, para 50.

<sup>339</sup> *Basic Principles*, para 49.

<sup>340</sup> *Basic Principles*, para 51.

#### 3.2.4.2. Remedies for forced evictions

When forced evictions occur, the *Basic Principles* provides that any person threatened with or subject to forced evictions has the right to timely remedies, which include: a fair hearing; compensation; return and restitution; and, resettlement and rehabilitation.<sup>341</sup> For unavoidable evictions, where necessary for the promotion of general welfare, those evicted should be entitled to just and fair compensation for losses (whether to property or goods, or to rights or interests in property). This compensation is in instances where such damage and loss is economically assessable, and such compensation is appropriate and proportional to the gravity of the violation/loss.<sup>342</sup> Further, those evicted, regardless of whether they hold the title to the property or not, should be entitled to compensation for the loss, salvage, and transport of their property affected by the eviction.<sup>343</sup> When it is not possible to return to their place of residence nor recover their property or possessions, following a forced eviction, the affected persons must be provided or assisted with appropriate compensation or other just forms of reparation.<sup>344</sup> While priority should be given to the right of return, where necessary in the circumstances, the resettlement of persons affected by development-based evictions should occur and should be just and equitable.<sup>345</sup>

#### 3.2.5. Other treaties and general comment

##### 3.2.5.1. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*

While the primary focus of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (*Basic Principles on the Use of Force*)<sup>346</sup> is self-evident in its title, it also sets out some guidance as to the use of force by any official or agent acting under the authority of the State in general. Accordingly, any reference to 'law

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<sup>341</sup> *Basic Principles*, para 52.

<sup>342</sup> *Basic Principles*, para 60. Furthermore, it should be made clear that cash compensation should never replace real compensation in the form of land; specifically, where land is taken, those evicted should be compensated with land of commensurate quality and value, or better.

<sup>343</sup> *Basic Principles*, para 61.

<sup>344</sup> *Basic Principles*, para 67. See also paras 64-66 for more detailed guidelines on the return and restitution of property and housing to those affected by forced evictions.

<sup>345</sup> *Basic Principles*, para 68.

<sup>346</sup> The *Basic Principles on the Use of Force* was adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August 1990 to 7 September 1990. It was adopted by the UN General Assembly on 18 December 1990 under Resolution 45/166.

enforcement official' should be read as 'any official or agent representing the State or acting under the authority thereof'.

The *Basic Principles on the Use of Force* provides that in carrying out their duty, law enforcement officials should, as far as reasonably possible, apply non-violent means before resorting to the use of force and, or, firearms. It further states that only if other means are ineffective, or cannot achieve the intended result, may the use of force or firearms by law enforcement officials be used.<sup>347</sup> Where the use of force or firearms is unavoidable, law enforcement officials should:<sup>348</sup> exercise restraint, and act in proportion to the objective to be achieved; and respect and preserve human life. Furthermore, no arbitrary or abusive use of force and firearms should be permitted, and any such arbitrary or abusive use should be punished as a criminal offence.<sup>349</sup>

Clearly the use of force is intended to be, and should be, highly restricted and prescribed for only the most necessary, reasonable, and proportional circumstances, and only, for the most part, once non-violent means have been exhausted. The application of these principles to conduct during evictions should be self-evident. It is clear then that during an eviction any law enforcement official, or person acting under the authority of the State (as would be the case for any person assisting an eviction in terms of section 4(11) of PIE), should not resort to the use of force prior to non-violent means being exhausted. The use of force should only be permitted where same is necessary, reasonable, and proportional to the threat faced. Accordingly, any use of force as a means of first resort or as a means of intimidation in order to execute an eviction order is contrary to accepted international principles on the use of force.

#### *3.2.5.2. General Comment No. 20: Non-discrimination in economic, social and cultural rights*

General Comment No. 20: Non-discrimination in economic, social and cultural rights (General Comment No. 20: Non-discrimination)<sup>350</sup> reaffirms the principles of non-discrimination and equality as clearly recognised in the ICESCR, such that the equal and inalienable right of every person encompasses, *inter alia*, the rights to an

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<sup>347</sup> *Basic Principles on the Use of Force*, para 4.

<sup>348</sup> *Basic Principles on the Use of Force*, para 5.

<sup>349</sup> *Basic Principles on the Use of Force*, para 7.

<sup>350</sup> CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR), adopted at the forty-second session, 2 July 2009, UN Doc E/C.12/GC/20 (General Comment No. 20: Non-discrimination).

adequate standard of living, and health.<sup>351</sup> General Comment No. 20 defines discrimination as:

any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant right.<sup>352</sup>

Of note is that the General Comment No. 20: Non-discrimination provides for a number of expressly prohibited grounds of discrimination.<sup>353</sup> These specifically include discrimination based on property ownership or the lack thereof.<sup>354</sup> Further, it is specified that the exercising of ICESCR rights should not be conditional on a person's place of residence,<sup>355</sup> nor on their economic or social situation.<sup>356</sup> This General Comment is relevant to the context of this dissertation in that no person, regardless of their property ownership, place of residence, or economic or social situation, should be arbitrarily deprived of their ICESCR rights or unfairly discriminated against on the basis thereof. Therefore, each person is entitled to equal protection under the ICESCR.

### 3.2.6. Conclusion

Based on the provisions of section 39(1)(b) read with section 233 of the Constitution, there is an obligation on South African courts to consider and apply international law when developing and interpreting the Bill of Rights and the legislation empowering the rights therein. This is of even more import when it is apparent that there are violations of rights or inadequacies in the empowering legislation allowing for such violations.

While there is a vast framework of international instruments available to guide the interpretation and development of the Bill of Rights and its empowering legislation in the context of housing rights and eviction law, the ICCPR and the ICESCR and the General Comments associated therewith provide significant assistance to courts in achieving this goal. These instruments evidence the overlap of the civil and political as well as social and economic rights, as they relate to housing rights and evictions. It

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<sup>351</sup> General Comment No. 20: Non-discrimination, para 3.

<sup>352</sup> General Comment No. 20: Non-discrimination, para 7.

<sup>353</sup> General Comment No. 20: Non-discrimination, paras 18–26.

<sup>354</sup> General Comment No. 20: Non-discrimination, para 25.

<sup>355</sup> General Comment No. 20: Non-discrimination, para 34.

<sup>356</sup> General Comment No. 20: Non-discrimination, para 35.

further underscores the link between housing rights and all other human rights, and that a violation of either set of rights will involve a violation of the other.<sup>357</sup>

Article 7 and Article 17(1) of the ICCPR read with General Comments 16, 20, 36, and 37, lay out the substantive framework in terms of the ICCPR, within which the constraints on the use of force during evictions must be understood and interpreted. In addition, Article 11(1) of the ICESCR, together with General Comments 4 and 7, provide a further framework within which the right to housing and evictions should be understood and interpreted.<sup>358</sup> It is made clear by these instruments that evictions should only occur in the most necessary of circumstances. Evictions must be conducted in such a manner so as to limit or prevent further, and unnecessary, violations of the rights of those involved. Of particular note is the fact that the conduct during evictions, wherever possible, should not resort to the use of force, and any such use of force necessary should be proportional and reasonable.

