BALANCING THE RIGHT TO PEACEFUL USE AND ENJOYMENT OF PRIVATE PROPERTY WITH THE RIGHT OF ACCESS TO ADEQUATE HOUSING AND THE GOVERNMENT'S LEGITIMATE INTEREST THERETO.

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ABSTRACT

In the pre-constitutional dispensation, the courts could grant an eviction order without considering the risk of homelessness to the evictees. This was possible because there was no constitutional right of access to adequate housing, and there was no law obligating the government to provide alternative accommodation to vulnerable evictees. In this context, the owner's right to peaceful use and enjoyment of private property to the exclusion of non-owners was absolute and it trumped the interests of the unlawful occupiers. Notably, this legal framework favoured historical landowners, while undermining the historical dispossession of land which in turn impacted on vulnerable evictees' housing interests.

In the new constitutional dispensation, there is a shift away from the pre-constitutional legal framework. The eviction landscape has been transformed by section 26 of the Constitution which gives everyone the right of access to adequate housing and not to be arbitrarily evicted. Section 26 further obliges the state to take all reasonable steps to realise the right of access to adequate housing. The subsequent promulgation of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 ("PIE") gives effect to section 26 of the Constitution. Accordingly, evictions are now qualified in terms of section 26 of the Constitution.

In a situation where unlawful occupiers have no prospect of finding alternative accommodation of their own, a court may order local government to provide them with temporary alternative accommodation. Therefore, in the new constitutional dispensation the government has a constitutional duty to provide alternative accommodation to vulnerable evictees. Notably, the government has a central legitimate interest in evictions. To the extent that the government cannot provide alternative accommodation, a court may refuse to grant an eviction order or may suspend it until the government makes such provision. This new development aims to infuse the principles of justice and equity into South African eviction law by balancing and reconciling the landowners' interests with those of the unlawful occupiers.

However, this transformative development is hindered by the government's failure to play its central role, in the sense that if the government fails to provide alternative

accommodation or provides an inadequate form of alternative accommodation the eviction will be refused or delayed. As a result, the landowners' property rights and the unlawful occupiers' housing rights will be compromised. Ultimately, the courts' balancing approach will be hampered. Therefore, this study indicates that the government has failed to play its central role in evictions. As such, balancing the landowners and the unlawful occupiers' opposed interests in the context of eviction is a complex exercise. The study concludes that it is impossible to balance the relevant rights without the meaningful involvement of government.

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LIST OF ABBREVIATIONS

AD	Appellate Division
PER/PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR/PL	Suid-Afrikaanse Publiekreg / South African Public Law
SCA	Supreme Court of Appeal
SERI	Socio-Economic Rights Institute of South Africa
TEA	Temporary Emergency Accommodation
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

CHAPTER ONE

Introduction

1.1 Introduction and background

In *Port Elizabeth Municipality v Various Occupiers*,[1] Sachs J made the following transformative points:

> "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[2]

The above quotation is representative of the background upon which this study is premised. It is upon this background that the heart of this study rests on the balancing of the right to peaceful use and enjoyment of private property with the right of access to adequate housing and the government's legitimate interest thereto. The *PE Municipality* case illuminates the Constitutional court's approach to the right of access to adequate housing where private land has been occupied by those who cannot afford alternative accommodation of their own. The right to peaceful use and enjoyment of private property is a traditionally strong property right whilst the right of access to adequate housing is a historically weak tenure right.[3] Notably, in the pre-constitutional

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[1] 2005 (1) SA 217 (CC) *("PE Municipality")*. See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd and Another* 2012 (2) SA 104 (CC) ("*Blue Moonlight*").
[2] *PE Municipality* para 23 (note 1 above).
[3] S Samaai *Evictions; towards a transformative interpretation of the constitutional requirement of considering 'all relevant circumstances'* LLM dissertation University of the Western Cape (2006) 5.

dispensation the landowner was entitled to evict any persons unlawfully occupying his property and the court could grant an eviction order without considering the risk of homelessness to the evictees.[4] Even worse, the state had no obligation to provide alternative accommodation to the evictees.[5] This meant that the evicted occupiers had to find alternative accommodation on their own or face the risk of homelessness. Eviction laws and remedies exclusively protected landowners against any persons interfering with their exclusive use and enjoyment of their property. Because ownership was afforded absolute protection over and above the interests of the unlawful occupiers, evictees were susceptible to arbitrary and unfair evictions.[6] As the result, homelessness was an ultimate and inevitable consequence.

In the new constitutional dispensation, no person may be evicted without being provided with alternative accommodation. The state's obligation in this respect is only limited to those evictees who cannot afford to provide alternative accommodation for themselves.[7] To this end, the landowner's right to evict is qualified in terms of section 26 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Thus, if the court grants an eviction without considering all the relevant factors or at least the housing needs of the unlawful occupiers, such eviction is deemed to be unconstitutional.[8] At the same time, the unlawful occupation can result in a violation of the landowner's common law right to peaceful use and enjoyment of private property. To some extent, this may ultimately result in the arbitrary deprivation of private property rights which is prohibited by section 25(1) of the Constitution.[9] Therefore, when dealing with evictions the courts are enjoined to strike an equitable balance between the ownership rights and the right of access to adequate housing.

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[4] See the common law principles governing the *rei vindicatio* as well as the *Prevention of Illegal Squatting Act* 52 of 1951 (PISA).

[5] For example, this was possible in terms of the *rei vindicatio* and PISA. See chapter 2 for more extensive discussion of these eviction remedies.

[6] As such the security of tenure was hugely affected and this harm was transited to the new constitutional dispensation. See *Molusi and Others v Voges No and Others* 2016 (3) SA 370 (CC*).*

[7] See section 26 of the Constitution; *the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998*; PE Municipality;* and *Blue Moonlight* (note 1 above). This new legal framework is fully discussed in chapter 3 of this study. The purpose of this is to heal the problem of homelessness which is a direct consequence of apartheid laws and practices, see *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 35.

[8] See the discussion on "justice and equity" in chapter 3 of this study.

[9] See *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty)* [2004] 3 All SA 169 (SCA) ("*Modderklip* SCA") para 28.

Ownership is described as the most complete real right a person can have in relation to a thing.[10] At common law, the right of ownership entitled the owner to exclusive use and enjoyment of his property and to ultimately vindicate his property from any person who infringed this entitlement.[11] This is because at common law landownership was "absolute".[12] The absolute nature of ownership implied that the right to use and enjoy private property, which is the central feature of ownership, was unrestricted and exclusive.[13] In the pre-constitutional dispensation ownership was afforded absolute protective mechanisms. These protective mechanisms were the *rei vindicatio* (common law eviction remedy) and *The Prevention of Illegal Squatting Act* 52 of 1951 ("PISA") (statutory eviction remedy).

In the pre-constitutional dispensation, the landowner was entitled to possession and to the use and enjoyment of his property to the exclusion of others. Accordingly, the *rei vindicatio* was available to restore such exclusivity in the event of unlawful occupation.[14] The *rei vindicatio* allows the owner to reclaim complete physical control over his property and all the entitlements attached thereto.[15] This remedy is criticised for entitling landowners to evict the unlawful occupiers regardless of the potential risk of homelessness.[16] While the *rei vindicatio* was already in place, in 1952 the Apartheid government passed PISA as a statutory eviction remedy and as an alternative to the *rei vindicatio*.[17] PISA was also criticised for affording landowners the right to evict without following fair procedures and without taking proper regard of the interests of the unlawful occupiers.[18] For the most part, PISA was generally applicable to black unlawful occupiers whereas the *rei vindicatio* was relied on when evicting white unlawful occupiers.[19]

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[10] *Gien v Gien* 1979 (2) SA 113 (T).
[11] CT Cloete *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context*, LLM thesis, Stellenbosch University (2016) 35.
[12] P Birks "The Roman concept of dominium and the idea of absolute ownership" in TW Bennett, W Dean, D Hutchinson, I Leeman and D Van Zyl Smit (eds), *Land Ownership: Changing Concepts* (1986) 1; and CG Van der Merwe *Sakereg* 2 ed (1989) 175.
[13] See generally the case of *Chetty v Naidoo* 1974 (3) SA 13 (A) ("Chetty").
[14] Cloete 2016, 16 (note 11 above).
[15] Van der Merwe 1989, 347 *(*note 12 above).
[16] AJ Van der Walt "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A model to evaluate South African Land Reform Legislation" (2002) *TSAR* 254, 258.
[17] Cloete 2016, 52.
[18] L A Stuurman *Illegal eviction and unlawful occupation of land: A comparative perspective* LLM Thesis Potchefstroom University (2002) 2. See section 3B of PISA. See also *Kgosana v Otto* 1991 2 SA 113 (W) para 116A; and *Mbangi v Dobsonville City Council* 1991 2 SA 330 (W) para 33 IG.
[19] Cloete 2016, 55-56. See also Van der Walt 2002, 261 (note 16 above).

Both PISA and the *rei vindicatio* have been widely criticised by academics and the South African courts. In *PE Municipality*, Sachs J described PISA as a drastic law because it completely neglected the interests of the unlawful occupiers and sought to portray ownership as the superior right.[20] It is further argued that PISA gave landowners and authorities wide-ranging powers to evict and ultimately destroy the homes of the unlawful occupiers.[21]

It is clear that in the pre-constitutional dispensation, both the common law and statutory law eviction remedies were used to protect the "absoluteness" of ownership. In *Graham v Ridley*,[22] Greenberg J found that ownership consists in the right to recover lost possession and that proof of ownership by the landowner and that the unlawful occupiers are in possession of the property, entitled the owner to an order giving him possession.[23] The case of *Chetty v Naidoo* is also one of the most important common law cases where the court found that the right to possess and use of private property is the central feature of ownership and that the owner can evict any person found in his property without his consent.[24] Both *Graham* and *Chetty* are mute on the issues pertaining to the housing needs and interests of the unlawful occupiers.

Cloete argues that *Chetty* shows that the courts were not required to consider the housing interests of the alleged unlawful occupier when dealing with evictions.[25] Pienaar,[26] also criticizes the common law approach as applied in *Chetty,* particularly in the way that the Appellant Division drew a relationship between ownership and the owner's right to eject any person found in unlawful occupation of his property without consideration of all the relevant circumstances.[27] *Chetty* shows that at common law and in the pre-constitutional dispensation the landowner had a complete right to use and enjoy his property. To this extent, the landowner could evict any persons in

[20] *PE Municipality* para 8. See also S Liebenberg *Socio-Economic Right: Adjudication under Transformative Constitution* (2010) 268-269.
[21] Socio-Economic Rights Institute of South Africa *Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government* (2013) *("*SERI*")* 8. See also C O'Regan "No more forced Removals? On Historical Analysis of the Prevention of Illegal Squatting Act" (1989) *SAJHR* 361; and *R v Zulu* 1959 (1) SA 263 (A).
[22] 1931 TPD 476 ("*Graham*").
[23] Ibid.
[24] *Chetty* v *Naidoo* 1974 (3) SA 13 (AD) para 20.
[25] Cloete 2016, 48.
[26] JM Pienaar *Land Reform* (2014) 668.
[27] Ibid.

unlawful occupation of his property without considering the social impacts of eviction in the lives of the evictees.

Accordingly, it is arguable that the *rei vindicatio* and its application was inhumane as it did not consider the housing needs of the unlawful occupiers. Additionally, the *rei vindicatio* was a remedy that sought to protect only landowners whilst undermining unlawful occupiers' right to shelter. Furthermore, the criticism of PISA made by Sachs J demonstrates that PISA was in all respect a bad law because its provisions and application did not consider all the relevant circumstances and the interests of the unlawful occupiers.[28] Therefore, both the common law and the statutory law eviction remedies over-protected ownership as the absolute right over the occupiers' interests.

Apart from simply favouring the rights of landowners above the interests of unlawful occupiers, it is argued that the application of the *rei vindicatio* had a strong racial dimension during the colonial and apartheid era.[29] In the pre-constitutional era, only whites as a general rule could acquire ownership of land and, therefore, claim the *rei vindicatio*.[30] The same point is true of PISA. Although it prohibited illegal squatting by all races, it was applied predominantly against black South Africans.[31]

In the new constitutional dispensation, "there is a shift away from a legal framework that revered immovable property ownership rights and considered them largely sacrosanct".[32] Wilson terms this shift as a "new normality".[33] This new normality affords the unlawful occupiers substantive and procedural protection regardless of the unlawfulness of their occupation.[34] The new normality further seeks to reconcile the opposing legal entitlements of landowners and unlawful occupiers facing threat of homelessness and articulates the government's constitutional obligation thereto.[35] Now, the landowner may evict the unlawful occupiers only in terms of PIE.[36] PIE was promulgated to give effect to section 26 of the Constitution and was, therefore, set in

[28] See *PE Municipality* para 8.
[29] See AJ van der Walt "Property rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa" (1999) 64 *Koers* 259.
[30] Ibid.
[31]Van der Walt 2002, 261.
[32] SERI 2013, 25 (note 21 above).
[33] S Wilson "Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality" (2009) 126 *SALJ* 270-290.
[34]SERI 2013, 25.
[35] Ibid.
[36] PIE repealed PISA.

place to substantively and procedurally regulate eviction proceedings in the new constitutional dispensation.[37]

This means that "PIE is a constitutionally ordained eviction measure promulgated to ensure that the rights and interests of both the owner and the unlawful occupier are protected in the process of evictions".[38] With the advent of the new Constitution, PIE was enacted in an attempt to rectify the injustices caused by forced removals and arbitrary evictions perpetuated by the apartheid government.[39] PIE simulates the transformative character of section 26 of the Constitution in the sense that even though it affords landowners eviction rights, it ensures the orderly resettlement of those left homeless after evictions.[40]

In the new constitutional dispensation evictions may be instituted in terms of five statutes namely, PIE; *Extension of Security of Tenure Act* (ESTA);[41] *National Building Regulations and Building Standard Act* (NBRBSA);[42] *Land Reform (Land Tenants) Act*;[43] and *Interim Protection of Informal Rights Land Act*.[44] In addition the *rei vindicatio* is still applicable, albert in very limited circumstances.[45] However, this study only focuses on PIE for a number of reasons. Firstly, this study discusses eviction in the context of municipalities' failure to provide alternative accommodation to the vulnerable evictees, according to Van Wyk, evictions in this context occur most often in terms of PIE.[46] Secondly, PIE is a widely applicable legislation and it applies where none of the other statutes are applicable.[47]

Thirdly, PIE covers a large scope of evictions, for example PIE regulates the unlawful occupation of land and buildings while ESTA and *Labour Tenants Act* comprise legislative measures that deal with redistribution of land and tenure issues as well as evictions from land not falling in proclaimed townships and in respect of which a

[37] Cloete 2016, 80.
[38] Ibid.
[39] Ibid 82.
[40] Cloete 2016, 83.
[41] 62 of 1997.
[42] 103 of 1977.
[43] 3 of 1996.
[44] 31 of 1996.
[45] J Van Wyk "The role of local government in evictions" 2011 *PER* 1727-3781, 52/194. In most cases the *rei vindicatio* is application in evictions instituted in commercial buildings.
[46] Van Wyk 2011 (note 45 above), 53/194.
[47] Ibid. See also Wilson 2009 (note 33 above), 271.

consent to reside exists or had previously been granted.[48] Fourthly, the other statutes are generally applicable only in restricted circumstances. For example, *Labour Tenants Act* would only apply where the relationship between the owner and labour tenant is problematic.[49] The *Interim Protection of Informal Rights Land Act* is also not as widely applicable as PIE, in the sense that it does not explicitly deal with evictions but protects people who qualify from being evicted unless existing rights have been terminated in terms of the law.[50]

The NBRBSA is also not as often used as PIE, especially in evictions instituted by the private landowners unless the building is found to be dangerous for occupation or is life threatening. Therefore, the NBRBSA is often used where the municipality must remove people occupying dangerous or unsafe buildings.[51] Finally, this study is limited to only discussing PIE in order to narrow its scope, discussing other statutes will not add any significant value to the study and it will unnecessarily broaden the scope of this discourse.

In the new constitutional dispensation, the right of the owner cannot be regarded as wholly unqualified.[52] This was confirmed and applied in the Constitutional court in *Occupiers of Skurweplaas v PPC Aggregate Quarries,*[53] and *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Threat.*[54] The principle succinctly confirms that the owner's right to the use and enjoyment of his property can be limited and that unlawful occupiers will be allowed to stay in the property until the government finds them alternative accommodation elsewhere.[55] This means that if the landowner wishes to evict he must join the municipality in such proceedings and if there is a likelihood of homelessness the municipality must make provision for alternative land or

[48] Ibid.
[49] Ibid. See section 7 of the *Labour Tenants Act*.
[50] Van Wyk 2011, 52/194.
[51] See section 12 of NBRBSA. See also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).
[52]SERI 2013, 35. See also *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 (2) SA 337 (CC) para 17.
[53] 2012 (4) BCLR 382 (CC) para 11.
[54] 2012 (2) SA 337 (CC) para 17.
[55] See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) ("Grootboom"); *PE Municipality; and Blue Moonlight*. These cases transformed the South African eviction law by deciding that the state has the obligation to provide shelter to desperate evictees and to ensure that evictions are conducted humanely.

accommodation for the evictees.[56] In the new constitutional dispensation local governments play a central role in the balancing of the landowner's right to use and enjoy property and the occupiers' right of access to adequate housing.

Without meaningful involvement of the local government, it is impossible to achieve the balance of these two opposing interests. The interests of the private landowners and those of the occupiers will be protected if the state is joined because the state has the duty to provide the evicted occupiers with adequate housing.[57] The realisation of section 26(1) of the Constitution rests wholly on the government. This means that the landowners cannot evict the unlawful occupiers from their properties if that will trigger the likelihood of homelessness except if alternative land or accommodation is made available by the local government.