Together, these instruments should provide binding international law obligations for South Africa. Guided by the soft international law of the *Basic Principles*,<sup>359</sup> it is made clear that State Parties should adopt policy and legislative measures to better provide for housing rights and evictions, specifically in the context of the use of force during evictions. This will ensure that adequate procedural and substantive safeguards are put in place to prevent unnecessary, unlawful, and avoidable violations of the rights of those being evicted.<sup>360</sup>

In this regard, the conduct during evictions and mass evictions, particularly as it relates to the use of force, should satisfy a high level of justification and should only be conducted in the strictest compliance with the aforementioned safeguards. The measures instituted by South Africa, as a State Party, should be adequate enough to guide the sheriff, and any third party assisting them. This will help to protect the dignity, housing rights, and other human rights associated therewith, of those being evicted.

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<sup>357</sup> Muller (n 34) 166.

<sup>358</sup> *Ibid.*

<sup>359</sup> Which could become a binding customary international law obligation.

<sup>360</sup> Muller (n 34) 166.

### 3.3. Foreign Law

#### 3.3.1. Introduction

Section 39(1)(c) of the Constitution provides that when interpreting the Bill of Rights, courts *may* consider foreign law. While not peremptory, this section read with section 39(2) of the Constitution does place an onus on courts to interpret legislation and develop the common law (and customary law) in a manner that promotes and gives effect to the spirit and purport of the Bill of Rights. Therefore, in my mind, any foreign law which can assist in the development and interpretation of South African law in such a manner, should be considered by courts. This is particularly so where such legislation or common law is open to abuse or potential human rights violations.

While section 39(1)(c) is not as commanding as section 39(1)(b) read with section 233, there are a multitude of lessons which can be learnt from foreign jurisdictions and through comparative analysis of such instruments and relevant foreign case law. This is evident in the case of evictions when comparison is made with foreign jurisdictions that have had to grapple with the rights of vulnerable groups, such as the Roma and travelling people throughout Europe. The consideration of such jurisprudence is pertinent given that the Roma and travelling people have historically been forced out of areas, and 'pushed to the periphery of society, with the aid of racial profiling and numerous instances of police brutality, to live in squalid conditions'.<sup>361</sup> Correspondingly, given the recent turmoil in the Middle East and Eastern Europe, comparison with the situation of refugees fleeing to and settling in Central and Western Europe can present strong comparative lessons that can guide the further development of South African housing and eviction law.

This section of the dissertation will therefore analyse the Revised European Social Charter (RESC)<sup>362</sup> and relevant case law, to assist in guiding a South African approach to evictions that is more in line with the Bill of Rights.

#### 3.3.2. Revised European Social Charter

In an attempt to further improve social and economic conditions in Member States, following the adoption of the European Convention for the Protection of Human Rights

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<sup>361</sup> Muller (n 34) 159.

<sup>362</sup> CETS No. 163.



and Fundamental Freedoms (ECHR),<sup>363</sup> the Council of Europe drafted the European Social Charter. The European Social Charter provided for a range of social and economic rights, and provided Member States with the opportunity to commit to the adoption of these rights through internal and external policies giving effective realisation to these rights and principles. However, due to a number of shortcomings the European Social Charter was essentially side-lined by the ECHR.<sup>364</sup>

Accordingly, by the early 1990s, substantive work began on the improvement and revision of the European Social Charter,<sup>365</sup> which *inter alia* clarified the role of the Committee, and provided for collective complaints mechanisms. By mid-1999, the RESC had been adopted and came into force. The RESC provided for a total of 31 rights, 12 more than the original charter, and more effectively provided for the effective realisation of the social and economic rights contained therein.

Interpretative guidance of the RESC is provided for by the European Committee of Social Rights (ECSR). While the only body that may make recommendations to Member States is the Committee of Ministers (CoM), the ECSR (through its reports and decisions) guides the CoM in governing Member States' compliance with and meeting the obligations of the RESC.<sup>366</sup> The CoM is the Council of Europe's statutory decision-making body and the guardian of the Council's fundamental values. It both discusses Europe's problems on a national level, and finds the collective responses to these challenges. The CoM is broadly governed by the Statute of the Council of Europe.<sup>367</sup> It has the power to consider the actions required to further the aims of the Council of Europe.<sup>368</sup> This includes the adoption, by governments, of common policy

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<sup>363</sup> 213 UNTS 221.

<sup>364</sup> Muller (n 34) 190-191. The shortcomings that resulted in the lacklustre operation of the European Social Charter included: the Committee of Independent Experts' (later renamed the European Committee of Social Rights) (the Committee) conclusions and decisions after examining country reports for compliance were unclear and not widely circulated; the role of the Committee was subordinate to the Governmental Committee and the Committee of Ministers of the Council of Europe; there was no provision for individual or collective complaints mechanisms; it only applied to nationals of Member States; the commitment by Member States to protect and further the progressive realisation of the rights contained therein was vague enough to allow Member States to not be bound by every provision of it; and, the degree of compliance with the protection of these rights was considered satisfied where the majority of its intended beneficiaries were protected.

<sup>365</sup> See Protocol Amending the European Social Charter CETS no 142 and Additional Protocol to the European Social Charter Providing for a System of Collective Complaints CETS no 158.

<sup>366</sup> Muller (n 34) 192.

<sup>367</sup> ETS No. 001, 1949.

<sup>368</sup> Where its aim, as prescribed by Article 1 of the Statute of the Council of Europe, is to achieve greater unity between its members for the purpose of safeguarding and realizing the ideals and principles that are their common heritage and facilitating their economic and social progress.

with regard to specific matters. The conclusions of the CoM may take the form of recommendations to governments, and it may request to be informed about the actions taken pursuant to such recommendations.<sup>369</sup>

In view of the topic of this dissertation, the most pertinent right of the RESC is that everyone has the right to housing.<sup>370</sup> In this regard, Member States should undertake to promote access to housing of an adequate standard, prevent and reduce homelessness, and make the price of housing accessible.<sup>371</sup> Arguably, some of the most influential decisions of the ECSR have been made in the context of the right to housing.<sup>372</sup>

### 3.3.3. Case Law

In terms of the Vienna Convention on the Law of Treaties, Article 31, it is set out that a treaty should be read in its context and in light of its objective and purpose, as well as in conjunction with relevant and applicable rules of international law.<sup>373</sup> This means that the rights contained in the RESC should not be interpreted or applied in a positivistic manner, but rather in harmony with the spirit and purport of the RESC. It was clearly stated in *International Federation for Human Rights (FIDH) v Ireland*,<sup>374</sup> that the obligation to promote and provide housing, under Article 16 read with Article 31 of the RESC, extends to security from unlawful evictions.<sup>375</sup> Thereto, any measures taken by Member States in recognising and promoting rights of the RESC should take a concrete form rather than a theoretical approach.

#### 3.3.3.1. France

In *Centre on Housing Rights and Evictions (COHRE) v France*,<sup>376</sup> the COHRE alleged *inter alia* that, following the announcement that new concerted policies of forced

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<sup>369</sup> Statute of the Council of Europe, Article 15.

<sup>370</sup> Article 31 of the RESC. Arguably, the rights to protection of health (Article 11), the right of the family to social, legal and economic protection (Article 16), and the right to protection against poverty and social exclusion (Article 30), also form part of the protection of housing rights and protection against unlawful eviction.

<sup>371</sup> Part II, Article 31 of the RESC.