In *Modderklip* SCA,[58] the state was reluctant to make provision for alternative land or accommodation for the unlawful occupiers and to ultimately make a way for landowners to regain use of their property. The SCA found that the failure on the part of the state to fulfil its constitutional obligation to realise the right to housing of the occupiers meant that the state had simultaneously breached its section 25(1) obligation towards the landowners and the right to provide alternative housing in terms of section 26 of the Constitution to the occupiers.[59] The court's reasoning in *Modderklip* is supported by SERI which argues that the principle set out in *Modderklip "*developed a novel way of balancing the conflicting rights and obligations that arise in eviction cases and affirmed the principle that an unreasonable state failure to give effect to the obligation to provide, at least, basic temporary alternative shelter for unlawful occupiers who face homelessness would constitute a breach of constitutional rights".[60]

As a result of the pre-constitutional legal framework many South Africans were left with no security of tenure. Therefore, section 26 of the Constitution intends to rectify these injustices of the past by imposing the obligation on the state to realise citizens' right of access to adequate housing, including the provision of alternative

[56] Section 4(6) and (7) of PIE. See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).
[57] *Sailing Queen Investments v The Occupiers La Colleen Court* 2008 6 BCLR 666 (W) para 18. See also *Ngomane v Govan Mbeki Municipality* 2016 12 BCLR 1528 (CC).
[58] See extensive discussion of this case in chapter 4 of this study.
[59] Para 28.
[60] SERI 2013, 13.

accommodation to evictees.[61] However, despite the constitutional obligation imposed on the state to provide housing, especially in critical conditions like evictions, "the municipalities across the country are struggling to devise and implement pro-active programmes and coherent responses to evictions and the provisions of alternative accommodation".[62] Therefore, if the government fails to play its central role in evictions, it is hard and almost impossible for the courts to balance landowners' interests with those of unlawful occupiers.

In *Hlophe and Others v Johannesburg Metropolitan Municipality and others*[63] an eviction order was granted in 2012 and the City of Johannesburg ("the City") was directed to provide TEA to the evictees. The City failed to comply with the court order but asked for the eviction order to be suspended for an undetermined period of time. The City's proposition was strongly criticised by the landowners as an unreasonable delay and argued that they could not continue to wait indefinitely to regain possession and use of their property. Upon personally enforcing the order against the City officials the occupiers were finally accommodated by the City in 2016.[64] The case of *Hlophe* shows that the landowners could not regain possession nor use of their property for almost four years after the eviction order was granted, due to the failure by the municipality to play its central role.

Against the above background, this study critically examines the common law eviction remedy (*rei vindicatio*) and statutory eviction remedy (PISA) in the pre-constitutional dispensation and how these remedies conflicted with the unlawful occupiers' interests. The reason for examining these eviction remedies is to establish the genesis of the imbalance between the right to peaceful use and enjoyment of private property and the right of access to adequate housing. In the new constitutional dispensation, the purpose of section 26[65] of the Constitution together with PIE are examined against the

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[61] See generally *Grootboom* (note 55 above).
[62] SERI 2013, 4.
[63] 2013 (4) SA 121 (GSJ) ("*Hlophe*").
[64] SERI 2013, 22.
[65] Section 26:

> (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.
> (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.

background of the pre-constitutional dispensation legal framework.[66] Finally, the study examines local governments' legitimate interests in eviction processes and the courts' approach to the balancing of the subject rights.

1.2 Research problem

South African eviction law is grounded on the principle of justice and equity.[67] In order for an eviction to be just and equitable the municipality must provide alternative accommodation to the evictees who have no reasonable prospect of finding alternative accommodation of their own.[68] A court may not grant an order evicting such person without information from the municipality reporting on how it intends to provide alternative accommodation to the evictees.[69] It is apparent, therefore, that the municipal role in evictions is central because a court cannot evict without its meaningful involvement.

Unlawful occupation infringes upon the landowner's right to peaceful use and enjoyment of private property. For example, the owner may not use his property for commercial reasons and generate a profit.[70] Where an unlawful building or structure has been erected on the landowner's premises such could deprive the landowner from extending or further developing his property in any manner he pleases. However, when the landowner seeks to evict in protection of his property rights, the eviction remedy is qualified in terms of the availability of alternative accommodation. To the extent that the state fails to provide alternative accommodation, the court may refuse or suspend eviction until such time that alternative accommodation is made available.

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[66] See the discussion of PIE in chapter 3 of this study.

[67] *PE Municipality* para 13; *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* [2009] 4 All SA 410 (SCA) para 6; *Arendse v Arendse and Others* 2013 (3) SA 347 (WCC); *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA); and *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C).

[68] The accommodation provided by government must be of comparable standard, within the reasonable proximity of the property evicted from, and must be provided before the date of execution of the eviction order. See SJ Fick *The power of the court to grant alternative accommodation orders: An investigation into when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of PIE would comply with the court's Constitutional mandate* PhD Thesis University Of Cape Town (2017); *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village* 2013 (1) SA 583 (GSJ) para 85.

[69] See section 4(6) and 4(7) of PIE Act*; Blue Moonlight*; and *Sailing Queen Investments v The Occupiers La Colleen Court* 2008 6 BCLR 666 (W).

[70] See *Blue Moonlight* where the main reasons for eviction were to give the property owners possession of the property in order for them to perform commercial activities in the property.

The Constitutional court has acknowledged that unlawful occupation infringes or violates the landowner's right to peaceful use and enjoyment of his private property.[71] However, the court has pointed out that the owner's inherent right to use and enjoy his property at common law may be limited in the process of justice and equity inquiry.[72] In terms of section 26 of the Constitution everyone has the right of access to adequate housing and such right ought to be realised by the state. To this extent, in the context of evictions the municipality is obliged to provide alternative accommodation to the evictees.[73] Accordingly, a court may not grant eviction until such provision by the municipality is made.

However, many municipalities are failing to discharge their constitutional and legislative obligation to provide alternate accommodation to the evictees. It has been established through caselaw that many municipalities have poor emergency housing plans, many municipalities are not proactively participating in the court eviction proceedings which delays finalisation of eviction matters and they take too long to comply with the court orders directing them to provide alternative accommodation to the evictee.[74] This has ultimately affected the landowners who cannot evict until the municipality has taken reasonable legislative or other measures to provide alternative accommodation to the evictees.

Walters argues that refusing eviction on the basis that the municipality is unable to provide alternative accommodation undermines the landowner's property rights.[75] It is further argued that the scale of justice and the scale of equality imposed by PIE is predominantly in favour of unlawful occupiers.[76] The municipalities' failure to provide alternative accommodation to evictees does not only frustrate the eviction process but it often hampers the court's ability to balance the landowners' right to peaceful use

[71] *Blue Moonlight* para 40.
[72] Ibid.
[73] This is necessary in order to avoid arbitrary eviction. See section 26(3) of the Constitution.
[74] See chapter 4 of this study where case law and academic arguments are discussed in support of the view that most municipalities are failing to discharge their constitutional and legislative duty to provide alternative accommodation to the evictees.
[75] A Walters "A balancing act between owners and occupants -Is PIE unconstitutional?: feature." (2013) 533 *De Rebus* 22. Accessible at http://www.derebus.org.za/balancing-act-owners-occupants-pie-unconstitutional/ (Accessed on10 April 2019).
[76] Ibid. Walters argues that "A society based on freedom should also include the freedom of a property owner to deal with his or her hard-earned property as he or she pleases for his or her benefit to the exclusion of others".

and enjoyment of private property with the unlawful occupiers' right of access to adequate housing.[77]

1.3 Research questions

a) How has the Constitution and relevant legislation transformed eviction laws in order to equally protect both the landowners and unlawful occupiers' rights?

b) What is the constitutional obligation of municipalities in eviction proceedings?

c) What are the difficulties faced by the municipalities in discharging their constitutional obligations insofar as the provision of alternative accommodation is concerned?

d) How do the courts strike a balance between the right to peaceful use and enjoyment of private property with the right of access to adequate housing?

1.4 Preliminary literature review and research purpose

The right to peaceful use and enjoyment of private property is a historically strong common law right. At common law this right was afforded strong protective remedies which allowed the landowner to easily evict any person unlawfully occupying his property. To the contrary, the right to housing is a historically weak tenure right. However, at present the right to housing is a strong tenure right recognised by many jurisdictions internationally. Thus, Article 11(1) of the *International Covenant on Economic Social and Cultural Rights ("Covenant")* [78] provides that every citizen in a country has a right to adequate housing. Article 2(1) of the Covenant provides that the state must adopt appropriate means, including legislative measures to achieve the realisation of the right to housing. The housing right is also inserted in Article 25 of the *Universal Declaration of Human Rights*.[79] In South Africa, the housing right is enshrined in section 26 of the Constitution.

[77] See *ABSA Bank v Murray* 2004 (2) SA 15 (C) para 41.
[78] *International Covenant on Economic Social and Cultural Rights*, 1966.
[79] *UN General Assembly* 302.2 (1948).

The question is whether municipalities are constitutionally obliged to provide alternative accommodation to evictees in order to comply with section 26 of the Constitution or not. In *Blue Moonlight*[80] the City of Johannesburg argued that it was not constitutionally obliged nor able to provide alternative accommodation to the unlawful occupiers evicted by private landowners. [81] The City based its argument on the fact that section 26 of the Constitution falls on all spheres of government. The City argued further that the proper interpretation of chapter 12 of the *Housing Code* means that when a local municipality's application for emergency housing funding is rejected by the province, that municipality's mandate to provide emergency alternative accommodation to evictees will be exhausted.[82] Because of its financial dependence on the provincial government, the City argued that its role to provide alternative accommodation to evictees is secondary.[83]

The City further relied on the *Government of the Republic of South Africa and Others v Grootboom and Others* judgment to argue that there is no primary responsibility on local government to fulfil the right of access to adequate housing.[84] The City further argued that it does not have enough resources and that it is not obliged to go beyond its available budgeted resources to secure housing for homeless people and that to do so would amount to incurring unauthorised expenditure.[85] The occupiers argued that the City could fund and resource emergency housing because of its duties to prioritise "basic needs" under section 153(a) of the Constitution and sections 1, 4(2) and 73(1) of the *Municipal Systems Act.*[86]

The Constitutional court held that "There is no basis in *Grootboom* for the assertion that local government is not entitled to self-fund, especially in the realm of emergency situations in which it is best situated to react to, engage with and prospectively plan around the needs of local communities".[87] Accordingly, the Constitutional court found

[80] See full discussion in chapter 3 below.
[81] *Blue Moonlight* paras 42-57.
[82] Ibid para 48.
[83] Ibid para 46.
[84] Ibid para 50, also see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
[85] Ibid para 72.
[86] *Municipal Systems Act* 32 of 2000. See *Blue Moonlight* para 51.
[87] *Blue Moonlight* para 57.

that municipalities have the constitutional obligation to provide TEAs to evictees within their jurisdiction.

However, there are so many issues associated with the provision of TEAs, especially in the metropolitan municipalities. This is the case because the cities are *inter alia* overpopulated; there is high level of unemployment and many people do not have secure tenure which is the root cause of land invasion and unlawful occupation. This seriously affects landowners who cannot use and enjoy their properties if the municipality fails to provide TEAs to the evictees. The case of *Hlophe* is the classical example of a case where the City of Johannesburg failed to provide TEA to the unlawful occupiers for almost four years after the eviction order was granted. Dugard argues that in so many court decisions where the City of Johannesburg has been ordered to provide TEAs, there has been a lengthy delay to do so.[88]

Dugard further argues that the municipalities' non-compliance with the court orders which direct them to provide TEAs has been frustrating.[89] In her criticism of the courts in this respect, she argues that such failure to provide TEAs has been "aided and abetted by the Constitutional court's disposition toward judicial avoidance in socio-economic cases".[90] Dugard criticises the Constitutional court for failing to give adequate content to the right of access to adequate housing.[91] She further argues that this has allowed the cities, in situations where they finally provide TEAs, to provide substandard or inadequate accommodation that violates multiple human rights.[92] Dugard further questions whether it is not the right time for the Constitutional court and other courts to adopt a new approach[93] to cure the failure by municipalities to provide TEAs and ensure that the TEAs provided by the municipalities are adequate.[94]

Stuurman[95] does not necessarily criticise the courts as Dugard does, neither does she criticise municipalities for failing to play their central role in evictions. Stuurman's

[88] J Dugard "Beyond Blue Moonlight: The Implication of Judicial Avoidance in Relation to the Provision of Alternative Housing" (2014) 5 *Constitutional Court Review* 265, 278, accessible at: https://old.juta.co.za/law/media/filestore/2014/11/CCR_Journal.pdf (Accessed on 10 April 2019).
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid 279.
[94] Dugard's proposition is founded on the bases that most municipalities are so reluctant to comply with court orders insofar as the socio-economic right are concerned. See also *Zulu and others v eThekwini Municipality and others* 2014 (4) SA 590 (CC).
[95] Stuurman 2002 (note 18 above).

criticism is levelled against PIE itself. She argues that the lack of balance between the right to peaceful use and enjoyment of private property and the right to housing was created by PIE.[96] She further argues that PIE over-remedied PISA in that the legislature did not fully consider the impact of PIE on the ownership right as protected by section 25(1) of the Constitution.[97] She argues that PIE lacks a proper balance between the rights of the unlawful occupiers and the rights of landowners.[98] This study does not accept Stuurman's argument. When a court fails to protect the rights of a landowner or over-protects the rights of an unlawful occupier, whatever the case maybe, it is not because PIE lacks a proper balance but rather because an independent court failed to correctly apply the Act. This study argues that the lack of balance between the two subject rights is caused by the municipalities' unwillingness and reluctance to provide TEAs to the evictees.

It is important also to note that the constitutional obligation imposed on municipalities to provide TEAs requires reasonable policy considerations, planning, budgeting and sustainability. Due to the challenges of migration, population growth, unemployment and poverty, evictions have increased in the major cities. Consequentially, the demand for TEAs has increased. The question is whether these cities have enough capacity to provide TEA facilities and to properly maintain these facilities. Arguably, the duty for the municipalities to provide TEAs to the evictees has far-reaching budgetary implications.

1.5 Research Methodology

This study is a desk-top and theoretical based research on non-empirical studies. An analysis of the Constitution, legislation, common law and case law are conducted. There is plenty of case law in support of this study. Therefore, the study critically reviews and analyses the case law. However, there is also use of secondary sources to support the study. The secondary sources include books, journals, articles, research papers and Socio-Economic Rights Institute Research Reports (SERI).

[96] Ibid 2.
[97] Ibid.
[98] Ibid.

1.6 Demarcation of the thesis

(a) Chapter One - Introduction

This chapter discusses the background to the study, the research problem, research questions, preliminary literature review and research purpose, research methodology, demarcation of the thesis and terminology used in the study.

(b) Chapter Two – The common law and statutory eviction remedies in the pre-constitutional dispensation

This chapter provides the historical background of landownership and the right to housing. This is followed by a detailed discussion of the common law eviction remedy (*rei vindicatio*) and the statutory eviction remedy (PISA) in the pre-constitutional context. Having discussed the background of landownership and the remedies, and having discussed the right to use and enjoy private property in comparison with the right to housing in the pre-constitutional context the chapter will, in conclusion, outline the criticism of the pre-constitutional legal framework.

(c) Chapter Three – Balancing the subject rights in the new constitutional dispensation

This chapter examines the transformation of South African eviction law. This is done through examining section 26 of the Constitution and the enactment of PIE which gives effect to section 26. This chapter further discusses how section 26 of the Constitution and its supporting legislation necessitates balancing the landowner's rights with those of the unlawful occupiers in the new constitutional dispensation. Using case law, the chapter demonstrates the courts' approach when striking a balance between the two subject rights and further examines the gaps in the approach.

(d) Chapter Four – The local government's duty to provide TEAs

This chapter discusses local government's legitimate interests and its central role in the balancing of the two rights.

(e) Chapter Five – Conclusion and Recommendations

This chapter concludes the study and makes recommendations based on the earlier chapters of the study.

1.7 Terminology

From the outset, it is necessary to make specific terminological points. Upon acquisition of ownership, the right to use and enjoy property becomes an integral part of ownership.[99] It should, therefore, be obvious that upon acquisition of ownership the owner would immediately attain the "right" to use and enjoy his property to the exclusion of others.[100] However, some writers refer to the "right" to use and enjoyment as an "entitlement" of ownership instead of a "right".[101] Although these notions are related, this study prefers the phrase "right to use and enjoy" intend of the phrase "entitlement to use and enjoy".

Although the phrase "right to use and enjoy" is commonly used in the Anglo-American legal systems and the phrase "entitlement to use and enjoy" is commonly used in the South African legal system, some South African academics and court judges prefer the former phrase, sometimes they use these phrases interchangeably.[102] Therefore, it is not academically unsound to use the phrase "right to use and enjoyment" in this study.

The right of "access to adequate housing" is a socio-economic right enshrined in section 26 of the Constitution. Therefore, the meaning of the right is sourced directly from the Constitution and is discussed as such. The term "government's legitimate

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[99] D P Visser" The 'Absoluteness' of Ownership: The South African Common Law in Perspective" in T. W Bennett, W Dean, D Hutchinson, I Leeman and D van Zyl Smit (eds), *Land Ownership: Changing Concepts* (1986) 43.

[100] Unless the owner voluntarily permits another person to use his property, or is compelled by law to do so. See L Kats "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315,275.

[101] See Van der Merwe 1979 (note 12 above); and J D Van der Vyver & D J Joubert *Persone en Familiereg* (1980) ch 1.

[102] See *Blue Moonlight* para 40, where Van der Westhuizen J held that "an owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE". See also P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 150; and Stuurman 2002, 75. In J Strydom and S Viljoen "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PER* 1727-3781, 1218, these phrases ("right" and "entitlement") are used interchangeably.

interest" appears frequently in chapter three and four respectively. The term refers to the constitutional obligation of the municipality to provide alternative accommodation to the unlawful occupiers facing the risk of homelessness. The term "Temporary Emergency Accommodation" (hereinafter referred to as "TEA") is sourced from the *Blue Moonlight* judgement.[103] TEA refers to alternative accommodation provided by the municipality to the evictees. TEA is used interchangeably with the term "alternative accommodation".

[103] See *Blue Moonlight* paras 13, 84 and 99.