<sup>372</sup> Muller (n 34) 192.

<sup>373</sup> *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece* Complaint No. 173/2018, decision on the merits of 26 January 2021, para 120.

<sup>374</sup> Complaint No. 110/2014, decision on the merits of 12 May 2017.

<sup>375</sup> *Ibid* paras 106-107.

<sup>376</sup> Complaint No. 63/2010, decision on the merits of 28 June 2011.

eviction of 'unlawful camps' and mass expulsions from France were to be implemented in July 2010, the situation of Roma in France had deteriorated significantly, and such evictions and expulsions were carried out with coercion and violence in violation of the RESC.<sup>377</sup> The COHRE continued by alleging that the poor quality of the living conditions of many Roma in France was indicative of France's inability or unwillingness to meet its obligations in respect of the right to housing and housing of an adequate standard, and drew attention to the discriminatory nature of these violent forced evictions and their empowering policies.<sup>378</sup> France contended *inter alia* that the evictions were lawful, and conducted under judicial supervision in an effort to maintain law and order and safeguard internal security.<sup>379</sup>

The ECSR recalled that while illegal occupation may justify evictions, such evictions *inter alia* should be sufficiently protective of the rights of the people concerned, must respect the dignity of the people concerned and must be in accordance with proper procedure.<sup>380</sup> In light of a previous decision,<sup>381</sup> the ECSR considered that this complaint revealed a clear deterioration of the situation in France.<sup>382</sup> The ECSR found that France had failed to refute the proof submitted by the COHRE regarding the forced evictions and the measures taken that are incompatible with human dignity. They found that there was an aggravated violation of human rights in respect of Article 31(2) of the RESC.<sup>383</sup> Therefore, it was found that the conditions under which the forced evictions of Roma took place constituted a violation of Article E read with Article 31(2) of the RESC.<sup>384</sup>

This decision was submitted to the CoM, who resolved<sup>385</sup> and noted that the report by the ECSR on the violations of Article E, read with Articles 31(2) and 19(8) of

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<sup>377</sup> *COHRE v France*, paras 6-7. Among other things, the policies put forward by the President of France and implemented therein, set clear objectives for the eviction of illegal camping sites and set a target of 300 sites being cleared within 3 months, see *Circular IOC/K/1017881 of 5 August 2010 on the eviction of illegal settlements*.

<sup>378</sup> *COHRE v France*, paras 36-38.

<sup>379</sup> *COHRE v France*, para 39.

<sup>380</sup> *COHRE v France*, para 41.

<sup>381</sup> *European Roma Rights Centre (ERRC) v France*, Complaint No. 51/2008, decision on the merits of 19 October 2009.

<sup>382</sup> *COHRE v France*, para 45.

<sup>383</sup> *COHRE v France*, paras 48-53.

<sup>384</sup> *COHRE v France*, para 55.

<sup>385</sup> Resolution CM/ResChS (2011) 9: Collective Complaint No. 63/2010 by the Centre on Housing Rights and Evictions against France.

the RESC, be made public, and that the French government was to report on the measures to be taken in order to deal with the situation described in the complaint.

### 3.3.3.2. Greece

In *European Roma Rights Centre (ERRC) v Greece*,<sup>386</sup> the complainant submitted that the Greek government, through the *Sanitary Provision for the Organized Relocation of Itinerant Persons (Nomadic Travellers) (1983 SPORIP)*,<sup>387</sup> which discriminated against Roma in housing matters,<sup>388</sup> denied the Roma people an effective right to housing in violation of Article 16 of the RESC.<sup>389</sup> The ERRC alleged that such law effectively ensured racial segregation, and promoted social exclusion and the perpetuation of their confinement to substandard housing.<sup>390</sup> 1983 *SPORIP* specifically targeted 'Athinganoi'<sup>391</sup> and provided that no encampment was allowed without permit.<sup>392</sup> Further, it provided that organised encampments were only allowed outside inhabited areas and 'a good distance from the approved urban plan or the last contiguous houses'.<sup>393</sup> In addition, these encampments were not allowed near archaeological sites, beaches, landscapes of natural beauty, visible by main highway points or areas which could affect the public health.<sup>394</sup>

The Greek government contended that the complaint was unfounded as 1983 *SPORIP* had been amended (Amendment to *SPORIP*).<sup>395</sup> The amendment provided that, pending the establishment of a permanent settlement, temporary settlement was 'on condition that the prerequisites of the [proceeding] articles are fulfilled'.<sup>396</sup> 'Appropriate locations' for these temporary settlements would be selected only after

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<sup>386</sup> Complaint No. 15/2003, decision on the merits of 8 December 2004.

<sup>387</sup> Ministerial Decision No A5/696/25.4.83.

<sup>388</sup> *ERRC v Greece* para 11.

<sup>389</sup> *Ibid.* Article 16 of the RESC provides for the right of the family to social, legal and economic protection:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

<sup>390</sup> *Ibid.*

<sup>391</sup> This term is used to describe persons of Roma origin.

<sup>392</sup> Article 1 of 1983 *SPORIP*.

<sup>393</sup> Article 3(1) of 1983 *SPORIP*.

<sup>394</sup> Article 3(3) of 1983 *SPORIP*.

<sup>395</sup> Joint Ministerial Decision No. 23641/3.7.2003.

<sup>396</sup> Article 1(2) Amendment to *SPORIP*.

extensive bureaucratic consultations.<sup>397</sup> Such temporary settlements would only be permitted to remain if these settlements maintained certain infrastructure including, *inter alia*, safe drinking water, electricity, sanitation facilities, and refuse removal.<sup>398</sup> Failure to adhere to these provisions would result in forced evictions and removals. The ERRC argued that these provisions and amendments would only worsen the discrimination faced by Roma, and would subject them to continued threats of forced evictions and other penalties.<sup>399</sup>

The ECSR stated that, flowing from the underlying purposes of the RESC to express solidarity and promote social inclusion, Member States had an obligation to respect differences and ensure that social arrangements do not lead to, or reinforce, social exclusion.<sup>400</sup> The ECSR went on to emphasise that in implementing the RESC, Member States should not only take legal action, but also practical action to give full effect to the RESC.<sup>401</sup> The ultimate responsibility for the proper implementation of policy to give effect to the RESC rights, lies with the Member State.<sup>402</sup> The ECSR found *inter alia* that Greece had failed to take sufficient measures to improve the living conditions of Roma as required by the RESC.<sup>403</sup> It also found, regarding forced evictions and other sanctions, that while eviction may be justified in certain circumstances of illegal occupation, the criteria of such illegal occupation should not be unnecessarily wide, and should take place in a procedurally fair manner that sufficiently protects the rights of people being evicted. The ECSR concluded that the forced evictions of Roma constituted a violation of Article 16 of the RESC.<sup>404</sup>

The ECSR submitted their decision to the CoM who, in a resolution,<sup>405</sup> noted the following: firstly, that the implementation of the Integrated Action Plan (IAP) for the Social Integration of Greek Roma was still in progress, and the evaluation and reform of the IAP were currently ongoing in order to ensure more effective coordination of the IAP between all partners involved; secondly, the extension and revision of the housing

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<sup>397</sup> Article 2(1) Amendment to *SPORIP*.

<sup>398</sup> Article 3(3) and Article 5 Amendment to *SPORIP*.