CHAPTER TWO

The common law and statutory eviction remedies in the pre-constitutional dispensation

2.1 Introduction

This chapter probes into the apartheid government's attitude and the courts' approach to the protection of ownership and the landowner's inherent right to peaceful use and enjoyment of his private property. The right to use and enjoyment is an ownership right and exists within the umbrella concept of 'ownership'.[104] As such, this right is afforded the same status ascribed to ownership and ultimately the same protection thereof. Arguably, the occupation of any property without the permission or against the will of its owner directly interferes with the owner's peaceful and exclusive use of his property. Therefore, in the pre-constitutional dispensation eviction remedies (the *rei vindicatio* and PISA) were put in place to protect the landowners against unlawful occupation.

To better understand the legal remedy, understanding the right which the remedy protects is critical. In the pre-constitutional dispensation, the more clearly defined and understood the right of ownership was, the stronger the remedy was.[105] Accordingly, before discussing the remedies available to ownership, the chapter first deals with the concept of ownership. Presumably, every writer would know that in order to give proper understanding of the present, one would have to begin from the preceding period. Hence, this chapter discusses the influence of the Roman law, the Roman-Dutch law and the Pandectists[106] on the concept of landownership in the pre-constitutional era before discussing the remedies.

[104] Right to use and enjoyment is not an independent or separate right, it is the component right of ownership. See I Currie and J De Waal *The bill of rights handbook* 6 ed (2013) 535.
[105] Cloete 2016, 22.
[106] Pandectists were German legal scholars in the early 19th century. See Cloete 2016, 30.

In the pre-constitutional dispensation, the remedies which were available to protect landownership against unlawful occupation were the *rei vindicatio* and PISA. These were common law and statutory eviction remedies respectively. In the pre-constitutional dispensation, ownership was an absolute real right in ambit and was accordingly attributed absolute protection.[107] In the context of eviction, the *rei vindicatio* and PISA gave courts no discretion to infuse the enquiry for justice and equity before granting eviction.[108] This meant that the *rei vindicatio* and PISA over-protected ownership to the prejudice of evictees' housing interest. This was the practice because there was no constitutional right of access to adequate housing.

This chapter focuses on how the eviction remedies protected the landowners against unlawful occupation in the pre-constitutional dispensation. The focus on the eviction remedies helps to determine the genesis of the imbalance between the ownership right to peaceful use and enjoyment and the right to housing. This background is critical in elucidating not only the transformative nature of section 26 of the Constitution (which is discussed in chapter three below) but also in putting us in the shoes of the draftsman to determine the purport of section 26 and all other legislation and various enactments which followed to give effect to this provision.

2.2 The legal and historical context of ownership

2.2.1 The concept of ownership and the right to peaceful use and enjoyment

Ownership is the most comprehensive real right a person can have in relation to a thing.[109] Of all real rights the ownership right is defined as the most comprehensive relationship between a person and a thing.[110] The right of ownership entitles the owner to deal with his property in any way he deems fit which must of course be within the confines of the law.[111] Based on the definition of ownership and the entitlements that

[107] CG Van der Merwe *Sakereg* 2 ed (1989) 175.
[108] The relevant circumstances would mean considering all the relevant factors. For example, the risk of homelessness as the result of eviction, the rights and interests of elderly people and children and disabled persons. See section 4 (7) of PIE for the new constitutional approach.
[109] *Gien v Gien* 1979 (2) SA 113 (T); *Van der Merwe v Taylor NO* 2008 (CC).
[110] AJ Van der Walt and GJ Pienaar *Introduction to the law of property* 7 ed (2016) 28 and 46.
[111] C Lewis "The Modern Concept of Ownership of Land" in T W Bennett, W Dean, D Hutchinson, I Leeman and D van Zyl Smit (eds), *Land Ownership: Changing Concepts* (1986) 241.

flow from the right, it is clear that ownership, particularly, landownership is an issue of no small importance. According to Locke, every person is born with the right to own a property, subject to labour, as God created things on earth so that man can use them.[112] It is upon this classical liberal notion of ownership that civil society and governments later decided to derive the grounds on which to base their protection of the ownership right and define it as a complete real right. The classical example is the US Constitution which reflects strong protection of private property.[113] What gives proper meaning to ownership is the owner's right to use and enjoyment of his property as he pleases. The right to use and enjoyment fulfils the needs of the landowner and further signifies the human will in the property.[114] By virtue of ownership, the owner acquires a complete right to use his property unless he chooses to give it to someone else or is restricted by law.[115]

Ownership is exclusive in nature; hence the owner can exclude any person interfering with the use and enjoyment of his property. This is clearly demonstrated in Dhliwayo's analysis of the exclusion theory and exclusive use theory.[116] Exclusion theorists hold the view that the owner's right to use and enjoyment of his property in complete exclusion of others is a fundamental element and necessary feature of private property ownership.[117] The argument advanced by exclusion theorists in Dhliwayo's analysis is that the freedom to decide on the use of private property is an exclusive territory of the owner.[118] It is further argued that denying the private owner the right to exclusive use drops the value of his property and invites unbearable interference from the public.[119]

Accordingly, the right to exclusive use brings peace, full enjoyment of private property and most importantly brings certainty to the governance of the private property

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[112] J Locke *Two treatises of government (*reproduced in Laslett P *Two treatises of government: A critical edition with an introduction and apparatus criticus)* (1963) 27. See also A M Honore "The nature of property and the value of justice, 'ownership'" (1961) *PL* 370, where Honore says ownership is one of the characteristics of human need.

[113] AJ Van der Walt "Property rights, land rights and environmental rights" in Van Wyk DH, Dugard J, De Villers B & Davis D (eds) *Rights and constitutionalism: The new South African legal order* (1994) 455-501, 461.

[114] GW Hegel *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 49.

[115] Ibid 50.

[116] Dhliwayo 2015, 40-60 (note 102 above).

[117] TW Merrill "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755,731. See also Dhliwayo 2015, 41; and *Kaiser Aetna v United States* 444 US 164 (1979) 179-180.

[118] Ibid. See also Dhliwayo 2015, 41.

[119] Merrill 1998, 740 (note 117 above).

institution.[120] It is further argued that ownership sets the boundaries between owner and non-owners.[121] These boundaries fairly define private ownership and further grant the owner broad powers to control access to his property within those boundaries and to improve productive use of his property.[122]

Moreover, the exclusive theorists argue that exclusivity is so significant in that it allows the owner to make valuable investment with his property peacefully so and without the interference of the non-owners.[123] Merrill argues that the right to exclude is the starting point because all other ownership rights are derived from it.[124] Merrill further argues that the owner's right to exclude the non-owner from the use of his property is the protection mechanism of ownership.[125] What Merrill argues is that exclusivity means that the non-owner must be completely excluded from privately owned property.

In contrast, the exclusive use theorists hold the view that exclusivity does not mean absolute exclusion of non-owners but that the non-owner's interests in the use of a property must be harmonized within the owner's agenda setting authority.[126] The exclusive use theorists concede the fact that ownership is exclusive in nature, however, they take a different descriptive approach from that of the exclusion theorists. The exclusive use theorists' approach differs from that of the exclusion theorists in that they describe exclusivity as the owner's authority to set the agenda regarding the use of his property as opposed to a simple keep-off rule.[127] Contrary to Merrill's argument, Claeys argues that exclusion does not mean total exclusion of non-owners but rather means the authority to set the agenda.[128] In a nutshell, the exclusive use theorists' conception is that since property is a social concept,[129] the owner's interests must be balanced and humanised with those of the non-owners.

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[120] Dhliwayo 2015, 43. See also RA Epstein "Takings, exclusivity and speech: The legacy of *PruneYard v Robins*" (1997) 64 *University of Chicago Law Review* 21-56, 22.
[121] T W Merrill & H E Smith "What happened to property in law and economics?" (2001) 111 *Yale Law Journal* 357-398, 389. See Dhliwayo 2015, 44.
[122] Ibid.
[123] C Rose "The comedy of the commons: Custom, commerce and inherently public property" in P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 47.
[124] Merrill 1998, 735.
[125] Ibid. See Dhliwayo 2015, 57.
[126] L Katz "Exclusion and exclusivity in property law" in P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015) 57.
[127] Dhliwayo 2015, 59.
[128] E R Claeys "Property 101: Is property a thing or a bundle?" (2009) 32 *Seattle University Law Review* 617-650, 633.
[129] Dhliwayo 2015, 59.

Relying on the exclusive-use theorists, Dhliwayo argues that the owner has a monopoly right over all the entitlements that are recognized as part of the ownership of his property.[130] This means that the owner has the right to make decisions regarding his property and that the non-owners are bound by those decisions.[131] The difference between the exclusion theory and exclusive-use theory is that the exclusion theorists hold the view that exclusion of non-owners from private property is absolute, whereas the exclusive-use theorist hold the view that the power to exclude must be humanized with the interests of the non-owners. However, the common ground between the two theories is that they both concede that ownership is exclusive in nature. Even though ownership determines the owner's personal use and enjoyment of private property to the exclusion of others, ownership has never, even in early Roman times, been unfettered.[132]

2.2.2 Roman Law

Although in the early Roman law, ownership was not clearly defined, the institution of *dominium* was, however, later developed by Roman classical law.[133] Accordingly, *dominium* is the type of ownership that was recognised by Roman law and was defined as a legal relationship that exists between the owner and a thing.[134] Even though the owner had the right to deal with his property in a way he deemed fit, that property right was subject to certain restrictions.[135] For example, a Roman farmer could not just burn off stubble after the harvest anyhow, but was required to first ensure that normal precautions had been taken.[136] In the event of him (the farmer) defaulting in this regard, he was held liable for the loss caused to his neighbours.[137]

Another source of restriction was the creation of a servitude. This type of restriction was described as the restriction on land-user.[138] Once the owner had created a

[130] Dhliwayo 2015, 56.
[131] Ibid.
[132] See Birks (1986), 1 (note 12 above).
[133] Dhliwayo 2015, 78-79; G Diósdi *Ownership in ancient and preclassical Roman law* (1970) 51; D Johnston *Roman law in context* (1999) 53; and A Borkowski & P Du Plessis *Textbook on Roman law* 3 ed (2005) 157.
[134] A Borkowski & P du Plessis *Textbook on Roman law* 3 ed (2005) 157; and Dhliwayo 2015, 80.
[135] Birks 1986, 16.
[136] Ibid. These limitations were also available in the English institution of ownership, even though not necessary to discuss for the purpose of this study, for example see *St. Helen's Smelting Co. v. Tipping* (1965) 11 H.L.C 642; and *Rylands v. Fletcher* (1868), L.R.3 H.L.C.330.
[137] Birks 1986, 16.
[138] Ibid.

servitude, he was considered to have created restrictions on his ownership right to use and enjoyment. Accordingly, when the owner exercised his right to use his property as he pleased, he had to respect the servitude right. During the laws of Twelve Tables[139] the legislation prevented the demolishing of houses which were in sound conditions.[140] The laws of Twelve Tables set a good example of statutory limitation to the Roman landowner's right to use. As gleaned from the above statutory intervention on the law of ownership, classical law could prohibit the property owner from building in a manner that will deprive his/her neighbours of light.[141]

Moreover, classical law allowed one owner to collect fruits fallen from his trees on the other owner's land.[142] In a situation where the neighbours had no alternative way to access a particular feature except by passing through another person's property, they were permitted by classical law to have a right of way through one's property.[143] Some of the restrictions in the content of Roman ownership can be explained from Mill's principle to the effect that "no liberty can be enjoyed unless liberty is restricted to prevent harm to others".[144] Accordingly, neighbours were protected against the arbitrary exercise of the right to use by landowners under the maxim *sic utere tuo ut alienum non laedas* which meant that the owner must not prejudice the neighbours when exercising his ownership right to use his property.[145]

The restrictions in the content of Roman ownership show that ownership was never an absolute right. It should, therefore, be obvious that there is no community that could tolerate ownership literally unrestricted in content.[146] Although the above list of restrictions of the Roman ownership is not exhaustive, it is, however, of greater value insofar as presenting the evidence of the existence of limitation in the Roman ownership.

[139] Ancient Rome legislation in 451 and 450 BCE.
[140] Birks 1985, 16.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Ibid. See also J S Mill *On Liberty* (1859) Ch1.
[145] Van der Walt and Pienaar 2016, 50 (note 110 above).
[146] Birks 1985, 1.

2. 2. 3 Roman-Dutch law

In Roman-Dutch law ownership was defined as a right to deal with your thing in a complete way (*perfecte disponere)*, in so far as it was not prohibited by the law.[147] This Roman-Dutch law definition of ownership was developed on the basis of Bartolus' definition of ownership as the right to perfectly dispose over a corporeal object insofar as it is not prohibited by law.[148] However, Bartolus' definition of ownership does not intend to convey an absolutist idea of ownership.[149] Bartolus writes in the climax of natural law philosophy which is a philosophy that views ownership as a restricted right. Hence, he did not intend to indicate complete power in an abstract sense but only in comparison with possession.[150]

Bartolus' definition built from Grotius' definition that ownership is the power to make full use of the object to the extent that such use is not prohibited by law.[151] Similarly, Grotius viewed ownership as an essentially restricted right. At the end of his definition Grotius uses the phrase "to the extent that such use is not prohibited by law" to clearly indicate that ownership was a restricted right. Grotius introduced the concept of *dominium emineus* (overriding ownership) to show that the state had powers to remove the owner's free control of his property, to compel the owner to sell his property, as well as to limit his right to use his property.[152] Even though Huber[153] and Decker[154] argue that *dominium emineus* was an extraordinary right only to be invoked in cases of necessity, it nevertheless remains that Roman-Dutch law ownership was a restricted right in principle.

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[147] Visser 1986, 43 (note 99 above).
[148] Dhliwayo 2015, 81. See also AJ Van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321, 305.
[149] Visser 1986, 43.
[150] Ibid. See also GC Van den Bergh *Eigendom. Grepen uit de geschiedenis van een omstreden begrip* (1979) 24.
[151] AJ Van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" 58 (1995) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420, 404; Dhliwayo 2015, 82.
[152] R Feenstra "Historische aspecten van de private eigendom als rechtsinstituut" (1976*) Rechtmagazijn Themis* 271. See also Visser 1986, 44.
[153] U Huber Heedensdaegse Rechtsgeleerthyt soo elders als in Frieslandt gebruikelijk (ed Amsterdam 1726) 2.2.8. See also Visser 1986, 44.
[154] WB Gallie "Essentially contested concepts" (1956) *Journal of the Aristotelian Society* 167.

2. 2. 4 The Pandectists' concept of ownership in South Africa

The Roman-Dutch concept of ownership was brought to South Africa by Dutch settlers in the 1700s.[155] However, the interpretation of the concept of ownership, as was developed in common law, was influenced by Pandectists.[156] With the influence of these German idealist, the concept of ownership began to shed its fundamentally restricted character.[157] Pandectists began to speak of ownership as an unrestricted right. According to Pandectists, the moral or immoral exercise of ownership right was of no consequence.[158] These ideologies formed part of the early South African law and the courts showed a very strong predilection towards quoting them.[159]

Pandectists defined ownership as an absolute power granted by the law to the owner to enforce his will against the non-owners.[160] Dhliwayo argues that this definition presents ownership as largely characterised by the power to exclude non-owners and arguably incorporated the autonomy of the owners in line with the metaphor "a man's home is his castle".[161] The Pandectists' ideologies introduced the notion of exclusive use and enjoyment of private property to the extent that the owner could evict any unlawful occupiers from his property without considering their interests.

Pandectists extended the works of Grotius in the sense that their description of ownership attributed the character of completeness in the institution of ownership. Notably, they added the character of individuality and abstractness in their description of ownership.[162] When Roman-Dutch law was introduced in South Africa, the literature of these jurists became a source of reference for interpretation of the early South African common law, particularly the institution of ownership.[163] Insofar as the

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[155] JRL Milton "Ownership" in R Zimmerman and D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699.
[156] Pandectists were the group of German scholars. See Cloete 2016, 30.
[157] Visser 1986*,* 46.
[158] Ibid 47.
[159] See *Johannesburg City Council v Rand Townships Registrar* 1910 TPD 1314.
[160] Dhliwayo 2015, 82; and AJ Van der Walt "Marginal notes on powerful (l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420,406. See also AJ Van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" 56 (1993) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589, 572.
[161] Dhliwayo 2015, 83.
[162] Milton 1996, 694 (note 155 above).
[163] Cloete 2016,32.

character of completeness is concerned, ownership was said to be absolute or a complete real right because the owner holds all the entitlement of ownership unless he decides to suspend or transfer some of these entitlement to someone else.[164]

Insofar as the character of individuality is concerned, ownership was ascribed absoluteness on the basis that the property is held by an individual owner to the exclusion of others.[165] Dhliwayo argues that this character of ownership underlies the absolute protection afforded the owner because it guarantees authority to the owner to vindicate his property from whosoever is in possession of it without his consent.[166] Moreover, ownership is said to be absolute on the basis that it is an abstract right. This means that ownership is more than the sum total of its constituent entitlements and that when the owner grants limited real rights to non-owners or when there is temporal restriction, the right is never exhausted.[167]

Cloete makes the following remarks about the influence of Pandectists to the South African common law:

> "...the South African legal professionals (courts and academics) inherited the thoughts, notions, explanations and institutions of these legal writers and in this way ensured that they continued to exist in the South African legal system. The Pandectists can therefore be said to have contributed greatly, along with Grotius, to the concept of the pre-constitutional institution of ownership accepted by South African courts. Understandably, the pre-constitutional South African concept of ownership was described with reference to characteristics of completeness, individuality and abstractness. This conceptual understanding of ownership in turn resulted in the *rei vindicatio* being confined to the function of protecting the rights of owners, and not the protection of the rational order as was the case in Roman law."[168]

What Cloete argues is that ownership was viewed as an absolute right and its remedies were accordingly attributed the same status. This allowed the owner to use

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[164] DV Cowen "New patterns of landownership: The transformation of the concept of ownership as pleana in re potestas" (1984) 89. See Dhliwayo 2015, 89.
[165] Dhliwayo 2015,91. See also JD Van der Vyver "Ownership in constitutional and international law" 1985 *Acta Juridica* 119-146,134; and AJ Van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457, 447.
[166] Ibid.
[167] Dhliwayo 2015, 92. See also Van der Walt 1992, 447 (note 163 above).
[168] Cloete 2015, 33.

and enjoy his property as he pleased and any restrictions were considered to be temporary.[169] Any limitation on ownership was required to be proven and as soon as one proves the existence of a limitation the ownership right was protected within the confines of that limitation.[170] This shows that limitations could only be imposed on strictly justified grounds and on a temporary basis which left ownership unrestricted in principle.[171]

The point being made is that the notion of absoluteness which was ascribed to ownership as a result of the influence of Pandectists did not recognise the housing interests of the unlawful occupiers as a an inherent or natural limitation to ownership, the so called "social- obligation norm".[172] Alexandra argues that the institution of ownership that was received in the pre-constitutional dispensation lacked the commitment to human flourishing.[173] It is for this reason that neither the *rei vindicatio* nor PISA recognised the interests of the unlawful occupiers . As a result of the nature of the institution of ownership which was received in South Africa, the *rei vindicatio* and PISA protected an absolute view of ownership. This meant that the right to use and enjoy could not be limited by unlawful occupiers' housing interests as is the case in the new constitutional dispensation.