<sup>399</sup> Muller (n 34) 194.

<sup>400</sup> *ERRC v Greece*, para 19.

<sup>401</sup> *ERRC v Greece*, para 21.

<sup>402</sup> *ERRC v Greece*, para 29.

<sup>403</sup> *ERRC v Greece*, para 42.

<sup>404</sup> *ERRC v Greece*, paras 50-51.

<sup>405</sup> Resolution ResChS (2005) 11 Collective Complaint no. 15/2003 by the European Roma Rights Centre (ERRC) against Greece.

loans programme for Greek Roma; thirdly, that a Commission for the social integration of Greek Roma had been established, and finally, decided not to accede to the request for the reimbursement of costs transmitted by the ECSR.

In *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece*,<sup>406</sup> INTERIGHTS submitted that Greece was still not in conformity with Article 16 of the RESC. It was submitted that Greece was continuing to forcibly evict Roma without providing suitable alternative accommodation or effective remedies. Many Roma still continue to suffer discrimination with regard to access to housing and are living in conditions that fail to meet adequate standards.<sup>407</sup> The ECSR noted, in considering the Recommendation of the Committee of Ministers to member states on policies for Roma and, or, Travellers in Europe,<sup>408</sup> that the forced displacement, discrimination and exclusion for participation in social life have resulted in poverty and disadvantage for the Roma and Traveller people.<sup>409</sup>

The complainant submitted that there were approximately 300,000 Roma living in Greece, with a substantial number living in improvised and dangerous encampments.<sup>410</sup> Further, the complainant submitted that a vast majority of Roma communities live in conditions that fail to meet adequate housing standards.<sup>411</sup> The Greek government contended that the data relied upon was outdated. Further, that the degree of improvement since *ERRC v Greece* should be measured not only in the number of houses constructed by the State, but also by the improvement of living conditions in existing settlements.<sup>412</sup> The complainant also alleged that Greece was in violation of Article 16 of the RESC. This was because the Roma were systematically evicted from sites without prior consultation, without access to effective remedies and rarely provided with suitable alternative accommodation. In support of this, the complainant cited that over a period of four years more than 20 forced evictions affecting over 300 Roma families had taken place,<sup>413</sup> along with numerous demolitions of homes.<sup>414</sup>

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<sup>406</sup> Complaint No. 49/2008, decision on the merits of 11 December 2009.

<sup>407</sup> *INTERIGHTS v Greece*, para 6.

<sup>408</sup> Recommendation CM/Rec (2008)5.

<sup>409</sup> *INTERIGHTS v Greece*, para 11.

<sup>410</sup> *INTERIGHTS v Greece*, para 16.

<sup>411</sup> *INTERIGHTS v Greece*, paras 19-22.

<sup>412</sup> *INTERIGHTS v Greece*, paras 27-34.

<sup>413</sup> *INTERIGHTS v Greece*, paras 41-45.

<sup>414</sup> *INTERIGHTS v Greece*, para 46.

The ECSR *inter alia* recalled that 'States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available'.<sup>415</sup> The ECSR held that while:

a person or group of persons, who cannot effectively benefit from the rights provided by the legislation, may be obliged to adopt reprehensible behaviour in order to satisfy their need...this circumstance can neither be held to justify any sanction or measure towards these persons, nor be held to continue depriving them of benefiting their rights.<sup>416</sup>

According to the ECSR, the Greek government failed to prove that there were sufficient procedural measures in place for those Roma evicted, such as prior consultation, notice and suitable alternative accommodation being provided.<sup>417</sup> The ECSR held that there did exist a serious number of Roma being unlawfully and forcibly evicted in breach of Article 16 of the RESC.<sup>418</sup>

This decision was submitted to the CoM and a resolution was made.<sup>419</sup> The CoM noted that the statement made by Greece and the information communicated on the follow-up to the decision, as well as the measures that had already been taken. Greece's commitment to bring the situation into conformity with the RESC was welcomed, and, so too was the anticipated reporting from Greece that the situation had improved and been brought into full conformity with the RESC.

### 3.3.3.3. *Italy*

In *European Roma Rights Centre v Italy*,<sup>420</sup> the complainant alleged that the housing situation of Roma constituted a violation of Article 31 of the RESC. This is due to Roma being discriminated against. It was also alleged that Roma were denied the effective right to housing as a result of, *inter alia*, the shortage and inadequate living conditions of camping sites, the forced evictions Roma were often subject to, and that there was

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<sup>415</sup> *INTERIGHTS v Greece*, para 57, and *FEANTSA v France*, Complaint No.39/2006, decision on the merits of 5 December 2007, para 163.

<sup>416</sup> *European Roma Rights Centre v Bulgaria*, Complaint No. 36/2005, decision on the merits of 18 October 2006, para 53.

<sup>417</sup> *INTERIGHTS v Greece*, paras 62-63.

<sup>418</sup> *INTERIGHTS v Greece*, paras 68-70.

<sup>419</sup> Resolution CM/ResChS (2011) 8: Collective Complaint No. 39/2008 by the International Centre for the Legal Protection of Human Rights (INTERIGHTS) against Greece.

<sup>420</sup> Complaint No. 27/2004, decision on the merits of 7 December 2005.

little to no access to accommodation other than these camping sites.<sup>421</sup> The Italian government *inter alia* contended that the majority of Roma in Italy were not covered by the protection of the RESC. This was because of the Roma not being nationals, lawful residents, or working regularly within the territory of Italy as a Member State.<sup>422</sup> For those Roma that were in Italy illegally, the complainant contended that this was due to discrimination and the systematic refusal of the Italian government to grant them legal status.<sup>423</sup>

The ECSR found that Italy had failed to show that adequate steps were taken to ensure Roma were offered housing of an adequate standard. Importantly, that steps hadn't been taken to ensure local authorities fulfilled this responsibility.<sup>424</sup> The complainant used the example of the 2004 eviction of the Via Adda 14 building in Milan to further contend that Roma were subject to the practice and threats of forced evictions, systematic destruction of property, and invasion of Roma dwellings by Italian authorities.<sup>425</sup> Furthermore, it was alleged that evictions from unauthorised camping sites were often carried out without procedural safeguards and were accompanied by the destruction of personal belongings. The ECSR found that Italy failed to establish that the relevant evictions were not carried out in a just manner respecting the dignity of those evicted. Moreover, Italy's failure to refute the claims of unjustified violence suffered during these evictions was found to constitute a violation of Article 31(2) of the RESC and amounted to discrimination.<sup>426</sup>

The ECSR submitted their decision to the CoM. The CoM noted, *inter alia*:<sup>427</sup> firstly, the measures already taken by the Italian authorities at local and national level; secondly, the statement made by Italy that it would undertake to bring the situation into conformity with the RESC by increasing these measures, including the adoption of a legislative framework, and; finally, Italy would report, on the occasion of the submission of the next report concerning the relevant provisions of the RESC, that the situation had improved and to keep the CoM regularly informed of all progress made.

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<sup>421</sup> *ERRC v Italy*, para 5.

<sup>422</sup> *ERRC v Italy*, para 6.

<sup>423</sup> *ERRC v Italy*, para 16.

<sup>424</sup> *ERRC v Italy*, para 37.

<sup>425</sup> *ERRC v Italy*, paras 38-39.

<sup>426</sup> *ERRC v Italy*, paras 41-42.