2.3 Common law and statutory law eviction remedies

2.3.1 Common law remedy: The *rei vindicatio*

The institution of ownership that was received in South Africa in the pre-constitutional dispensation strongly protected the owner's right to use and enjoyment of his property. South Africa received an absolute institution of ownership which determined the owner's right to use and enjoyment to the complete exclusion of the non-owner. Accordingly, the above conceptual understanding of ownership characterised by absoluteness[174] and exclusivity[175] gave more sense to the existence of the *rei*

[169] AJ Van der Walt "The future of common law landownership" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 21-35, 31. See also Dhliwayo 2015, 95.
[170] Dhliwayo 2015, 96.
[171] Ibid 97.
[172] GS Alexander "The social-obligation norm in American property law" in Dhliwayo (2015) 65.
[173] Ibid.
[174] In the sense that ownership was considered to be complete real right; individualistic in nature; and as an abstract right.
[175] The *rei vindicatio* developed along the principle of exclusivity. See PJ Badenhorst…et al *The law of property* 5 ed (2006) 243.

vindicatio.[176] In the pre-constitutional dispensation, ownership was given the status of an absolute right. It was, therefore, inevitable that the *rei vindicatio* would be attributed the same strength in order to protect the *status quo*.

The *rei vindicatio* is the ownership remedy available to the owner to restore complete physical control and exclusive possession of his property together with the fruits attached thereto.[177] In principle, the *rei vindicatio* protects ownership and the owner's inherent rights to possession and use of the property.[178] Whether possession was attained *bona fide* or *mala fide* is not material.[179] Van der Walt argues that the *rei vindicatio* guarantees exclusive use to the owner.[180] Because of this, the owner can evict any person who interferes with such exclusive right to use of private property.

In order for the owner to institute the *rei vindicatio* action, he needs to prove that: (a) he is the owner of the *res*; (b) that the *res* exits and is identifiable; (c) and that the defendant is in possession of the *res.*[181] Thus, as gleaned from what needs to be proved as presented above, the onus of proof then shifts to the defendant to prove any defence or that he has the right to continue to be in possession.[182] In relation to immovable property for example, the owner must prove unlawful occupation. Where occupation was first consented to, the onus will rest on the defendant to prove that he has consent or some other rights in law to occupy the land.[183] This means that in a situation where the owner has leased his property to the defendant, the court could not grant eviction if the defendant proves occupation consent.[184] When the defendant

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[176] Badenhorst …et al 2006, 243 (note 175 above); and Van der Merwe 1989, 175.
[177] Van der Merwe 1989, 352; and Badenhorst…et al 2006, 246.
[178] AJ Van der Walt "Ownership and eviction: Constitutional rights in private law" (2005) 9 *Edinburgh Law Review* 32-64, 42.
[179] See *Mngadi v Ntuli* 1981(3) SA 478 (D).
[180] AJ Van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446- 447.
[181] Van der Merwe 1989, 348-349; AJ Van der Walt *Constitutional property law* (2005) 410-411; *Chetty* para 20; *Graham* para 479; *Shimuadi v Shirungu* 1990 (3) SA 344 (SWA) para 347; *Ontwikkelingsraad Oos-Transvaal v Radebe And Others* 1987 (1) SA 878 (T); *Jeena v Minister of Lands* 1955 (2) SA 380 (A); and *Ebrahim v Deputy Sheriff Durban* 1961 (D). See also R Keightley "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999) 15 *SAJHR* 277-307, 283; and R Keightley "When a home becomes a castle: A constitutional defense against common law eviction proceedings: *Ross v South Peninsula Municipality*" (2000) 117 *SALJ* 26.
[182] This was held in *Chetty* with reference to *Jeena v Minister of Lands* 1955 (2) SA 380 (AD) para 382E -383.
[183] See generally *Jeena v Minister of Lands* 1955 (2) SA 380 (AD).
[184] See *Boshoff v Union Government* 1932 TPD 345 para 351.

fails to discharged this onus of proof and in the absence of any valid defence or any existing right enforceable against the owner, the right of ownership will prevail.[185]

In defence against the *rei vindicatio* the defendant can allege and prove that he has the right to possess the property and such right is binding to the owner, for example, the right to occupy the property by existence of a lease agreement.[186] To the extent that the possessor does not have a right to possess the property, he can still allege and prove, for example, that a person seeking ejectment is not the owner of the property in question; that the property does not exist; that he had lost physical control of the property at the time the action was instituted or rely on estoppel.[187]

Where the defendant is found to be in occupation of the property without the consent of the owner and without proving any defence or right to continue with occupation, the *rei vindicatio* would entitle the owner to an order for ejectment.[188] Whether the defendant/unlawful occupier will be rendered homeless as the result of such an ejectment order is immaterial for the purpose of the *rei vindicatio*. The *rei vindicatio* has nothing to do with justice and equity of eviction as the remedy only concentrates on the protection of the absolute and exclusive view of ownership[189] Once the landowner has satisfied the requirements of the *rei vindicatio,* the court cannot refuse to grant eviction order based on the social circumstance of the unlawful occupiers.[190]

In any action or application brought in terms of the *rei vindicatio*, the court does not have the discretion to consider the social rights of those sought to be ejected in terms of the remedy. This is so because the early South African common law considered the owner's rights to use and possession as superior rights.[191] To the extent that the user and possessory rights were limited, this was only possible on strict and justified grounds. In the absence of constitutional democracy to recognise the right of access

[185] *Chetty* para 23; *Akbar v Patel* 1974 (4) SA 104 (T); *Warrenton Munisipaliteit v Coetzee* 1998 (3) SA 1103 (NC); and *Ex parte Menzies et uxor* 1993 (3) SA 7999 (C).
[186] Liebenberg 2010, 343 (note 20 above).
[187] *Ncume v Kula* (1905) 19 ED para 338; *Street v Regina manufacturers (Pty) Ltd* 1960 (2) SA 346 (T) para 648; *Mehlape v Minister of safety and Security* 1996 (4) SA 133 (W) para 136E-H. See also Badenhorst…et al 2006, 245; Van der Merwe 1989, 350.
[188] See *Myaka v Havemann and Another* 1948 (3) SA 457 ATP para 465; *Jeena v Minister of law* 1955(2) SA 380 (A).
[189] IJ Kroeze *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) unpublished LLD dissertation University of South Africa 128, 132. See also Dhliwayo 2015, 99.
[190] AJ Van der Walt *Property in the margins* (2009) 54.
[191] LS Underkuffler *The Idea of property: Its meaning and power* (2003) 64-71.

to adequate housing as an essential socio-economic right, the *rei vindicatio* protected the landowner to the prejudice of the poor unlawful occupiers. In every society, the institution of ownership should be structured in a way that respects and prioritises the social needs of the people, that is, the concept of ownership carries social responsibility.[192] However, the *rei vindicatio* does not seem to consider this critical aspect of ownership.

2.3.1.1 Case law analysis

The *Jeena v Minister of Lands* ("Jeena")[193] decision is a classic example of a pre-constitutional dispensation judgment which sought to uphold the absolute-view of ownership in complete disregard of the unlawful occupiers' housing interets. This was an appeal based on the objects of the *Land Settlement Act*[194] which entitled the government to purchase land and settle people thereon. Upon this object of the Act, the government was given the entitlement to eject any person who could not set up any valid claim to the possession or *detentio* of such land.[195]

In the court *a quo* the government had instituted eviction against the Appellant in terms of the *rei vindicatio*. The government had purchased two lots in the farm with the intention of allotting them to somebody else. However, one of the lots was already occupied by the Appellant whose lease agreement had terminated.[196] Because the government was the registered owner and the Appellant was in unlawful occupation, the government instituted eviction against the Appellant.[197] The Appellant failed to prove that he had the right to continued occupation and as such the court *a quo* granted the eviction.[198]

When the matter was brought before the Appellate Division, the issues were very crisp. It was common cause that the government was the owner of the lot in issue and it was further common cause that the lease agreement which put the Appellant in occupation had expired by effluxion of time.[199] However, the contention was that the government

[192] Cowen 1984,70-73 (note 164 above).
[193] 1955 (2) SA 380 (A).
[194] *Land Settlement Act* 12 of 1912.
[195] *Jeena* para 380.
[196] *Jeena* para 382.
[197] Ibid.
[198] Ibid.
[199] *Jeena* para 383.

was not entitled to sue for ejectment because it had transferred possession of the lot to someone else.[200] The Appellant argued that the right to eject rested upon the person whom the land had since been allotted to.

The court held that the fact that the government was the registered owner of the lot in issue and that the Appellant was in wrongful occupation disclosed a good cause of action. The court further held that in the circumstances where the Appellant failed to raise any valid claim to the possession or *detentio* of the lot, there was nothing in support of the Appeal.[201] Accordingly, the Appeal was dismissed.

The *Jeena* Judgment shows that the Appellant interfered with the government's right to use and enjoyment of its property, that is, to allot the land to a person of its choice. The judgment is completely silent on the housing interests of the evictee. In this specific case, the Appellant did not have an alternative accommodation, it is apparent that he was consequentially rendered homeless. It is therefore, a well-established fact that in the pre-constitutional dispensation, the courts could not refuse the granting of eviction orders on the basis of the social circumstance of the evictee.

The *Jeena* judgment is a clear illustration of the genesis of the imbalance between the ownership right to use and enjoyment and the social right to housing. Cloete argues that the court obliquely upheld the character of completeness and individuality of ownership while undermining the housing interests of the Appellant.[202] In *Jeena* the court quoted extensively from *Graham v Ridley ("Graham")* [203] in order to support the view that the landowner's right to evict unlawful occupiers is inherent to ownership. In *Graham*, Greenburg JA's conceptual view was that ownership entails the right to evict any person who interferes with the owner's entitlements, that is, the right to exclusive use and possession.[204] However, Greenburg JA is silent on the ultimate social implications of ejectment and the harm it causes to the poor evictees.

Chetty v Naidoo ("Chetty")[205] is another classical case that dealt with the ejectment claim in terms of the *rei vindicatio*. The Appellant was appealing the ejectment order

[200] Ibid.
[201] *Jeena* para 382-383.
[202] Cloete 2016,44.
[203] 1931 TPD 476.
[204] *Jeena* para 383. See *Graham v Ridley* 1931 TPD 476; *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T); and *Van der Merwe v Webb* (1883-1884) 3 EDC.
[205] 1974 (3) SA 13 (A)

of the court *a quo* on the ground that the court *a quo* erred on the burden of proof.[206] What is important about this case is the description of ownership and the relationship between the right to exclude and the former. The relevance of this case is not the question of who had the onus of proof, but the link drawn by the court between ownership and its protective remedy. In this respect, Jansen JA made the following points:

> "The incidence of the burden of proof is a matter of substantive law (*Tregea and Another v Godart and Another*, 1939 AD 16 at A p. 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council v Rand Townships Registrar and Others*, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v Gengemma,*1954 (4) SA 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right)"[207]

In this case, the court upheld that the ownership right to use and enjoyment and the right to possession are exclusive in nature as they are central features of ownership.[208] Similar to *Jeena,* the court in *Chetty* emphasized the absoluteness of ownership and ensured that ownership was never restricted on no justified ground and not undermined by other rights.

Having analyzed the nature and the character of the institution of ownership which was received in South African law, it does not come as a surprise that the courts' underlying reasoning in the above discussed cases certified the *rei vindicatio* as an absolute protective remedy of ownership. The fact that the courts were not required to consider the interest of the unlawful occupiers is a clear indication that ownership and its inherent rights thereof, were superior over the interest of the unlawful occupiers.

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[206] *Chetty* para 16.
[207] *Chetty* para 20.
[208] Ibid. See also Cloete 2016, 45.

Thus, it is arguable that the courts' approach gave more effect to the complete, individualistic and abstract character of ownership.

The cases discussed above show that in the pre-constitutional dispensation the courts' adjudication approach gave full force to the right to exclude when dealing with eviction cases brought in terms of the *rei vindicatio.*[209] These cases succinctly illustrate that in the pre-constitutional dispensation the courts adopted an approach that sought to favour ownership above the social rights of the evictees. This approach was the genesis of the imbalance between ownership rights and the unlawful occupiers' rights to housing. It is upon this background that the new Constitution sought to dismantle the status *quo* and reconceptualise the institution of ownership in order to infuse the social character in the institution of ownership.[210]

2.3.2 Statutory remedy*:* The *Prevention of Illegal Squatting Act 52 of 1951 (*PISA*)*

While the *rei vindicatio* was already in place, the apartheid government introduced PISA as an alternative statutory eviction remedy to the common law remedy.[211] The long title of PISA states that the Act was enacted "to provide for the prevention and control of illegal squatting on public or private land." Whereas many Africans in South Africa did not have secure tenure and were thus vulnerable to arbitrary evictions, the Act sought to perpetuate the status *quo* by allowing private landowners and the state to arbitrarily evict desperate unlawful occupiers who were in dire need for shelter. PISA was enacted with *mala fide* political motives premised on the National Party's manifesto of 1948 which was to vigorously and effectively protect "whites'".[212] This *mala fide* premise of PISA undermined and violated the poorest and most vulnerable African South Africans' right to shelter.

2.3.2.1 Prohibition of Illegal Squatting

Section 1(1)(a) of PISA provides that no person is allowed to enter or remain on any land or building without the consent of its owner or any lawful occupier of such land or

[209] Cloete 2016, 48.
[210] See section 26 of the Constitution.
[211] Cloete 2015,52.
[212] G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD dissertation Stellenbosch University (2011) 54.

building. The Act appears to provide two offences: (i) entering; and (ii) remaining in the property without consent of the landowner or lawful occupier.[213] This provision was criticised for failing to distinguish between a person who enters the property with the intention of remaining in the property and the person who has no intention of remaining in the property.[214]

In *R v Zulu*[215] the Appellant attempted to challenge section 1(1)(a) provision of PISA. The legal issue was whether the Appellant who had lived on the farm for all his life had contravened the provision. This came after the Appellant remained on the farm after the owner had withdrawn its permission.[216] The Appellant argued that 'entering' and 'remaining' constitute one offence. The contention was that the 'entering' must first be unlawful then followed by 'remaining'.[217] In this light, the Appellant argued that his entry in the farm was not unlawful, thus the continuation to reside in the farm did not constitute an offence for the purposes of section 1 of the Act.

The Appellant relied on *Tsose v Minister of Justice ("Tsose")* [218] in support of the argument that his case did not fall under the ambit of section 1(1)(a) of the Act. The Appellant pointed out that there was in 1951 subsisting legislation which dealt with natives residing on farms as squatters, either without the consent of the owner or after the owner had withdrawn his consent.[219] It was argued that this legislation was not repealed by PISA. Accordingly, it was contended that the act of the Appellant of 'remaining' on the farm after the farm owner had withdrawn its consent had to be dealt with in terms of the earlier legislation and not under PISA.*[220]* It was argued that this was the reasoning adopted by the same court in the precedent case of *Tsose*.

In dismissing the Appellant's case, the Appellate Division found that:

> "It must, of course, be borne in mind that the mere fact that there is overlapping between two enactments does not mean that the same act or omission is not punishable under both (cf. sec. 382 of Act 56 of 1955). Nor can an accused

[213] *R v Phiri* 1954 (4) SA 708 (T); *S v Bhengu* 1968 (3) SA 606 (N); and *R v Press 1956* (3) SA 89 (T).
[214] Stuurman 2002,30.
[215] 1959 (1) SA 263 (A); *R v Melville* 1959 (3) SA 544 (E); *R v Ntala and Others* 1960 (1) SA 494 (T); and *R v Matiwane* 1961 (2) SA 2 (T).
[216] R v Zulu 1959 (1) SA 263 (A) para 265.
[217] Ibid para 266.
[218] 1951 (3) SA 10 AD.
[219] *Tsose* para 267.
[220] Ibid.

> successfully claim that the provision under which he is prosecuted does not apply to him merely because the other is more specially or directly related to the circumstances of his case. He only escapes if, as happened in *Tsose's* case, consideration of the enactments leads to the conclusion that the one under which he is prosecuted does not apply to his case at all."[221]

The court held further that PISA was enacted to prevent illegal squatting and such squatting will be considered illegal where the squatter has no right to remain in the property, whether his original entry was legal or not is immaterial.[222] The court further held that paragraph (a) of the provision provides for two offences. The court's reasoning was that the paragraph speaks of entering "without lawful reason" and remaining "without the permission of the owner". These offences were found to be related but not identical. Accordingly, the appeal was dismissed.

Section 1(2) of the Act provides that upon prosecution of the squatters for contravening subsection (1), the accused would bear the onus of proof on the balance of probabilities that he had lawful reason to enter and/or remain in the property in issue.[223] This was contrary to the common law presumption that in criminal cases the state bears the onus of poof beyond reasonable doubt that the accused is guilty of the alleged offence.[224] However, PISA seemed to disregard the common law and undermined the presumption of innocence of the accused.[225]

2.3.2.2 Ejectment and demolition of structures

Section 3 of PISA provided that the court which convicts in terms of section 2 of the Act shall make an order for summary ejectment of such persons from the property

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[221] *Tsose* para 266-267.
[222] *Tsose* para 267.
[223] Section 1(2)-
If in the prosecution of a person for a contravention of subsection (1) it is proved-
(a) that he entered upon or into land or a building of any other person, it shall be presumed that that person entered upon or into the land or building without lawful reason;
(b) that he remained on or in any land or building of any other person, it shall be presumed that that person so remained without the permission of the other person,
unless the contrary is proved. See also C Lewis "The Prevention of Illegal squatting Act: The promotion of homelessness?" 1989 *SAJHR* 233, 235 and section 2 of PISA for penalties.
[224] *R v Ndhlovu* 1954 AD 369.
[225] It was predictable that the rebuttable presumption of PISA was not going to survive the new Constitution. See section 35(3)(h) of the Constitution; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC).

concerned.[226] This provision further provides that the court may issue an order or give instructions to ensure that there is ejectment, demolition and removal of building or any structures which might have been erected on the property concerned.[227] This provision was criticised for precluding the courts from suspending eviction pending the outcomes of appeal or review.[228]

2.3.2.3 Prohibition of erection or occupation of unauthorised building or structure

Section 3A of PISA forbid the owners or lessee of land from allowing the erection of buildings or structures intended for occupation without approval of the local authority.[229] The penalties for contravening this provision completely discouraged the landowner from acting according to their own dictates but to obey the provision.[230] Section 3A (3) of the Act provided that upon conviction of the landowner or lessees for contravening subsection (1), such convicted person shall demolish and remove the erected buildings or structure at his own expense. The provision did not require notice to the occupiers of the building or structure.[231]

Stuurman further argues that the provision did not give recognition to the common law rule of *audi alteram partem*.[232] Moreover, the provision appears to have hijacked the objective of the NBRBSA.[233] The objective of this Act is " to provide for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities; for the prescribing of building standards; and for matters connected therewith."[234] As PISA was also dealing with the regulation of the erection of the unauthorised buildings, it encroached on the objects of the NBRBSA.

2.3.2.4 Right to demolish unauthorised building or structure

[226] Section 3(1)(a) of PISA.
[227] Section 3(1)(b) of PISA.
[228] Stuurman 2002, 38; and *Ntuli v Van der Merve* 1963 (2) SA 88 (N).
[229] Section 3A(1)(a)(i) of PISA. See also AJ Van der Walt "Land reform in South Africa since 1990-an overview" 1995 *SAPL* 18.
[230] See section 3A (2) of PISA. See also Stuurman 2002, 39.
[231] Stuurman 2002, 40.
[232] Ibid. *Audi alteram partem* is the phrase meaning "listen to the other side".
[233] Stuurman 2002, 40.
[234] See the long title of NBRBSA.

In terms of section 3B of PISA, the landowner could without a court order summarily demolish any structures erected without his consent. This provision was criticised for encouraging people to take the law into their own hands.[235]

2.3.2.5 Appeal and review proceedings

Section 11B of PISA provides that "notwithstanding anything to the contrary contained in any other law, any order, instruction or authority referred to in this Act shall, notwithstanding the noting of an appeal against or review proceedings concerning any conviction, punishment or order by virtue of the provisions of this Act, apply." Stuurman argues that this was contrary to the general common law principle that the noting of appeal or review suspends the present decision.[236] It is, therefore, apparent that the purpose of section 11B was to cure a delay that could be caused by any appeal or review and to avoid unlawful occupiers from remaining in the property, pending appeal or review.[237]

2.3.2.6 Defence against statutory eviction

PISA was premised on the same rational as the *rei vindicatio* which is to protect the owner from unauthorised possession and use of his property by no-owners and thus to evict any person interfering with such autonomy.[238] Accordingly, the defences to eviction were, in principle, similar to those provided at common law. In order to defend against eviction instituted in terms of PISA, the defendant had to prove that the right to occupy the property or that the owner permitted the occupation.[239]

In *George Municipality v Vena and another ("George Municipality")*[240] the first and second Respondents ("Respondents") were residing in the property owned by George municipality. The first Respondent's house had been destroyed by fire and she

[235] Demolishing another person's property without the court order is arbitrary and it undermines the court's fundamental purpose of promoting fairness and administration of justice. Because of the arbitrariness of section 3B of PISA, it was inevitable that PISA will not survive the new constitutional dispensation. See section 26(3) of the Constitution and PIE which gave effect to section 26(3) of the Constitution. See also O'Regan1989,361(note 21 above).
[236] Stuurman 2002, 46.
[237] Ibid 47.
[238] This meant that ownership trumps the conflicting unlawful occupiers or squatters' housing interests and needs. See Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367, 368.
[239] Usually by way of a lease.
[240] 1989 (2) SA 265 (A). See also *Vena and another v George Municipality* 1987 (4) SA 29 (C).

decided to rebuild it from scratch which the Appellant municipality had decided to demolish. The second Respondent had decided to build an additional room which the municipality had also decided to demolish. Accordingly, the Respondent applied to the court *a quo* for spoliation order on urgent bases praying that the municipality must restores them to the condition they had been prior the demolition.

The Appellant municipality opposed the application on the basis that the Respondents had no right to reside on the property and that they had built without its consent. The issue in this case was whether the Respondents had any right to the land which entitled them to occupy and build on it. The first Respondent's case was that she was the lawful tenant and that her name appeared on the municipal records. The second Respondent's case was that he was granted permission by the municipality to occupy the land. Because he had the permission to occupy the land, the second Respondent argued that he had the right to extend the building he had erected on the land.

The court *a quo was* satisfied that the Respondents had proved on the balance of probabilities that they were lawful tenants which entitled them to occupy the land. Accordingly, the spoliation order was granted. However, when the matter was brought before the Appellate Division ("AD") the order of the court *a quo* was partly altered. The AD found that the second Respondent had failed to establish a title to the land. The AD held that the second Respondent's name did not appear in the survey conducted by the Appellant nor as a tenant in any of the Appellant's records.[241] The AD held further that the second Respondent had failed to produce receipts for rental nor did he provide any reason for such inability.[242] Accordingly, the AD concluded that the court *a quo* erred in finding that the second Respondent had proved on the balance of probabilities that he was a tenant of the Appellant and was thus entitled to occupy the land. The Appeal succeeded with regards to the second Respondent.[243]

With regards to the first Respondent, the AD concurred with the court *a quo* that at the time the Appellant demolished the first Respondent's house the first Respondent was still a lawful tenant. The court added that the Appellant's consent to the erection of the first Respondent's original building continued to operate in respect to re-erection after the fire damage. Accordingly, the court held that the first Respondent had title to

[241] Para 268.
[242] Ibid.
[243] Para 269.

occupy the land and to rebuild after her building had been destroyed. The court concluded that the Appellant was not justified in demolishing the first Respondent's property and the appeal against the first Respondent was dismissed.[244]

The relevance of *George Municipality* judgement is that it shows that the only defence that was recognised by PISA was that of proving title or right to the property. Thus, in the absence of the title eviction could not be resisted. Just like the *Chetty* judgement, the *George Municipality* judgment succinctly demonstrates that there was no consideration of all the relevant circumstances before the court could order eviction. Thus, it can be concluded that in the pre-constitutional dispensation the courts were not given discretion to infuse the enquiry with the principles of justice and equity before granting eviction orders.

2.3.2.7 Criticism of PISA

The effect of PISA could be felt through the homelessness, social and economic harm that it caused to the majority of black South Africans. When parliament decided to enact PISA the common law remedy (*rei vindicatio)* was already in place and it uncompromisingly protected the absoluteness of ownership. It can, therefore, be inferred from this that the objective of PISA was to extend the harshness of evictions and to deprive vulnerable occupiers of their home. This is so because at common law the landowner could not evict or demolish the unlawful occupiers' building or structure without the court order. However, in terms of PISA the landowner was entitled to demolish without any court order any building or structure erected on his land without his consent. At common law the eviction order was certain to be suspended by noting of appeal or review. However, in terms of PISA, this was not possible. The reason for this was to cure a delay of eviction that could result from launching of an appeal or review proceedings.

Although at common law unlawful occupation was the matter of private law, in terms of PISA the matter was dealt with in terms of the public laws by criminalising the act of unlawful occupation. Arguably, the criminalisation of the act of unlawful occupation was *mala fide* because it prioritised the interests of the landowners over those of the alleged unlawful occupiers. The fact that in those criminal proceedings the alleged

[244] Para 264.

unlawful occupier or squatter bore the onus of proof that he did not contravene the statute instead of the state proving beyond the reasonable doubt that there is contravention of the law is evidence that PISA was a flawed system of law.

PISA set a severe penalty for all those landowners who could allow other persons to build or erect any form of structure in their land without the consent of the municipality. It can further be deduced that PISA was used as a safety-net to deal with all that could have been missed by the common law.[245] It is also notable that in the pre-constitutional dispensation the land was predominantly in the hands of white South Africans. Because of the wide-ranging eviction powers which were given to the landowners PISA destroyed homes and families of many black South Africans who were evicted without being provided with alternative accommodation.[246]

The rationale behind PISA was that ownership rights to exclusive possession and exclusive use and enjoyment trumps the interest of the unlawful occupiers.[247] Muller argues that this approach adopted in the pre-constitutional dispensation perpetuated the insecurity of tenure.[248] This is demonstrated by the fact that the courts were evicting squatters without having considered their personal circumstances or housing needs.[249] Because of such inhuman eviction procedure, PISA is strongly criticised for furthering political ideological goals of racial segregation and for being a systematic oppression of black people.[250]

Because of its political ground of racial segregation, PISA was for all intents and purposes a drastic law.[251] PISA was made as swift as possible to quicken and induce forced removals of black people to live in racially designated locations.[252] This swift nature of PISA proved to be disastrous to landless and homeless black South Africans while privileging white landowners by protected autonomy and absoluteness of ownership. In support of this view Sachs J in *PE Municipality* judgement quotes Van der Walt with approval in his assertion that:

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[245] SERI 2013, 7-8.
[246] This supported the apartheid government's goal of racial segregation. See Van der Walt 2002, 254-258 (note 16 above). SERI 2013, 8; and Liebenberg 2010, 268.
[247] Cloete 2016, 58.
[248] Muller 2011, 69 (note 212 above).
[249] Ibid 70.
[250] Ibid. See also Van der Walt 2009, 60 (note 190 above).
[251] *PE Municipality* para 8; See also O'Regan 1989, 361.
[252] *PE Municipality* para 10.

> "The 'normality' assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law. However, it had disastrous results for non-owners under . . . apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid to effect the evictions and removals required to establish the separation of land holdings along race lines."[253]

Van der Walt demonstrates that in the pre-constitutional dispensation the courts adopted a hierarchical approach when dealing with evictions showing partiality towards the landowner's interests over those of the unlawful occupiers.[254] Because of this PISA operated as a cornerstone for racial segregation political goal.[255] As such, PISA was an arbitrary and inhumane property law regime.

2.4 Concluding remarks

In this chapter, the common law and statutory law eviction remedies have been examined. Before discussing the remedies, it was necessary to begin with an examination of the character and the notion of ownership in order to give more sense to the absolute protective mechanism afforded thereon. To this extent, the remedies have been examined in light of the conceptual understanding of ownership as an absolute real right. Without this background, it would have been difficult for one to understand the absolute power which was attributed to the *rei vindicatio* and PISA by the early South African common law and apartheid legislature.

The right to use and enjoyment of private property is a component right of ownership and as such it was necessary to examine the historical background of ownership. This was done through exploring Roman law, Roman-Dutch law and the scholarly ideologies of the Pandectists. The analysis of the adjudication of evictions and the

[253] Ibid para 10. See Van der Walt 2002, 254-258; *Ndlovu v Ngcobo;* and *Bekker and Another v Jikka* 2003 (1) SA 113 (SCA) para 65.
[254] This was described as "presumptive power", see Underkuffler 2003, 64-71 (note 191 above).
[255] It was upon this background that section 26(3) of the Constitution came into place. See *PE Municipality* para 10; Van der Walt 2002, 254.

court's reasoning in the application of the remedies has fairly been rendered. This has been done through analysis of caselaw with the incorporation of academic criticisms. Because ownership was conceptualized as an absolute real right this chapter demonstrated that it was almost impossible to interfere with the right to use and enjoy private property.

Additionally, the criticism of both the common law and statutory law eviction remedies was demonstrated. The principles which governed the early South African common law of property is, arguably, incorporated by philosophies of Roman-Dutch law authorities such as Grotius as well as by the Pandectists scholars. Pandectists conceptualized ownership as a complete, individualistic and abstract real right which permitted the landowner to exclude or evict any persons who interfered with his peaceful use and enjoyment of his property. It is upon this background that Muller and Van der Walt argue that the *rei vindicatio* and PISA protected the landowner's interests above those of the unlawful occupiers and considered the landowner's right to use and enjoyment as an exclusive right that trumps the non-owners' interests.[256] It is for this reason that the unlawful occupiers or non-owners' interests could not stand against those of the landowners.

The case law examined in this chapter has in a nutshell demonstrated that the courts' approach to evictions in the pre-constitutional dispensation was such that they applied the remedies without considering the social impact of eviction on the evictees. The chapter further demonstrates the *mala fide* intentions of the apartheid government in promoting racial segregation through the enactment of PISA. This statutory eviction remedy afforded absolute eviction power to the landowners who were predominantly white South Africans. Because the Act was silent on the disastrous implication of the evictions, the Act was criticized as an arbitrary system of law or drastic law, as Sachs J puts it in the *PE Municipality* case.

Ownership is a social concept, it, therefore, carries a huge social obligations and should as a result always comply with the social need of the day.[257] The notion of ownership as an absolute right and the absolute right to evict any person compromising possession and peaceful use of private property becomes problematic

[256] Muller 2013, 368; Van der Walt 2002, 258.
[257] Cowen 1984, 70-73; and P Dhliwayo 2015, 101.

if the courts do not take into account the social context.[258] It is for this reason that the 1996 Constitution is not in harmony with the Grotius and Pandectists concept of ownership that seeks to prioritize the interests of landowners at the expense of those of the non-owners. To this extent, section 26 of the Constitution is transformative in that it seeks to balance both the opposed interests of the landowners and those of the non-owners.

[258] Dhliwayo 2015, 102.

CHAPTER 3

Balancing the Subject Rights in the New Constitutional Dispensation

3.1 Introduction

In the *Blue Moonlight* case Van der Westhuizen J held that:

> "The owner's right to use and enjoy property at common law can be limited in the process of the justice and equity mandated by PIE."[259]

Van der Westhuizen writes this judgement in the context of eviction in the new constitutional dispensation framework. It is, therefore, apparent that in the new constitutional dispensation there is a shift away from the pre-constitutional dispensation legal framework which considered ownership rights as largely sacrosanct.[260] Accordingly, this "new normality"[261] seeks to remedy the drastic eviction laws of the apartheid government by imposing certain limitations on ownership for the public interest at large. However, the new normality does not seek to undermine ownership nor its entitlements. Section 25(1) of the Constitution is enshrined to protect landowners from arbitrary deprivation of property. Accordingly, any unlawful occupation would trigger section 25(1) of the Constitution and the landowner would be entitled to institute eviction proceedings in protection of his section 25(1) right.

Notably, the state has an obligation to realize the section 25(1) right by assisting landowners to evict unlawful occupiers. This is evident in the *Modderklip's* judgement where Harms JA found that the state's failure to assist the landowners to evict the unlawful occupiers by way of providing alternative accommodation to the unlawful

[259] *Blue Moonlight* para 39.
[260] SERI 2013, 25.
[261] See discussion of "new normality" in Wilson 2009, 270-290 (note 33 above).

occupiers was a violation of section 25(1) of the Constitution.[262] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*[263] the Constitutional court defined the scope of section 25(1) to cover any interference with the peaceful use, enjoyment or exploitation of private property.[264] However, it is important to note that section 25(1) is not absolute. The landowner may be deprived of his property in terms of law of general application and if such deprivation is not arbitrary.[265] This confirms that in the new constitutional dispensation, ownership is a limited real right.[266] Furthermore, in the new constitutional dispensation the right of access to adequate housing is a fundamental socio-economic right which has been effectively developed by the courts. To this extent, the court may not grant eviction if such order would render the unlawful occupiers homeless.[267]

With the advent of the new Constitution, South African eviction law was transformed. Section 26 of the Constitution provides that everyone has the right of access to adequate housing and that no one may be arbitrarily evicted from their homes. The provision further puts an obligation on the state to ensure that the right of access to adequate housing is realised. PIE was promulgated to give effect to section 26 of the Constitution. Accordingly, in the new constitutional dispensation, courts are required to strike an equitable balance between section 25(1) and 26 of the Constitution. Strydom and Viljoen argue that this balancing approach can lead to the limitation of the landowner's normal ownership entitlements.[268]

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[262] Para 28.
[263] 2002 (4) SA 768 (CC).
[264] Para 57.
[265] According to Cloete, "a law of general application refers to a law or a rule that is authorised by valid and properly promulgated legislation, regulation, subordinate legislation other than regulations, municipal by-laws, rules and principles of common law and customary law, rules of court and international conventions that apply to the citizenry", see Cloete 2016, 179. See also S Woolman & H Botha "Limitations" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (2014) 34; A J Van der Walt *Constitutional property law* 3 ed (2011) 232-237. Deprivation is arbitrary if there is *inter alia* no sufficient reason for deprivation and if it cannot be justified in terms of section 36 of the Constitution, this was the position in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2002 (4) SA 768 (CC) para 99.
[266] AJ Van der Walt *Constitutional property law* 3 ed (2011) 218.
[267] *Jaftha v Scoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA); *Blue Moonlight*; *City of Johannesburg v Changing Tides* 74 (Pty) Ltd 2012 (6) SA 294 (SCA); and *Occupiers, Berea v De Wet no and Another* 2017 (5) SA 346 (CC) ("*Berea"*). *Berea* judgement has recently been used in deciding *Absa Bank Ltd v Mokebe And Related Cases* 2018 (6) SA 492 (GJ); and *Mayekiso And Another v Patel No And Others* 2019 (2) SA 522 (WCC).
[268] Strydom and Viljoen 2014, 1211 (note 102 above).