<sup>427</sup> Resolution ResChS (2006) 4 Complaint No. 27/2004 by the European Roma Rights Centre against Italy.



In *Centre on Housing Rights and Evictions (COHRE) v Italy*,<sup>428</sup> the complainant alleged that the adoption of 'Pacts for Security' and of the 'Nomad' state of emergency Decrees, and the implementation of Order and Guidelines have constituted deliberate retrogressive steps that failed to address the violations found in *ERRC v Italy*.<sup>429</sup> The complainant also alleged that there is both a *de facto* and *de jure* segregation regarding the housing of Roma, and Sinti,<sup>430</sup> that has worsened living conditions contrary to the RESC.<sup>431</sup> It was also alleged that the policy of segregating Roma and Sinti in ghettos denies them access to adequate housing and protection of family life.<sup>432</sup> In addition, the reference to 'nomads' as a threat to national security has contributed to racist and xenophobic propaganda.<sup>433</sup> As a result, Roma and Sinti have been deprived of protection and assistance regarding access to housing and, in cases of forced evictions, from housing and expulsions from the territory.<sup>434</sup>

Relying *inter alia* on the Memorandum by Mr Hammarberg, Council of Europe Commissioner for Human Rights,<sup>435</sup> the ECSR found that the living conditions of Roma and Sinti in camps worsened following the adoption of the 'security measures' at challenge.<sup>436</sup> Therefore, the situation of the living conditions of Roma and Sinti in camps or similar settlements in Italy constituted a violation of Article E read with Article 31(1) of the RESC.<sup>437</sup> Furthermore, regarding the issue of evictions and Article 31(2) of the RESC, the ECSR found that Italy failed to demonstrate that the numerous examples of evictions (highlighted by COHRE) were conducted in a manner that respected the dignity of those being evicted. It stated that the government had an obligation, under Article 31 of the RESC, to avoid criminal actions being perpetrated against Roma and Sinti settlements by individuals or organised groups. In the final instance, the ECSR pointed out that where such violence is allegedly perpetrated by police officials, the authorities had an obligation to fully investigate such allegations.<sup>438</sup>

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<sup>428</sup> Complaint No. 58/2009, decision on the merits of 25 June 2010.

<sup>429</sup> *COHRE v Italy*, para 11.

<sup>430</sup> The Sinti are a subgroup of Romani people.

<sup>431</sup> N429 above.

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*

<sup>435</sup> Following his visit to Italy on 19-20 June 2008, CommDh (2008) 18.

<sup>436</sup> *COHRE v Italy*, paras 55-58.

<sup>437</sup> *COHRE v Italy*, para 59.

<sup>438</sup> *COHRE v Italy*, para 67-68.

Given consideration of a number of reports,<sup>439</sup> as well as the evidence presented by the complainant, the ECSR found that the evictions of Roma and Sinti continued to be carried out in Italy without respecting the dignity of the persons concerned. Moreover, that Italy failed to refute the allegations that Roma had suffered unjustified violence during evictions, including by police, and have had their property destroyed.<sup>440</sup> Therefore, the ECSR concluded that the practice of eviction of Roma and Sinti in Italy, as well as the often accompanying violence, constituted a violation of Article E, read with Article 31(2) of the RESC.<sup>441</sup> The ECSR continued to find numerous violations of the RESC in Italy on the grounds of discrimination (Article E, read with a number of other rights).<sup>442</sup>

Upon submission of the decision, the CoM made a resolution.<sup>443</sup> It noted the statement made by Italy and the information communicated thereby. Italy's commitment to ensure the effective implementation of the rights deriving from the RESC for every individual was also noted. The CoM anticipated Italy's report that the situation had been brought into full conformity with the RESC.

#### 3.3.3.4. Czech Republic

In *European Roma and Travellers Forum v the Czech Republic*,<sup>444</sup> the complaint submitted by the European Roma and Travellers Forum (ERTF) alleged that the Czech Republic failed to adequately protect the housing and health care rights of Roma, in that, *inter alia*, they suffered from a lack of accessible housing, residential segregation, inadequate living conditions and forced evictions, in breach of Article 16 read with the Preamble of the RESC.<sup>445</sup> The ERTF proceeded to allege *inter alia* that there was inadequate funding for, and there existed no systematic policy on, social housing in the Czech Republic. The lack of policy and funding was alleged to have an impact on the most socially disadvantaged, particularly the Roma,<sup>446</sup> a consequence

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<sup>439</sup> See, the *Advisory Committee on the Framework Convention for the Protection of National Minorities' second opinion on Italy*, document ACFC/INF/OP/II (2005) 003, and CommDH (2008) 18.

<sup>440</sup> *COHRE v Italy*, para 73.

<sup>441</sup> *COHRE v Italy*, para 79.

<sup>442</sup> *COHRE v Italy*, Second Part to Fourth Part.

<sup>443</sup> Resolution CM/ResChS (2010) 8: Collective Complaint No. 58/2009 by the Centre on Housing Rights and Evictions (COHRE) against Italy.

<sup>444</sup> Complaint No. 104/2014, decision on the merits of 17 May 2016.

<sup>445</sup> *ERTF v Czech Republic*, para 10.

<sup>446</sup> *ERTF v Czech Republic*, paras 24-25.

of which had led to residential segregation of the Roma.<sup>447</sup> Furthermore, in certain circumstances, this lack of policy resulted in landlords being able to evict tenants from property without a court order.<sup>448</sup> The ERTF provided examples of the evictions of Roma that took place in Ostrava with little more than 24 hours' notice, where only some of the families were offered alternative accommodation – these evictions were found to be inadequate by Amnesty International.<sup>449</sup> The ERTF also used the example of the evictions that took place in Usti nad Labem. These evictions took place with inadequate prior consultation and little effort to find suitable alternative accommodation. As a result of this, many families were forced to live in residential hostels.<sup>450</sup>

The Czech Government contested the allegations by *inter alia* arguing that Article 16 of the RESC barely encompasses the right to housing, as enshrined in Article 31 of the RESC, which had not been ratified by the Czech Republic.<sup>451</sup> It continued to contest that there exists social and legislative policies for social housing, some of which are aimed at specific vulnerable groups including the Roma people.<sup>452</sup> Moreover, that the forced evictions only occurred when an eviction order had been granted by the courts against an unlawful occupier, and that such evictions were only ordered where compatible with 'good manners' according to Article 2(3) of the Czech Civil Code.<sup>453</sup>

The ECSR noted that the notions of adequate housing and forced eviction were identical under Articles 16 and 31 of the RESC, and that housing issues can arise from Article 16 of the RESC.<sup>454</sup> It proceeded to state that in order for States to satisfy Article 16 of the RESC, they must promote the provision of an adequate supply of housing. According to the ECSR, this would entail taking the needs of families into account in housing policies and ensure such housing is of an adequate standard and includes

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<sup>447</sup> *ERTF v Czech Republic*, para 29.

<sup>448</sup> *ERTF v Czech Republic*, para 38. Further, reference is made in paragraph 39 and 40 to the Building Act and the Civil Code, which respectively permit the demolition of a building which poses a threat to life or health and permit the termination of a lease agreement without court approval.

<sup>449</sup> *ERTF v Czech Republic*, para 41.

<sup>450</sup> *ERTF v Czech Republic*, para 42.