This chapter, therefore, discusses how section 26 of the Constitution limits the common law rights to peaceful use and enjoyment of private property as protected by section 25(1) of the Constitution. The chapter further analyses the courts' approach in balancing landowners and unlawful occupiers' interests in the context of evictions. Finally, the chapter analyses the provisions of PIE which gives effect to this balancing exercise.

3. 2 The right of access to adequate housing

3.2.1 The overview, meaning and scope of section 26 of the Constitution

Many South Africans do not have secured tenure.[269] Despite the state's effort and designed programmes to give effect to the progressive realisation of housing rights, many poor people are unable to access adequate housing.[270] It is for this reason that many poor South Africans live in difficult conditions in informal settlement and inner City "slum buildings" subject to risk of evictions by state or private landowners.[271] To this end, the right of access to adequate housing has become the most contested and frequently litigated socio-economic right.[272] This high volume of litigation over the right of access to adequate housing has challenged the courts to give more content to housing rights.

The housing rights are enshrined in section 26 of the Constitution which has three subsections. The first subsection talks about the general right to housing. The second subsection establishes the scope of the obligation imposed on the state, with three key elements namely, (a) the state is obliged to take reasonable legislative and other measures; (b) within its available resources; (c) and to achieve progressive realisation of the right. [273] The third subsection protects unlawful occupiers against arbitrary evictions.[274]

The right of access to adequate housing is a very important human right and is equally enforceable like all other rights in the Bill of Rights. The right of access to adequate

[269] *Molusi and Others v Voges No and Others* 2016 (3) SA 370 (CC) para 1.
[270] SERI 2013, 3.
[271] Ibid.
[272] Ibid.
[273] *Grootboom* para 21.
[274] Ibid.

links other cross cutting rights. For example, the right to human dignity and equality would ultimately be affected if the state fails to realise the right of access to adequate housing. The right of access to adequate housing is more than a mere commodity to meet the basic needs of the society as it enables people to reach their full potential as humans.[275] It is further argued that the right of access to adequate housing affords people the opportunity to participate in the society as equals.[276]

3.2.2 Analysis of section 26(1) and (2)

Section 26(1) of the Constitution provides that everyone has the right of access to adequate housing.[277] Accordingly, the state has the constitutional duty to give effect to the realisation of this right. Currie and De Waal argue, however, that even though the state has an obligation to give effect to the realisation of the right, such obligation is not an unqualified obligation.[278] Notably, Currie and De Waal's argument is premised on the fact that the provision of housing may differ according to economic resources available to different sectors of the country.[279] Thus, subsection (2) provides that the state must take reasonable and other measures, within its available resources to achieve the progressive realisation of the right. Because subsection (1) is qualified in terms of subsection (2), both subsection (1) and subsection (2) must be read together.[280] Accordingly, both subsection (1) and (2) create a positive obligation on the government to make provision for access to adequate housing.[281] These two

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[275] Muller 2011, 81. See also Liebenberg 2010, 177.
[276] Ibid.
[277] The Constitution does not define nor give meaning to the right of access to adequate housing. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) the Constitutional court was so reluctant to give a clear definition of the right or rather to substantively develop the right. See S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stellenbosch LR* 664.
[278] Currie and De Waal 2013, 584 (note 104 above). Currie and De Waal argue that the right is that of "access to" housing as to article 11(1) of the *International Covenant of Economic Social and Cultural Rights* (IESCR) which reads:
"The states parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The states parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent". See also *Grootboom* para 35; Muller 2011, 75; S Liebenberg "The interpretation of socio-economic rights" in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 2 ed (2003) 33-22; and Muller 2011,76.
[279] Currie and De Waal 2013, 585.
[280] Subsection (2) gives a scope upon which subsection (1) is measured. See Muller 2011, 76; D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 135-177; and Liebenberg 2010, 173-186.
[281] Currie and De Waal 2013, 585; *Grootboom* 34; and Muller 2011, 82.

subsections compel the state to discharge its obligation by prioritising people in conditions of poverty, homelessness or intolerable housing conditions.[282]

In terms of section 26(1), for one to have access to adequate housing there must at least be land; basic services and a dwelling. This means that adequate housing is more than mere bricks and mortar.[283] The provision of access to adequate housing is not an exclusive obligation for the state as other agents within the society including individuals must be encouraged and be given the opportunity by legislative and other measures to provide access to adequate housing within their capacity.[284] Even though the state's obligation to provide access to adequate housing is qualified in terms of subsection (2), the state is required to devise a comprehensive and workable plan to provide housing to its people.[285]

Of importance to note in this regard is the fact that all the spheres of government[286] have the shared responsibility of coordinating a comprehensive housing programmes in consultation with one another.[287] The National government plays a huge role insofar as the allocation of national revenue to the provinces and local government is concerned.[288] The measures that must be taken by government to provide housing in terms of section 26(2) of the Constitution must be a coherent public housing programme and must be progressive in nature.[289]

3.2.2.1 Reasonable legislative and other measures

The question is: how does one determine whether the government has fulfilled its obligation in terms of section 26(2) of the Constitution? Yacoob J holds the view that the test would be that of reasonableness.[290] If it is found that the legislative and other measures taken by the state to ensure realisation of section 26(1) were unreasonable, the state would be found to have acted unconstitutionally. The government has enacted legislation in order to properly deal with the provision of housing. Although this move is commendable, it is notable, however, that mere enactment of legislation

[282] *Grootboom* para 24.
[283] *Grootboom* para 35.
[284] Ibid.
[285] *Grootboom* para 38.
[286] National, Provincial and Local governments.
[287] Grootboom para 39. See chapter 3 of the Constitution.
[288] *Grootboom* para 40. See section 100, 139 and 155 (7) of the Constitution.
[289] *Grootboom* para 41.
[290] Ibid.

does not necessarily mean the government has complied with section 26(2) of the Constitution. Arguably, mere legislation cannot be enough as the state is further obliged to achieve the intended purpose of the legislation so enacted.[291] The programmes or any other measures taken by the government must marry the social and economic situations of the people to be provided with housing because these are significant segments of the society.[292]

The test of reasonableness set out by Yacoob J in *Grootboom*, seems to have attracted a lot of academic criticism. This followed after the Constitutional court rejected the international notion of "minimum core".[293] The concept of the minimum core obligation describes the minimum expected of a state in order to comply with its obligation to realise socio-economic rights, including housing rights.[294] In *Grootboom* it was argued that the minimum core obligation is essential in order to ensure that the government satisfies section 26(1) of the Constitution.[295] The *amici curiae* argued that the minimum core obligation "is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation".[296] Yacoob J held that the determination of a minimum core in the context of housing presents difficulties.[297] In his substantiation Yacoob J held that it is difficult to determine the minimum threshold for the realisation of the right of access to adequate housing because the needs in the context of housing are diverse.[298] Accordingly, the Constitutional court held that the test to determine whether the measures taken by the state have satisfied section 26(1) is that of reasonableness.

Dugard argues that the Constitutional court failed to put more content on the right of access to adequate housing.[299] The criticism of the reasonableness test is well advanced by Muller in his discussion of Liebenberg's critique of the model of reasonableness review.[300] Liebenberg argues that the reasonableness review

[291] By further making policies and implement programmes to achieve the results. See *Grootboom* para 42.
[292] *Grootboom* para 43.
[293] *Grootboom* para 33.
[294] *Grootboom* para 31.
[295] *Grootboom* para 33.
[296] *Grootboom* para 31.
[297] *Grootboom* para 33.
[298] Ibid.
[299] Dugard, 2014, 265 -279 (note 88 above).
[300] Muller 2011, 87. See also S Liebenberg "Socio-economic rights: Revisiting the reasonableness review/minimum core debate" in Woolman S and Bishop M *Constitutional Conversations* (2008).

approved by Yacoob J fails to give substance to the content of the right of access to adequate housing and the obligation that flows from the right.[301] Liebenberg argues that the reasonableness test is vague and open-ended in that it allows the court to avoid giving content to the housing right.[302] Liebenberg describes the reasonableness test as being highly differential to the state.[303] Accordingly, Liebenberg argues that the minimum core is stronger than the reasonable enquiry.[304]

The fact that the reasonable test is based on the justifiability of the state's reason for failing to fulfil the right to housing, without first engaging with the purpose and underlying values of the housing right does not help in giving meaning on what it means to have access to adequate housing.[305] The difficulty is that if the court fails to put content on the right of access to adequate housing, it narrows the dialogic space in both the adjudication of the right and the claiming of the benefits that flow from the right.[306] It is, therefore, hard or almost impossible to determine the reasonable legislative and other measures if the meaning of the right of access to adequate housing is not clearly developed and well established.[307] Muller criticises the reasonableness review model approved in *Grootboom* on the basis that it precludes the development of the substantive content of the right of access to adequate housing by arguing that the reasonableness review model focuses disproportionally on the reasons advanced by the government for limiting access to housing.[308]

3.2.2.2 Available resources

The second element of section 26(2) imposes a condition on the state's obligation to provide access to adequate housing. The state is required to take reasonable legislative and other measures, "within its available resources". This means that the

[301] Muller 2011, 87.
[302] Ibid. See also M Pieterse "Coming to terms with the judicial enforcement of socio-economic rights" (2004) 20 *SAJHR* 383-417, 410-411.
[303] Ibid.
[304] S Liebenberg *Socio-economic rights* in G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD dissertation Stellenbosch University (2011) 88-89.
[305] Ibid 89.
[306] Muller 2011, 89.
[307] Ibid.
[308] Muller 2011, 92.

state is not required or expected to do more than its available resources permit.[309] This further demonstrates that all the measures that the state is required to take in order to achieve progressive realisation of section 26(1) right are governed by availability of resources.[310] Because the court cannot make an order that is impossible or not practical to comply with, Yacoob J holds the view that the availability of resources is an important factor in determining whether the government has acted reasonably or not in its progressive realisation of the right of access to adequate housing.[311]

3.2.2.3 Progressive realisation of the right of access to adequate housing

Finally, the government has the duty to ensure that there is progressive realisation of the right of access to adequate housing and to ensure that housing is made accessible to a wider range of people as time progresses.[312] Even though the state must take reasonable steps to achieve realisation of housing right, section 26(2) of the Constitution acknowledges that the right cannot be realised immediately.[313]

3.2.3 Analysis of section 26(3)

Section 26(3) provides that no one may be evicted from their homes or have their homes demolished without an order of court made after considering all relevant circumstances.[314] The subsection further provides that no legislation may permit arbitrary eviction. Yacoob J describes this right as a negative right because it is a guard or protection of subsection (1) in the sense that it ensures that the state or private landowners do not tamper with the unlawful occupiers' right of access to

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[309] *Grootboom* para 46.
[310] Ibid. See also *Soobramoney v Minister of health, KwaZulu-Natal* 1998(1*)* SA 765 (CC) 11.
[311] Ibid.
[312] *Grootboom* para 45. See also article 2(10) of ICESCR which reads:

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

[313] Ibid.
[314] See *Pheko v Ekurhuleni Municipality* 2012 (2) SA 598 (CC), in this case the Constitutional court was asked to decide whether it was permissible for the Ekurhuleni municipality to evict informal settlers from their homes without a court order. Nkabinde J unanimously found that the Ekurhuleni municipality was not authorised to evict without the court order and its action to evict without the court order was declared unlawful.

adequate housing.[315] Section 26(3) protects the occupiers from being evicted from their "homes". The questions are: what constitutes a home? What does "home" mean?

According to Sixsmith, the meaning of a home can be derived from a number of commercial, social, academic and literary sources.[316] However, these different sources tend to present different ideas and observations.[317] Some writers define home as a social unit where there is strong blood relationship.[318] Home is also viewed as a medium of self-expression and identity.[319] Some writers view the concept of home not as a mere physical structures but as a center of emotional significance; crucial sites of cultural activity; and cultural expression representing a person's individuality and their tie to society.[320] In the South African law of eviction home has been conceptualized as a territory that affords occupiers the opportunity to exercise control over their space and to do activities thereon.[321]

It is, therefore, apparent that evictions do not only remove individuals from mere buildings or structures they occupy but further damage their psychological and social well-being. Having described "home" as a psychological and social concept one would imagine that PISA and the *rei vindicatio* remedies did not only destroy the physical buildings or structures of the unlawful occupiers but destroyed the dignity, privacy, personal intimacy and family security of the unlawful occupiers. It is upon this background that section 26(3) seeks to protect unlawful occupiers against arbitrary

[315] Liebenberg argues that even though the Constitutional court talks about this negative right in *Grootboom* it fails to explain what would amount to impairment of the right of access to adequate housing, see note 300 above. This negative right was explained in *Jaftha v Schoeman and others*; *Van Rooyan v Stoltz and others* 2005(2) SA 140 (CC); and *Gundwana v Steke Development and Others* 2011 (3) SA 608 (CC), where Mokgoro J held that the sale of the debtor's home in recovery of the debt tempers with section 26(3) of the Constitution and further violates section 26(1) of the Constitution.
[316] J Sixsmith "The meaning of home: an exploratory study of environmental experience" (1986) 6 *Journal of Environmental Psychology* 281-298.
[317] Ibid.
[318] Ibid.
[319] L Rainwater "Fear and the House-as-Haven in the Lower Class" (1966) 32 *Journal of the American Institute of Planners* 23-31; and J Rapoport "A critical look at the concept 'home'" in Benjamin DN (ed) *The Home: Words, Interpretations, Meanings and Environments* (1995) 25-52.
[320] J Sixsmith 1986 (note 316 above)
[321] R Sebba and A Churchman "The uniqueness of Home" (1986) 3 *Architecture of Behavior* 7-24, 21, and Muller 2011, 47. See also *PE Municipality* para 17 where Sachs J explains that home is more than just a shelter but that it is a zone of personal intimacy and family security. He further defines home as the only relatively secure space of privacy. See also United Nations Housing Rights Programme Report NO 1 "Housing Rights Legislation: Review of International and National Legal Instrument" (2002) 1.

eviction. The aim of section 26(3) is to strongly protect unlawful occupiers and more so to bring about the transformation of the South African legal order.[322]

3.2.3.1 Relevant circumstances

In terms of section 26(3) eviction may not be granted without the order of court and without consideration of all "relevant circumstance". However, the Constitution does not explain these relevant circumstances. Sammai argues that it is important to define these circumstances in order to give clarity to the provision and to avoid unfair evictions.[323] Section 26(3) has, therefore, altered the common law position which allowed the landowner to evict upon proving ownership, without consideration of all relevant circumstance.[324] Even though PIE may assist the courts in determining the relevant circumstances, the courts have the discretion to consider other factors which may appear to be relevant on the case by case basis.[325]

In *PE Municipality,* the Constitutional court emphasized that consideration of all relevant factors before granting eviction is key in the sense that "the landowner cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers".[326] The court used this scenario to demonstrate that even if the land is privately owned, section 26(3) is horizontally applicable.[327] It is, therefore, peremptory that in any eviction proceedings the Plaintiff or Applicant must allege all the relevant circumstances and if this does not appear in the papers, the court may not grant eviction.[328]

In *Port Elizabeth Municipality v People Dialogue on Land and Shelter*[329] the court held that in order to satisfy the element of justice and equity the court must consider all the relevant information at its disposal including the personal circumstance of the unlawful

[322] Samaai 2006, 18 (note 3 above).
[323] Ibid 33. PIE is enacted to give guidance to the meaning of "relevant factors". For example, relevant factors would include: how the unlawful occupiers occupied the property in issue; the financial condition; heath condition; the availability of alternative accommodation. See sections 4(6) and (7) of PIE.
[324] See *Ross v South Peninsula Municipality* 2000 (1) SA 586 (C).
[325] *MEC for Business Promotion, Tourism and Property Management, Western Cape v Matthyse* and Others 2000 (1) All SA 377 (C).
[326] *PE Municipality* para 20.
[327]See *Japhta v Schoeman* 2005 (2) SA 140 (CC) where the Constitutional court reinforced the consideration of all relevant circumstances before eviction could be granted.
[328]*Standard Bank of South Africa Limited v Elizabeth Snyders and Others* (C) (case no 10076/04 Unreported judgment).
[329] 2002 (2) SA 1074 (SECLD).

occupiers.[330] This is also evident in the recent *Berea* case[331] where the Constitutional court held that the court seized with an eviction matter is enjoined by section 26(3) to consider all relevant circumstances before granting eviction.[332] Consideration of all relevant factors ensures that if one is evicted, his constitutional right of access to adequate housing is not harmed.

Because section 26(3) does not define "relevant factors", PIE was promulgated to give meaning to the concept and thus to form a primary source of protection for unlawful occupiers against arbitrary eviction.[333] To this extent, it is necessary to evaluate the courts' approach to the interpretation and application of the provisions of PIE in order to strike an equitable balance between the landowners and the unlawful occupiers' interests.

3.3 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)

3.3.1 The purpose and scope of PIE

The background set out in chapter 2 of this study suggests that in the pre-constitutional dispensation evictions were carried out in an arbitrary manner which grossly violated the unlawful occupiers' housing interests. With the advent of the new Constitution, PIE was promulgated with the manifest objective of overcoming such inhuman and arbitrary evictions.[334] PIE promotes substantive and procedurally fair evictions and further ensures that evictions are instituted in a manner that respects the values of the constitutional dispensation.[335] PIE gives effect to both section 25(1) and 26 of the Constitution in the sense that it allows landowners to evict where peaceful use and enjoyment of their property is infringed by unlawful occupation while protecting the unlawful occupiers' right of access to adequate housing. The basic principles underlying PIE is that of fairness, justice, morality and social values.[336] These

[330] *Port Elizabeth Municipality v People Dialogue on Land and Shelter* 2002 (2) SA 1074 (SECLD).
[331] See note 267 above for full citation.
[332] *Berea* para 40.
[333] Muller 2011, 104.
[334] *PE Municipality* para 11; Samaai 2006, 43.
[335] Ibid.
[336] Samaai 2006, 44.

principles require the courts to make decisions which are fair and equitable under the circumstance.[337]

What can be ascertained from the title, the long title and the preamble of PIE is that it seeks to prevent both illegal evictions from land and unlawful occupation of land.[338] PIE repeals PISA which sought only to protect the landowners' interests during the apartheid era.[339] Even though Walters argues that PIE is tipped predominantly in favour of the unlawful occupiers,[340] this is not the purpose of the Act. PIE protects both the landowners and the occupiers' interests and thus obligates the courts to strike an equitable balance thereon. Unlike the pre-constitutional dispensation framework, now, property ownership does not trump the housing rights of the unlawful occupiers.[341] Now, all evictions are subject to substantive and procedural fairness, in the sense that the courts are enjoined to equally consider the landowners and unlawful occupiers' interests.[342]

What is significant about PIE is that it permits the landowners to evict in protection of possession, use and enjoyment of private property whilst ensuring orderly resettlement of the evictees.[343] The nature of these opposed interests requires the courts to apply PIE in a sensitive and balanced manner.[344] The purpose of PIE is well stablished in *PE Municipality* judgment.[345]

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[337] Ibid. See also AJ Van der Walt *Constitutional Property Law* (2005) 327.
[338] Muller 2011, 103.
[339] Ibid 103-104.
[340] See Walters 2013, 22 (note 75 above).
[341] Muller 2011, 104.
[342] AJ Van der Walt *Constitutional Property Law* 2005 419; *PE Municipality* para 12.
[343] Cloete 2016, 83.
[344] Ibid 84. Pienaar 2014, 661 (note 26 above); AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 521; *PE Municipality* para 35; and *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) para 56.
[345] Even though the purpose of PIE was well set out by Sachs J in *PE Municipality judgement* some of the lower courts are still struggling to properly apply the Act. See for example, *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and another* 2001 (4) SA (W), this is the decision of the High court where the court demonstrated an approach which sought to strongly protect the landowners' interests over those of the unlawful occupiers; *Ingelosi House (Pty) Ltd v Howard and others* (38755/2013) [2014] ZAGDJHC 437, where Victor J erroneously granted eviction without considering all the relevant factors and without joining the City of Johannesburg Metropolitan Municipality as required in terms of PIE, when the matter was appealed to the full bench under case number A 5005/16 (19 May 2017) Francis J found that Victor J erred in granting eviction without joinder of the local authority in term of section 4(7) of PIE and without considering whether alternative accommodation was made available to the unlawful occupiers. See also *Johannesburg Housing Corporation (Pty) Ltd v unlawful occupiers, Newtown urban village* 2013(1) SA 583 (GSJ); Voster *v Van Niekerk* (6723/2008) [2009] ZAFSHC 9 (5 February 2009); *Shibambo and others v Pitje* (7700/2010) [2015] ZAGPPHC 89 (19 February 2015); and *Pietermaritzburg v Daisy Dear Investment (Pty) Ltd and others* 2009 (4) All 410 (SCA).

In *PE Municipality* the Constitutional court held that PIE must be interpreted against the background of PISA which sought to dehumanise and abuse the unlawful occupiers through its arbitrary eviction procedures.[346] The court held that PIE did not only repeal PISA but that in a sense reinvented it by placing evictions in an absolute procedural and substantive process and further ensures that evictions are treated with dignity and respect.[347] Accordingly, the court held that PIE abolished processes that took no account of the life circumstances of the evictees and replaced them with humanised procedures that focused on fairness to all.[348] It was further found that the purpose of PIE is to provide dignified and individualised treatment of the evictees with special considerations for most vulnerable people.[349]

The court acknowledged that unlawful occupation is by nature conflicting with the landowners' interests. In this light, it was held that courts have a new role to play which is to hold the balance between land ownership and unlawful occupation.[350] To this extent, the court pointed out that PIE cannot simply be looked at as a legislative mechanism designed to restore common law property rights by freeing them of racism and authoritarianism, though that is one of its founding objectives.[351] The court held further that PIE cannot be simply be reduced into a means of promoting judicial philanthropy in favour of the poor, though compassion is one of its objectives, the Act has to be understood and its governing principle of 'justice and equity' has to be applied, with a defined and carefully calibrated constitutional matrix.[352]

Accordingly, the court found that the principle of 'just and equity' underlines the central philosophical and strategic objectives of PIE.[353] Sachs J held further that the purpose of PIE is not only to protect the unlawful occupiers but also to protect the landowners' interests. Sachs J pointed out that PIE obliges the courts to balance out and reconcile these opposed interests in a fair and just manner.[354] Against the backdrop of PISA, the court held that the purpose of PIE is to infuse the element of grace and compassion

[346] Para 11.
[347] Para 12.
[348] Para 13.
[349] Ibid.
[350] Ibid.
[351] Para 14.
[352] Ibid.
[353] Para 35.
[354] Para 23.

into formal structures of the law.[355] Moreover, it was held that when applying PIE, courts must infuse the spirit of ubuntu which forms part of the deep cultural heritage of South Africans which syndicates the individual rights with a communitarian way of life.[356]

3.3.2 Analysis of certain provision of PIE

3.3.2.1 Section 2- Application of the Act

Section 2 provides that PIE applies in respect of all land throughout the country. In *Absa Bank v Amod* the court narrowly interpreted "land" to mean vacant land.[357] This definition excludes permanent structures and buildings. Stuurman argues that this narrow interpretation presents unfortunate implications.[358] She further argues that the court erred in its interpretation of "land" and that land should be defined and interpreted to include any building or structure erected on the land in question.[359] In *Ndlovu v Ngcobo; Bekker and another v Jika*[360] the interpretation adopted in *Absa Bank v Amod* was overturned. The court found "land" includes buildings or structures used for residential or dwelling purposes.[361] This means that PIE does not apply to evictions instituted in non-residential buildings or structures not used for dwelling purposes.[362] PIE is also not applicable in holidays home and where occupation is in terms of ESTA.[363]

3.3.2.2 Section 4- Eviction of unlawful occupiers

Section 4(1) of the Act provides that only the "owner" or "person in charge" of the land has the *locus standi* to institute eviction of the "unlawful occupies". In terms of section 1 of the Act, the owner refers to the registered owner of land including an organ of

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[355] Para 37.
[356] Ibid.
[357] *Absa Bank v Amod* 1999 All SA 423 (W).
[358] Stuurman 2002, 52.
[359] Ibid. See also P Ranjit "Equity for tenants" 1999 *De Rebus* 28.
[360] 2003 (1) SA 113 (SCA).
[361] *Ndlovu v Ngcobo;* and *Bekker and another v Jika* 2003 (1) SA 113 (SCA).
[362] For example, commercial offices. See *Shoprite checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) paras SO6E-SO7E; *Kanescho Realtors (Pty) Ltd v Maphumulo and Others and three similar cases* 2006 (5) SA 92 (D) para 94F; and *Mangauang Local Municipality v Mashale and another* 2006(1) SA 269 (O).
[363] See *Barnett and others v Minister of Land Affairs and others* 2007 (6) SA 313 (SCA); and *Ridgway v Janse van Rensburg 2002 (4) SA 186 (C)* 2002 4) SA 186 (C). PIE is also not applicable where occupation is protected by *Protection of Informal Land Rights* Act 31 of 1996.

state and the person in charge means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside on the land in question. Section 1 further defines "unlawful occupier" to mean a person who occupies the land without the "consent" of the owner or person in charge or without any other right in law to occupy the land in question. In terms of section 1 "consent" means expressed or tacit consent whether in writing or otherwise given by the owner or person in charge of the land in question.[364]

In terms of section 4(2) of PIE before the owner or person in charge of the property can institute eviction, he must serve a written notice 14 days before eviction proceedings contemplated in section 1 commences on the alleged unlawful occupiers and the municipality having jurisdiction.[365] The court would normally have the discretion to determine the manner of service of the notice. [366] Muller argues that the notice served in terms of PIE must take into account the fact that some of the unlawful occupiers are usually illiterate and can only read and speak African languages.[367] In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others,*[368] Hlophe DJP held that the notice served in English on a community which was predominantly illiterate was not effective because it was not accompanied by Xhosa translation which was the dominant spoken language in the community.[369]

Section 4(6) and 4(7) provides that the court may only grant eviction if it is just and equitable to do so after considering all the relevant factors.[370] The same principle of

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[364]The meaning of consent was well defined in *Residents of Joe Slovo community, Western Cape v Thubelisha homes and others (centre on housing rights and evictions and another, amici curiae)* 2010 (3) SA 454 (CC). See also H Mostert and A Pope (eds) *The Principles of the Law of Property* (2010).

[365] This is the same procedure followed when eviction is instituted in terms of section 6 of PIE (evictions instituted by organs of state). In terms of section 4(5) of the Act the notice must-
(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
(b) indicate on what date and at what time the court will hear the proceedings;
(c) set out the grounds for the proposed eviction; and
(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

[366] See *Cape killing property Investments (Pty) Ltd v Manamba and others* 2001 (4) SA 1222 (SCA) para 11.

[367] Muller 2011, 115.

[368] 2000 (2) SA 67 (C).

[369] Ibid paras 11, 15 and 18. See also *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 28.

[370] Section 4(6)-
If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and

justice and equity is applicable when eviction is instituted by organs of state in terms of section 6 of PIE. The concept of justice and equity gives courts a large discretion to grant or refuse eviction.[371] Justice and equity mean that the court must grant eviction only if it is fair to do so as opposed to the ground of legal correctness.[372] Accordingly, fairness requires the court to equally consider and balance the right of access to adequate housing and an owner's right to use and enjoy private property.[373]

In *Port Elizabeth Municipality v Peoples Dialogue on Shelter and others*[374] the court held that in deciding whether it is just and equitable to grant eviction, the factors enumerated in section 4 of PIE are peremptory, namely the period for which the occupiers had been in occupation; 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; rights and needs of the elderly, children, disabled persons and households headed by women; and the public interest and the circumstances under which the land had been occupied.[375]

In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*[376] Horn AJ held that when dealing with eviction:

> "one is dealing here with two diametrically opposed fundamental interests. On the one hand there is the traditional real right inherent in ownership reserving the exclusive use and protection of his property to the landowner. On the other hand, there is the genuine despair of people in dire need of adequate accommodation. It is with regard to these two opposing interests that the Legislature had, by virtue of the provisions of the Act, set about implementing a procedure which envisages

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;
Section 4(7)-
If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

[371] Unlike section 3(1)(a) and 4(3)(a) of PISA which gave courts no discretion at all. See Stuurman 2002, 55.
[372] Ibid.
[373] Ibid.
[374] 2001 (4) SA 759 (E).
[375] Para 762.
[376] 2000 (2) SA 1074 (SE).

> the orderly and controlled removal of informal settlements. It is the duty of the court in applying the requirements of the Act to, with the wisdom of Solomon, balance these opposing interests and bring out a decision which is 'just and equitable'."[377]

What Horn AJ sought to bring to light is that the principle of justice and equity does not only relate to the unlawful occupiers but that it covers both the interests of the unlawful occupiers and those of the landowners. This definition of justice and equity in Horn AJ's approach to evictions was approved by Sachs J in *PE Municipality* Judgement.[378] Moreover, this approach by Horn AJ has been described both judicially and academically as sensible and balanced approach.[379]

It is, therefore, apparent that any eviction which has the ultimate risk of rendering unlawful occupiers homeless is not just and equitable. It is for this reason that section 4 and 6 of PIE require the municipality to make provision for alternative accommodation to the evictees in dire need for shelter. However, this obligation imposed by section 26 of the Constitution read with section 4 and 6 of PIE had been mostly litigated. Some municipalities hold the view that they are not obliged to provide alternative accommodation to evictees.

3.3.3 Case law

In the *PE Municipality* judgement, the Constitutional court was asked to deal with eviction instituted in terms of section 6 of PIE. In this case the Port Elizabeth municipality sought to evict 68 people who had erected shacks on the privately-owned land.[380] At the time eviction was instituted, the occupiers contended that they had been living in the property for a period ranging from two to eight years.[381] It was common cause that the shacks were erected without the consent of the municipality. However, the occupiers argued that they could not leave the property without being provided with suitable alternative land on which they could move to.[382] The municipality argued that it is aware of its obligation to provide housing and had for that reason embarked on a comprehensive housing development programme. However, the municipality

[377] Para 1081.
[378] *PE Municipality* para 35.
[379] Ibid. See also *Ndlovu v Ngcobo; Bekker and Another v Jika* [2003] (1) SA 113 (SCA) 56.
[380] Para 1.
[381] Para 2.
[382] Ibid.

contended that if alternative land was to be made available to the occupiers, such would encourage que-jumping access to adequate housing.[383] The municipality argued further that such preferential treatment will disrupt its housing programme.[384]

The High court found in favour of the municipality and granted eviction without directing the municipality to provide alternative land to the occupiers.[385] The matter was appealed to the SCA. The SCA found that the argument that the occupiers were seeking preferential treatment in the housing queue was unfounded, on the basis that the occupiers were merely requesting land where they could build their shacks and where they would have some measure of security of tenure.[386] The SCA criticised the High court for granting eviction without assurance that the occupiers would have some measure of security of tenure.[387] Accordingly, the decision of the High court was set aside.[388] The municipality then appealed to the Constitutional court against the decision of the SCA and to have the decision of the High court restored.[389] Now the argument was that the municipality is not bound to provide alternative land or accommodation to the evictees.[390]

After providing a comprehensive historical background and the purpose of section 26 of the Constitution and PIE, the court had to decide whether it would have been just and equitable to grant eviction. Sachs J found that when dealing with evictions, the court is enjoined to balance two opposed interests which are closely intertwined.[391] Namely, the landowners' right in terms of section 25(1) and the unlawful occupiers' rights in terms of section 26 of the Constitution.[392] Sachs J further held that section 25 and 26 create a broad overlap between land rights and socio-economic rights.[393] Accordingly, it was found that the court in these circumstances must balance out and reconcile these opposed claims.[394]

[383] Para 3.
[384] Ibid.
[385] Para 4.
[386] Para 5.
[387] Ibid.
[388] Ibid.
[389] Para 6.
[390] Ibid.
[391] Para 19.
[392] Ibid.
[393] Ibid.
[394] Para 23.

In deciding whether it was just and equitable for the High court to grant eviction, the court focused on the criteria set out in section 6(3) of PIE. The court noted that the occupiers moved into the land in question with what they considered to be the permission of the owner; had been on the land for a long period of time; had about eight children who were attending school in the same area; and that they were working nearby the area. After considering all these factors, the court found that the reluctance on the part of the municipality to engage with the occupiers regarding alternative land was unreasonable.[395] The court further criticised the municipality for failing to engage with the occupiers arguing that the occupiers were the small group of people and that it was not an administrative impossibility for the municipality to identity their particular circumstances and needs.[396]

It was further held that the fact that the occupiers were a small group of homeless families who have been evicted once; who found land under the impression that they were permitted by the owner; and who have been residing on the land for almost eight years it was not accurate for municipality to consider them as “que jumpers”.[397] Accordingly, it was held that the municipalities have major function to perform when it comes to the fulfilment of the right of access to adequate housing.[398]

The court pointed out that the municipalities have a duty to systematically improve access to adequate housing on the understanding that there are complex socio-economic problems in major cities.[399] The court further held that the duty on the municipalities to provide alternative land to the evicted communality must be carried out with respect, insight and a sense of humanity.[400] The court further criticised the municipality for failing to make suitable alternative land available, arguing that the availability of alternative land is a determining factor for justice and equity mandated by PIE.[401] Accordingly, the application for leave to appeal was dismissed and ultimately eviction was refused.[402]

[395] Para 53.
[396] Para 54.
[397] Para 54-55.
[398] Para 56.
[399] Ibid.
[400] Ibid.
[401] Ibid.
[402] Para 60.

The *Blue Moonlight* judgement followed seven years later after the landmark *PE Municipality* judgement was decided. The *PE Municipality* judgement was decided in terms of section 6 of PIE where the court found that the municipality was obliged to provide alternative accommodation to the evictees. Thus, the question of law in *Blue Moonlight* was whether the City of Johannesburg Metropolitan Municipality ("the City") was obliged to provide alternative accommodation to the evictees evicted by private landowners in terms of section 4 of PIE. Ultimately, the court had to decide whether eviction would be just and equitable in the circumstances.

In this case, *Blue Moonlight* launched an eviction against the unlawful occupiers on its privately-owned property for purposes of developing it.[403] The occupiers opposed the eviction on the bases that they would be rendered homeless if eviction is granted.[404] They argued that section 26 of the Constitution protects them against homelessness.[405] The landowners anchored their case on section 25(1) of the Constitution arguing that the unlawful occupation deprived them of the use and enjoyment of their property.[406] The City argued that it was not obliged nor able to provide alternative accommodation to unlawful occupiers evicted by private landowners.[407] The City further argued that its policies only covered those occupiers who were evicted at its instance in terms of section 6 of PIE.[408]

The occupiers were 86 people, comprising of adults; children; disabled child; pensioners; most of the families were headed by women and the average income per household was R940.00 per month.[409] It was common cause that the occupiers were not meaningfully employed and that they relied on the informal sector in order to make ends meet. It was further common cause that most of the occupiers resided in the property for a period exceeding 6 months.[410] When the matter was brought before the High court for the first time, eviction was granted.[411] The court found the City's housing policy unconstitutional to the extent that it discriminates against people evicted by

[403] Paras 8-11.
[404] Para 11.
[405] Para 19.
[406] Para 17.
[407] Para 32.
[408] Para 76.
[409] Para 6.
[410] Ibid.
[411] Para 12.

private landowners.[412] Accordingly, the City was ordered to: remedy this defect and report back to the court on steps taken to cure the defect; retrospectively compensate Blue Moonlight a fair and reasonable monthly rental from 1 July 2009 to the date of eviction; and provide the occupiers with temporary accommodation or pay R850 per month to each occupier or household head until the structural interdict is concluded.[413]

When the matter was brought before the SCA by the City, the High court's structural interdict was set aside and the compensation order in favour of Blue moonlight was also set aside.[414] However, the eviction order was upheld, the City's housing policies were confirmed to be unconstitutional and the City was ordered to provide TEA to the occupiers.[415] The City then appealed to the Constitutional court against the order of the SCA which declared its housing policies unconstitutional and also appealed against the order to provide accommodation to the evictees.[416] In his unanimous judgment Van der Westhuizen J had to carefully deal with the opposed interests of the unlawful occupiers and landowners and also the municipality's obligation to provide alternative accommodation to the evictees.