<sup>451</sup> *ERTF v Czech Republic*, para 43.

<sup>452</sup> *ERTF v Czech Republic*, paras 44-51.

<sup>453</sup> *ERTF v Czech Republic*, paras 52-53.

<sup>454</sup> *ERTF v Czech Republic*, para 68.

essential services.<sup>455</sup> Further, that those rights recognised in the RESC must take a concrete and effective form.<sup>456</sup> This would mean States must *inter alia* adopt the necessary legal means of ensuring steady progress towards achieving the goals laid down by the charter, and pay close attention to the impact of such policies on the persons concerned, particularly the most vulnerable.<sup>457</sup> The ECSR observed that while the Czech Republic has provided broad information on certain measures to increase availability of housing, such information lacks detail particularly in the context of housing, and that there exists much evidence that Roma were being socially excluded and discriminated against in the housing context.<sup>458</sup> The ECSR continued in recalling that in order to comply with the RESC, it is well established that legal protection for persons threatened with eviction must be prescribed by law, even if illegal occupation may justify eviction. When such evictions do take place, they must *inter alia* be carried out under conditions respecting the dignity of the persons concerned, and be governed by rules sufficiently protecting the rights of the persons being evicted.<sup>459</sup> The ECSR found that the legislation permitting evictions failed to adequately ensure the necessary safeguards required by Article 16 of the RESC.

The ECSR accordingly concluded that there was a violation of Article 16 of the RESC, regarding the housing rights and evictions of Roma in the Czech Republic. This conclusion was submitted to the CoM who resolved and noted,<sup>460</sup> *inter alia*, that while disagreeing with some parts of the report, the Czech Government would continue its efforts in the area of Roma integration and would update the CoM on future developments.

### 3.3.3.5. Bulgaria

In *European Roma Rights Centre (ERRC) v Bulgaria*,<sup>461</sup> the complainant alleged that Bulgaria discriminated against Roma in the context of housing. This was because Roma families were segregated in housing matters, lacked legal security of tenure,

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<sup>455</sup> *ERTF v Czech Republic*, para 70.

<sup>456</sup> *ERTF v Czech Republic*, para 71. See also *International Commission of Jurists v Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, para 32.

<sup>457</sup> *ERTF v Czech Republic*, para 72.

<sup>458</sup> *ERTF v Czech Republic*, paras 75-77.

<sup>459</sup> *ERTF v Czech Republic*, paras 80-82.

<sup>460</sup> Resolution CM/ResChS (2017) 2: *ERTF v Czech Republic*, Complaint No 104/2014.

<sup>461</sup> Complaint No. 31/2005, decision on the merits of 18 October 2006.

were subject to forced evictions, and were forced to live in substandard conditions, in breach of Article 16 of the RESC.<sup>462</sup> The Bulgarian government contended that the complaint was unfounded as Bulgaria had not accepted Article 31 of the RESC, which, it argued, should have been the foundation for such a complaint. The complainant contended that housing rights were fundamental to the development of family life, and Bulgaria had accepted the right to housing as encompassed by Article 16 of the RESC.<sup>463</sup>

The ECSR held that upon ratification into Bulgarian law, due to the nature of their constitution,<sup>464</sup> the RESC was incorporated with a status higher than statutory law. In this regard, the right to adequate housing, which *inter alia* includes security of tenure, is therefore a part of their domestic law.<sup>465</sup> Thus, the inadequate status of housing and lack of proper amenities for Romani families constituted a violation of Article 16 of the RESC. Furthermore, regarding the lack of security of tenure and forced evictions, the complainant alleged that the Roma were disproportionately exposed due to Bulgarian legislation.<sup>466</sup>

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<sup>462</sup> *ERRC v Bulgaria*, para 7.

<sup>463</sup> *ERRC v Bulgaria*, paras 13-14.

<sup>464</sup> Article 5(4) of the Bulgarian Constitution.

<sup>465</sup> *ERRC v Bulgaria*, paras 33-34.

<sup>466</sup> *ERRC v Bulgaria*, paras 44-48. The state and municipal laws in question, which allow for the forced evictions of Roma, given the often illegally built structures and settlements of the Roma people, without any compensation for demolition or alternative housing being provided, are as follows:

Law on Municipal Property (1996), Article 65:

- (1) A municipal property which is in possession or is being held on no legitimate grounds, is not being used as designed, or the need for which is no longer there, shall be seized on the basis of an order of the mayor of the municipality.
- (2) The order to seize a property shall be executed under an administrative procedure with the assistance of the National Police authorities.
- (3) The order under paragraph (1) can be appealed in the order of the Administrative Procedure Act. Appeal shall not suspend the execution of the order, unless the court rules otherwise.

Law on State Property (1996), Article 80:

- (1) Any State property held in possession or tenure without any legal grounds, or such as shall be used inappropriately or such of which the purpose shall have ceased to exist shall be repossessed by the order of the competent Regional Governor.
- (2) The order of the Regional Governor to repossess such property shall be implemented by administrative procedure and enforced by the National Police authorities.
- (3) The order under paragraph 1 above shall be subject to appeal in accordance with the procedure laid down in the Administrative Procedure Act. The appeal shall not have suspensory effect, unless otherwise provided by court decree.

Territorial Planning Law (2001):

Article 16(3) - Any illegal construction works, commenced after the 30th day of June 1998 but not legalized prior to the promulgation of this Act, shall not be removed if the said works were tolerable under the effective detailed urban development plans and under the rules and standard specifications effective during the said period and according to this Act, and if declared by the owners thereof to the approving authorities within six months after the promulgation of this Act.

The ECSR held *inter alia* that it is the state's responsibility to ensure that when evictions are carried out they are conducted in such a manner as to respect the dignity of the persons concerned, regardless of whether or not they are illegal occupants, and to provide alternative accommodation or other compensation.<sup>467</sup> The ECSR also held that while the legislation may not specifically target Roma, it has the indirect effect of discriminating against them as they were disproportionately affected by the legislation, and that the evictions carried out did not satisfy the conditions of the RESC. Therefore, the situation facing Roma regarding lack of security of tenure and facing forced evictions was a violation of Article 16 of the RESC.<sup>468</sup>

After the ECSR submitted their decision, the CoM issued a resolution.<sup>469</sup> The CoM noted the undertaking of Bulgaria to bring the situation into conformity with the RESC, through the implementation of measures to improve the housing situation of Roma. The CoM also expected to be regularly informed of all progress made and that Bulgaria's next report would show that the situation had improved.

### 3.3.4. Conclusion

Article 31 of the RESC clearly provides for housing rights and, read with Articles 11, 16, and 30, reinforces protection against unlawful and forced evictions. The ECSR, in implementing and enforcing the RESC, has developed a substantive understanding of the purpose and scope of the rights to family protection, the right to dignity, the right to housing and the right to protection against poverty and social exclusion,<sup>470</sup> as these rights, among others, relate to housing rights and the protection against unlawful evictions.

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Article 222(1) - (Amended, SG No. 65/2003) The Chief of the National Construction Control Directorate or an official authorized thereby shall perform the following functions, acting within the competence vested therein:

1. suspend illegal construction works;
2. suspend construction works, parts thereof, or individual building and erection works performed in deviation from the construction file as approved, and permit resumption after rectification of violations and payment of the fines and pecuniary penalties due;
3. bar access to construction works referred to in Items 1 and 2 and direct the placing of signs restricting the access of people and machinery and barring them from any such construction works;
4. ban the supply of electricity and heat, running water and gas to construction works referred to in Items 1 and 2

<sup>467</sup> *ERRC v Bulgaria*, para 56.

<sup>468</sup> *ERRC v Bulgaria*, para 57.

<sup>469</sup> Resolution CM/ResChS (2007) 2 Collective Complaint no. 31/2005 by the European Roma Rights Centre against Bulgaria.

<sup>470</sup> Muller (n 34) 212.

With regard to Article 31 of the RESC, the ECSR found that, while evictions may be permitted in certain circumstances, the criteria of illegal occupation should not be unnecessarily wide and that evictions should take place in such a manner so as to be adequately protective of the rights of those concerned.<sup>471</sup> Further, where evictions are justified they must be conducted in such a manner so as to still respect the dignity of those affected.<sup>472</sup> Moreover, the necessary procedural safeguards should be implemented to ensure that evictions are carried out with guaranteed and due respect for every person's dignity, and without violence being resorted to during such evictions.<sup>473</sup>

The ECSR, through the aforementioned cases and the RESC, has been able to identify numerous systemic issues and practices that have unlawfully prevented Roma, as a vulnerable group, from access to adequate housing and have subjected them to numerous events of unlawful evictions. The ECSR has gone on to state that while certain groups may be forced to adopt reprehensible behaviour, such as unlawful occupation, this does not justify unjust sanctions or deprivation of their rights or protections under the law.<sup>474</sup> Through an incorporation of the right to non-discrimination in Article E of the RESC, the ECSR has been able to advance its interpretation of housing rights and protection against unlawful evictions. This has made it easier for the ECSR to enforce and accept that the rights and needs of vulnerable groups such as the Roma require special consideration in domestic law and policy.<sup>475</sup>

The repeated consensus of the RESC, as can be seen from the aforementioned cases, is that regardless of the circumstances resulting in unlawful occupation, the rights of those being evicted (where just, reasonable, and lawful to do so) should still be protected and they should still be treated with dignity. Such a clear underscoring of this principle can clearly guide the interpretation and development of domestic policy and law. Very importantly, this would ensure that the conduct during evictions is prescribed in such a manner so as to ensure that no unnecessary and unlawful violations and infringements of the rights of the people concerned occur.

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<sup>471</sup> *ERRC v Greece* para 51.

<sup>472</sup> *FEANTSA v France* para 163. See also ECSR *Conclusions 2007* (Finland) on Article 31(2).

<sup>473</sup> ECSR *Conclusions 2007* (Italy) and ECSR *Conclusions 2011* 252 (Italy).

<sup>474</sup> *ERRC v Bulgaria*, para 53.

<sup>475</sup> *Muller* (n 34) 213.

Accordingly, South Africa should take heed of the lessons learnt by the ECSR in applying, upholding, and interpreting the RESC in the context of housing rights. In doing so, South Africa would be better equipped to interpret and develop PIE and its application, particularly in the context of the use of force in evictions. South African courts would be well within their rights and duty to utilise the jurisprudence of foreign law in developing and protecting these rights, in terms of section 39(1)(c) of the Constitution. Further, given the similarities in the treatment and evictions of Roma across Europe to those facing mass evictions in South Africa, clear and easily applicable examples can be transplanted to ensure adequate protection of the vulnerable in South Africa.

### 3.4. Conclusion

The perpetual insecurity of people facing the practice of forced and unlawful evictions, together with the frequent concurrent use of force and physical violence, clearly reveals the personal and collective trauma inevitably faced by and inflicted on those faced with these practices.<sup>476</sup> As can be seen from the above international and foreign instruments and case law, there has been a clear recognition of the negative human rights implications that can and do result from evictions, particularly mass evictions. There appears to be a general consensus that the practice of unlawful evictions and evictions that employ violence or intimidation is unacceptable as it has disastrous consequences on the fundamental human rights of those being evicted. However, despite such consensus and the existence of human rights norms and guidelines, the manner in which evictions often occur, either by the state or private actors, involving violence and intimidation as a means of facilitating such evictions, remains disturbingly common.<sup>477</sup>

The international and foreign communities alike have, when presented with cases of unlawful and/or forced evictions, taken reactive and progressive steps to address such violations. These communities further attempted to put measures in place to curb practices of unlawful violations of fundamental rights, such as adopting guidelines and adapting the interpretation, and enforcing, of the international and foreign instruments that already exist. These measures would be well suited as a

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<sup>476</sup> UNHRC *Forced Evictions and Human Rights: Fact Sheet No. 25* (1996), 4.

<sup>477</sup> *Forced Evictions and Human Rights: Fact Sheet No. 25*, 11-12.



guiding framework from which South Africa could address the shortcomings identified above within its own domestic legislation and approach in dealing with unlawful evictions.

In the face of such violations, it becomes clearer that the Bill of Rights should be seen not only as a catalogue of rights, which certain legislation is enacted to give effect to, but also as a guideline for the systemic transformation of the legal system.<sup>478</sup> In the current circumstances, the Bill of Rights should also be seen as the guideline for the transformation of eviction law and protection against such violations.

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<sup>478</sup> *Property and Constitution*, 111.

## 4. Conclusion and Recommendations

Throughout recent history, South African eviction law has undergone significant changes. The procedural protections and substantive safeguards against illegal evictions and unlawful occupation has come into existence and since drastically expanded through PIE. However, the mere fact that the practice of unlawful and forced evictions continues in such a manner so as to violate the right of access to adequate housing, and other human rights by implication, can only mean that there exists a significant gap between legal norms and practice.<sup>479</sup> The recurrence of violence and intimidation during evictions is a blatant infringement of fundamental and internationally recognised human rights. Despite there being existing legislation and measures in place to provide procedural and substantive safeguards, it is a practice that evidences the inadequacy of such measures.

This continued practice raises the core question posed by this dissertation, namely whether unlawful occupiers can be afforded greater procedural and substantive protection through a transformative interpretation of the use of force during the execution of eviction orders in South Africa. Not only does this practice raise the aforementioned question, it also directly elucidates the call for greater procedural and substantive protection against the use of force during the execution of eviction orders, and the need for a transformative interpretation to provide therefor.

Chapter 2 of this dissertation was focused on providing the current framework that exists to provide the measures in place to protect against unlawful evictions, and to highlight the balance that must be struck between the intertwining rights involved in the eviction process. The current measures in place to provide safeguards against illegal evictions, which were discussed in chapter 2, provide significantly for a just and equitable procedure in the granting of an eviction order. However, it was made clear that there exists little in the way of procedural and substantive measures for conduct during evictions. As such, the principle of just and equitable evictions comes into question when evictions leave room for the violation of unlawful occupiers' fundamental rights.

Section 4(11) of PIE provides *inter alia* that a sheriff may be assisted, upon approval by the court, by third parties in the execution of an eviction order. In this

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<sup>479</sup> Commission on Human Rights, *Forced evictions: Analytical report compiled by the Secretary-General pursuant to Commission resolution 1993/77*, 7 December 1993, E/CN.4/1994/20, 36.

section, there is no provision made for the conduct to be adhered to by the sheriff or any assisting party during the execution of an eviction order. Accordingly, there is no provision as to the use of force during an eviction order. Thus, it is necessary to analyse complementary legislation, being the legislation governing sheriffs and other relevant third parties. The analysis is done in order to determine whether or not adequate provision is made for the substantive and procedural safeguards against the use of force during the execution of an eviction order.

Through an analysis of PIE's complementary statutes and frameworks in this regard, being the Sheriff's Act, the SAPS Act, and PSIRA, it was made evident that while there exists broad provision for the general conduct of each body and the consequences of non-compliance therewith, there is little in the way of providing for specific conduct allowable during evictions particularly as it relates to the use of force therein. Furthermore, it should be noted that the consequences of non-compliance with the regulatory framework in terms of the general codes of conduct for each body are somewhat lacklustre, if intended to prescribe the use of force during the execution of eviction orders. In fact, it should be clear that PIE, the Sheriffs Act, the SAPS Act and PSIRA (individually or read together) do not adequately provide the necessary substantive and procedural safeguards that should be in place to protect against violations of the rights of unlawful occupiers during an eviction due to the use of force.

This means, based on the principle of subsidiarity, that a constitutional challenge would be possible on the basis that neither PIE nor its complementary statutes adequately provide for prescribed conduct as it relates to the use of force during evictions and mass evictions.

On an analysis of various case law, particularly in the *Modderklip* case, the growing need for third parties to assist the sheriff becomes clearer. Thus, when analysed in conjunction with cases such as *SAHRC v Cape Town* and the like, the growing risk of violations during evictions becomes ever more apparent.

Therefore, chapter 2, while providing an overview of the existing South African framework for mass evictions and the conduct thereof, highlights the inadequacies of the current framework and the need to prescribe and provide for conduct as it relates to the use of force in mass evictions. Furthermore, chapter 2 evidences the need for, and possibility of, South Africa expanding its interpretation and development of the existing legal regime to adequately provide the necessary substantive and procedural protections for unlawful occupiers.

It is evident that there is a need, which was made clear by the highlighted inadequacies in chapter 2, for the development of eviction law with regard to the use of force and conduct during evictions and mass evictions. This need and the current status quo, as evidenced in the case law discussed therein, is testament to the fact that South African courts have either struggled or refused to engage with development in this regard. The struggle or refusal is why lessons should be learnt and experience gained from both foreign and international sources.

The plethora of international sources, both hard and soft international law, provide a useful framework within which to further develop South African eviction law, particularly in the context of conduct during evictions. Based on the core premise that every person has inherent dignity, and such dignity should be respected and upheld even during evictions, the principles within which South African law can be developed should start to take shape. It is this fundamental principle of inherent dignity, which synergises with the other fundamental principles of the Bill of Rights, that governs the international framework governing eviction.

Not only do the international sources emphasise this principle of dignity, but they also make clear the interwoven nature of rights as they relate to eviction. It is imperative to note that no person should be arbitrarily deprived of these rights. Furthermore, while not necessarily directly drafted in respect of evictions, the principles relating to the use of force provide significant insight as to how the South African approach can be adapted to adequately provide for the use of force in evictions.

The key principle, as it relates to the use of force, is that the use of force, particularly lethal force, should be avoided and a course of last resort. The requirements laid down by international law are that non-violent measures should be attempted where possible, and the use of force should only be resorted to when such use is necessary, reasonable, and proportional to the threat faced. These are the internationally accepted constraints on the use of force, and at no point should force be utilised to intimidate or to effect a court order, where same does not comply with the requirements on the use of force and is not an absolute necessity.

The fundamental principle of inherent dignity, along with the guidelines on the use of force, evidence the intention, and generally accepted norms, of the international community. This is such that, when applied in the context of evictions, for any eviction to take place lawfully such process must *inter alia* respect the dignity of those being

evicted. This would mean that the use of force should be avoided and only relied upon by persons where such force is necessary, reasonable, and proportional to the threat faced.

From the international sources, as discussed in depth in chapter 3, the South African courts and the legislature should be easily guided in their development of South African eviction law, particularly as it relates to the conduct and use of force during evictions. The inadequate substantive and procedural protection, established in chapter 2, belies South Africa's Constitution and international obligations. All too often, the inherent dignity of unlawful occupiers, and other related rights, risk serious violation during evictions as should be clear from the above-discussed South African case law. This is particularly so during mass evictions where sheriffs require the assistance of SAPS or eviction specialists, and it is this clarity that demands that changes be made.

While international sources may provide the broad overarching principles by which the South African inadequacies need to be addressed, it is the stark comparison that can be drawn with the treatment of Roma in foreign jurisdictions to the plight of unlawful occupiers in South Africa. This comparison provides the finer detail by which South African courts and legislature can learn to adapt, enhance, and develop prescriptive conduct during evictions particularly as it relates to the use of force in evictions. Thus, it creates a transformed interpretation of the use of force in evictions to better provide substantive and procedural protections for unlawful occupiers.

Through an analysis of the RESC and foreign case law in chapter 3, the fundamental principles highlighted in international law that are affected by evictions, especially in regard to dignity and the interwoven nature of various socio-economic rights, are brought to the fore once more.

It is as a result of the violent displacement and callous forced removals of Roma, highlighted in the case law in chapter 3, that Europe has expanded its social and economic protection of occupiers. The constant reiteration of anti-discriminatory practices and measures that respect the dignity and socio-economic rights of occupiers, has provided a robust catalogue from which South Africa can develop its substantive and procedural protections of unlawful occupiers during the execution of eviction orders.

As can be seen throughout this dissertation, there is no single perfect system that can prescribe conduct during evictions. However, the intention of the South

African legislature through the enacting of PIE was *inter alia* to prevent illegal evictions. Very importantly, to prevent evictions that unnecessarily violate and threaten the rights of unlawful occupiers, a principle that South African courts have attempted to uphold. However, it has been shown that there are glaring inadequacies within PIE in the inadequate substantive and procedural protections afforded to unlawful occupiers during the execution of eviction orders. These inadequacies have allowed, and continue to allow, violations of unlawful occupiers' rights. They have also permitted scare tactics and the use of force and intimidation to be utilised by persons effecting the eviction, particularly in cases of mass eviction.

Furthermore, it has been made evident that in addition to PIE being inadequate, the complementary statutes and rules that govern third parties who are entitled to assist the sheriff in executing eviction orders in terms of section 4(11) of PIE, also fail to provide the necessary substantive and procedural protections. What is surprising in this regard is that, despite provision being made for it, no regulations have been published in terms of PIE that would assist and provide further clarity on various matters including the one in question.

Accordingly, as can be learnt from both international and foreign law, the South African courts and the legislature should take proactive measures to provide for the procedural and substantive protection of unlawful occupiers in such a manner as to prescribe the use of force and other conduct during evictions.

As PIE already has the provision for regulations to be published in terms thereof, it would not be necessary to amend PIE itself. However, regulations should be issued either in terms of PIE or its complementary statutes or both, which would prescribe the use of force during evictions and prescribe the conduct of third parties assisting the sheriff in terms of section 4(11) of PIE. If appropriate consideration is given to the core principles of dignity and proportional, necessary, and reasonable force, as learnt from international and foreign sources, then such regulations could easily provide the transformative interpretation necessary to create substantive and procedural protection for unlawful occupiers against the use of force.

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