Van der Westhuizen J found that PIE may limit the common law right to the use and enjoyment of private property protected by section 25(1) of the Constitution if eviction has the implication of rendering the unlawful occupiers homeless.[417] Accordingly, Van der Westhuizen J held that the landowner is required to patiently wait until the municipality provides alternative accommodation to the unlawful occupiers.[418] Van der Westhuizen J found that unlawful occupation will always amount to deprivation of private property and that such deprivation is most likely to pass constitutional muster in terms of the law of general application if not arbitrary.[419] It was further found that when land is purchased for commercial purposes, the landowner who is fully aware of

[412] Ibid.
[413] Ibid.
[414] Para 13.
[415] Ibid.
[416] Para 14.
[417] Para 40.
[418] Ibid.
[419] Para 37.

occupation in that property must consider the possibility of having to endure the occupation for some time.[420]

The court found that this level of patience is inevitable in a process that is aimed at achieving justice and equity.[421] Insofar as the provision for alternative accommodation is concerned, the court found that this is not the duty of the landowner but the full obligations of the municipality.[422] Whereas the City argued that the duty to realise section 26 of the Constitution falls within all three spheres of government, relying on *Grootboom*, Van der Westhuizen J found that this argument is misplaced.[423] He further held that even though Yacoob J in *Grootboom* described housing duties among all spheres of government he did not delineate that the responsibility amongst spheres of government are undividable, but that, the duty to provide housing was the primary obligation of the municipality though the other spheres of government could also assist.[424]

Whereas the City argued that it relies on the national and provincial government for funding, this argument was again dismissed on the bases that the municipality is entitled to self-fund, especially when there is a call for temporary emergency accommodation.[425] Again, the City's argument that it did not have enough resources to provide alternative accommodation to the evictees was also dismissed on the basis that it was not well substantiated.[426]

Finally, the City's argument that its housing policy did not cover the provision of alternative accommodation to the occupiers evicted by private landowners was dismissed. The court held that differentiation of the occupiers evicted in terms of section 6 and those evicted in terms of section 4 of PIE was unconstitutional.[427] Van der Westhuizen J then concluded that the municipality has the obligation to provide alternative accommodation to both occupiers evicted in terms of section 4 and 6 of PIE in order to satisfy the principle of justice and equity. Accordingly, the eviction was

[420] Para 40.
[421] Ibid.
[422] Para 31.
[423] Para 54.
[424] Ibid.
[425] Para 57.
[426] Para 96.
[427] Para 95.

confirmed, and the City's housing policy was declared unconstitutional and the City was ordered to provide alternative accommodation to the evictees.[428]

Blue Moonlight was then supplemented by *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread("Mooiplaats")*[429] and *Occupiers of Skurweplaas v PPC Aggregate Quarries ("Skurweplaas")*[430] to finally spell out the substantive framework of the relationship between landowners, occupiers and the state as regards constitutional property rights.[431] In *Mooiplaats* the Constitutional court criticised the High court for granting an eviction without requiring the City of Tshwane Metropolitan Municipality ("the City") to provide alternative accommodation to the evictees and for failing to investigate all the relevant factors before granting the eviction.[432] In the Constitutional court the City argued that it was not obliged nor had any power to expend its own resources in order to provide alternative accommodation to the evictees.[433] The City contended that this obligation falls within the duties of the province of Gauteng, not the municipality.[434] The Constitutional court referred to its decision in *Blue Moonlight* where this similar proposition was rejected. Accordingly, the court found, not for the first time, that the City was obliged to provide alternative accommodation to the evictees.[435]

Yacoob J unanimously found that it is possible that when the High court was deciding on this matter it was motivated by the common law principles of ownership which attribute the element of absoluteness to the right.[436] Again, the court referred to *Blue Moonlight* to explain that in the new constitutional dispensation the landowner's right to use and enjoy property at common law can be limited in the process coming to a just and equitable decision.[437] The court stressed out that in eviction proceedings the landowner has to be somewhat patient and accept that the right to use and enjoyment may be temporarily limited.[438] In light of the fact that landowners had not put the land

[428] Para 98 -104.
[429] 2012 (2) SA 337 (CC).
[430] 2012 (4) BCLR 382 (CC).
[431] S Wilson…et al "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitution court" 31 (2015) *SAJHR* 472 487.
[432] Para 11.
[433] Ibid.
[434] Ibid.
[435] Ibid.
[436] Para 17.
[437] Ibid.
[438] Ibid.

to use, the court concluded that while the City is looking for alternative accommodation for the evictees, they should remain on the property of the landowner as there appeared to be little prejudice to the landowner.[439]

The *Skurweplaas* case was also premised on the same argument as *Mooiplaats*. In this case the High court had granted an eviction order against the unlawful occupiers and further directed the City of Tshwane to provide alternative accommodation to the evictees. When the matter was brought before the Constitutional court, the City argued that it had no obligation to provide alternative accommodation to the evictees.[440] On the other hand, the landowners prayed for the Constitutional court order ensuring that their ownership right is not burdened any further.[441] However, the Constitutional court found that the ownership property right is not wholly unqualified in the enquiries concerned with whether an eviction would be just and equitable.[442]

Moreover, the court found that there was no evidence that the landowners planned to use the property gainfully in the foreseeable future and that there was no reason to assume that the City was not going to provide alternative accommodation to the evictees within a reasonable period determined by the court.[443] Just like *Blue Moonlight,* the court found that the City was obliged to provide alternative accommodation to the evictees and that during this period the landowner must be patient and allow the unlawful occupiers to remain on its property until alternative accommodation is made available by the municipality.

3.3.4 The balancing approach in terms of PIE

The case law discussed above makes it clear that in the context of eviction the landowner's right to use and enjoyment of private land may be limited by the unlawful occupiers' right of access to adequate housing. It is also well established in terms of case law that unlawful occupation results in deprivation of private property. However, such deprivation is not considered to be arbitrary and can be justifiable. The landowners are not burdened to provide alternative housing to the evictees, this duty, however, falls on the shoulders of the local governments. To this extent, the

[439] Para 18.
[440] Para 7.
[441] Para 11.
[442] Ibid.
[443] Para 12.

landowners are expected to be patient until alternative accommodation is made available by the municipality to the evictees.

Since PIE is founded on the principle of fairness, the courts have always been of the view that it is only fair if the unlawful occupiers remain on the landowner's property while waiting to be accommodated by the municipality elsewhere as opposed to waiting on the streets and be subjected to homelessness. Even though the courts are criticised for failing to put substantive content on the right of access to adequate housing, there is no doubt that the right has received reasonable protection in the new constitutional dispensation. In terms of PIE the right of access to adequate housing is a determining factor of justice and equity. It is for this reason that in many Constitutional court cases the decisions of the lower courts have been criticised for failing to properly consider this right before granting eviction.

The historical context of the Constitution is relevant for one to better understand why the courts find it fair to temporarily limit the ownership right at the instance of the right of access to adequate housing. Eviction destroys one's individuality, human dignity, privacy and identity as a person. It further perpetuates poverty to those in dire need. This ultimate harm to the evictees is not comparable to the harm suffered by the private landowner as the result of the suspension of eviction pending the provision of TEAs. The balancing approach that has been adopted by the courts does not mean that the unlawful occupier must comfortably stay in the private landowner's property forever. However, they must be permitted to remain in the property while the municipality is looking to accommodate them elsewhere.

The courts have made it clear that the failure by a municipality to provide alternative accommodation to evictees within a reasonable period of time amounts to deprivation of private property.[444] Accordingly, if the municipality fails to provide alternative accommodation to evictees within a reasonable period the landowner may approach the court and compel the municipality to provide alternative accommodation. If the municipality is reluctant to provide alternative accommodation the landowner may claim constitutional damages. The courts have always been of the view that the landowner cannot be expected to be patient for an indefinite period. To this end, PIE does not seem to present any problem. However, what has caused problems in the

[444] See *Modderklip.*

balancing approach is local government's failure to play its central role which is to provide alternative accommodation to evictees. This has resulted in the unlawful occupiers remaining on the private owner's properties indefinitely.

The case law discussed above makes it clear that the balancing approach proposed by PIE cannot be successful without the meaningful and proactive involvement of local governments. From the *PE Municipality* judgment to *Mooiplaats* and *Skurweplaas* local governments' unwillingness to play a role in evictions is apparent. The Constitutional court has made it clear that it is only through the joinder of municipalities in eviction matters in order to provide suitable alternative accommodation that solutions can be found for the complex housing problem in South Africa in a manner that respects both the property rights of the landowners and the housing rights of unlawful occupiers.[445] It is therefore, apparent that the municipalities' failure to play their central role in eviction is a liability to the balancing approach imposed by PIE.

3.4 Concluding remarks

The South African law of eviction has experienced a paradigm shift from a position where eviction processes were predominantly in favour of the landowner without any regard of the housing rights and the hardship and any other personal circumstances that may result from eviction, to a position where these factors are prerequisites of the justice and equity enquiry prescribed by PIE.[446] In the new constitutional dispensation the courts can no longer apply eviction rules in a mechanical fashion as they are required to fully enquire as to the needs and legal interests of the occupiers facing eviction.[447] The enshrinement of housing rights in section 26 of the Constitution and promulgation of PIE was a golden move towards development and transformation of the South African eviction law. The intention of the draftsman in section 26 of the Constitution is apparently transformative in nature in the sense that it seeks to protect the unlawful occupiers against arbitrary eviction and to further impose the obligation on the state to realise the occupiers' right of access to adequate housing.

[445] Muller 2011, 256.
[446] Muller 2011, 154.
[447] Ibid.

Section 26 was drafted against the background of land dispossession, forced removals and arbitrary evictions which occurred during the pre-constitutional era. Therefore, the purpose of section 26 is to heal the wounds and injustices initiated by apartheid laws and practises. PIE gives effect to section 26 of the Constitution and was promulgated with the intention to infuse the principle of justice and equity in the eviction laws. PIE ensures that evictions are executed in accordance with justice and fairness as opposed to legal correctness. In the pre-constitutional dispensation, the landowner could evict in terms of PISA or the *rei vindicatio* which completely disregarded the personal circumstances and interests of the occupiers. This position has since been abandoned in the new constitutional dispensation to the extent that any eviction which has the consequence of rendering unlawful occupiers homeless is declared to be unconstitutional.

Even though section 26 of the Constitution protects the unlawful occupiers against arbitrary eviction, the common law right to peaceful use and enjoyment of private property is not neglected in the law. PIE operates as statutory eviction remedy to protect the landowners against unlawful occupation of private property. However, the ownership right and its inherent right to evict is no longer considered as an absolute right. The right to evict can be limited by section 26 of the Constitution. Accordingly, eviction is always the discretion of the court. Before granting eviction, in terms of PIE the court must consider all the relevant factors and satisfy itself whether it will be just and equitable to grant eviction.

Even though the landowners' right to evict is qualified in terms of section 26 of the Constitution, section 25(1) protects the landowners against arbitrary deprivation of their property. It is now a settled law that municipalities have an obligation to provide alternative accommodation to the evicted occupiers in order to allow the landowner to recover possession, use and enjoyment of his property. If the municipality fails to fulfil this obligation, it could be found to have violated the landowner's common law right to peaceful use and enjoyment of private property as well as section 25(1) of the Constitution.

Even though the landowners are expected to be somewhat patient while the state is preparing alternative accommodation, the landowners are not expected to shoulder the state's obligation by providing free accommodation to the evicted occupiers for an

indefinite period of time. In the context of evictions, the unlawful occupier's right of access to adequate housing will always conflict with the landowner's exclusive right to peaceful use and enjoyment of private property. In order to balance these opposing interests, the state is called upon to provide alternative accommodation to the evicted occupiers. This is the approach adopted by the courts in order to balance the subjects' rights. Ideally, this approach is balanced in accordance with the dictates of justice. What presents difficulties in the approach is the state's unwillingness and failure to play its mediating role.

CHAPTER 4

The Local Government's Duty To Provide TEAs

4 .1 Introduction

Lessons have been acquired from the early Constitutional court judgments that the government has the constitutional duty to provide alternative accommodation to evictees.[448] This duty to provide alternative accommodation is placed on the local governments or municipalities as the sphere of government that is very close to the people and their needs. To this end, the existing legal framework requires the municipalities to play a central role in evictions in the sense that the court may not grant eviction unless the occupiers are provided with alternative accommodation by the municipality having jurisdiction on the matter in question. In *Grootboom* the right of access to adequate housing is shown as a fundamental human right and that the state must devise a comprehensive and workable plan to provide housing to its people.[449]

In *PE Municipality* an eviction instituted by the state is revealed to have the effect of triggering the duty on the municipality to provide alternative accommodation to the evictees.[450] In *Blue Moonlight,* the duty to provide alternative accommodation to the evictees by the local authority is further strengthened to evictions instituted at the instance of the private landowners.[451] Finally, in *Modderklip,* the government's failure to fulfil its constitutional obligation or to play its central role in evictions is declared to be a simultaneous breach of the landowner's rights not to be deprived of private property and the occupier's right of access to adequate housing.[452] At this stage of the discussion, it has been established that every municipality has legitimate interest in evictions instituted within its jurisdiction.[453]

Notably, it remains to be seen whether the municipalities have fully adapted to the existing legal framework or not. Thus, this chapter probes into whether the

[448] See chapter 3 above where the cases that established the constitutional obligation on the municipality to provide TEA are discussed.
[449] *Grootboom* para 38.
[450] *PE Municipality* para 56.
[451] *Blue Moonlight* paras 94-104.
[452] *Modderklip* para 28.
[453] See the discussion of case law in 3 above.

municipalities have complied with the obligation to provide TEAs to the evictees or not. To this end, the chapter examines firstly the relevant constitutional provisions and other enactments which support the existing legal framework insofar as it relates to the provision of TEAs. Secondly, the chapter examines whether the municipalities have fulfilled their constitutional obligation. Additionally, the chapter probes into the challenges faced by municipalities in the execution of the duty to provide TEAs.

4.2 The special role of municipalities to provide TEAs

Municipalities are tasked with the duty to provide TEAs to the evictees because they are better placed to provide the emergency needs of the people.[454] To a greater degree, the purpose of the municipality is to regulate the local government affairs of its communities.[455] Section 7(2) of the Constitution provides that the state must fulfil the rights in the Bill of Rights ("BoR"). The right of access to adequate housing is one of the human rights found in the BoR. Accordingly, section 7(2) enjoins the state to fulfil the right of access to adequate housing. Moreover, section 26(2) places a duty on the state to realise the right of access to adequate housing. Section 152 of the Constitution requires the municipalities to provide services and to develop its communities. In doing so, municipalities must prioritise the basic needs of its communities during the budgeting and planning process.[456] Even though it was argued in *Blue Moonlight* that the duty to provide TEAs is not the special role of the municipality,[457] the Department of Human Settlement *Emergency Housing Programme ("*EHP")[458] is very clear in this regard.

EHP provides that the municipalities are responsible for emergency housing situations and that each municipality must have a plan to address emergency situations in its area of jurisdiction.[459] In situations where the municipality has exhausted all of its resources such that it is unable to provide TEA to the evictees, it must apply to the provincial government for funding assistance.[460] Similarly, if the provincial government has also exhausted its budget for emergency housing it can apply to the National

[454] See Fick 2017, 206 (note 68 above).
[455] Ibid. See also section 151(3) of the Constitution.
[456] Section 153 of the Constitution.
[457] *Blue Moonlight* paras 54-57.
[458] Department of Human Settlement *Emergency Housing programme* (2009).
[459] Ibid part A 2.6.1; and Fick 2017, 98.
[460] Ibid part A 2.6.1.

government for funding.[461] This means that all the spheres of government must co-operate and support each other in this regard.[462]

The *National Housing Act*[463] also confirms that the duty to provide TEA is the obligation of the municipality. Section 9 of the Act which gives effect to section 26 of the Constitution obliges the municipalities to take all reasonable and necessary steps to ensure that its communities have access to adequate housing.[464] The *Municipal Systems Act*[465] also supports the existing legal framework. The preamble of the Act succinctly provides that the purpose of the Act is to impose the duty on the municipalities to uplift their communities and to provide the basic services to all its people, particularly the poor and disadvantaged groups.[466] Section 1 of the Act defines "basic municipal services" as those services that are necessary to ensure the quality of life to all people residing within the jurisdiction of the municipality which, if neglected, would endanger the public health or safety or environment.[467]

Section 4 of the *Municipal Systems Act* imposes the duty on the municipalities to provide its communities with the services they need. Section 8(2) empowers the municipalities to do anything reasonably necessary to effectively perform its functions. Section 23(1) of the same Act obliges the municipalities to undertake developmentally oriented planning in order to achieve the objects of section 152 and 153 of the Constitution.[468] Finally, section 73(1) of the Act places a general duty on municipalities to ensure, amongst other things, that its inhabitants have access to basic services.

The *National Housing Code* is another enactment which gives effect to section 26 of the Constitution. The Code was enacted under section 4 of the Housing Act. Chapter 12 of the Code which was introduced after the landmark case of *Grootboom* makes provision for emergency housing assistance to those people who find themselves in

[461] Ibid part A 2.6.2.
[462] In other words, the national and provincial government must fund the municipalities to implement the state's housing programme at a local level. See *Blue Moonlight* paras 49 and 54-57 where the Constitutional court corrected the City of Johannesburg's misplaced interpretation of Yacoobs J judgment in *Grootboom* that the duty to provide TEA is not necessarily a shared duty of all spheres of government. See Fick 2017, 210.
[463] 107 of 1997.
[464] See *Blue Moonlight* para 24.
[465] 32 of 2000.
[466] See the preamble of The *Municipal Systems Act* 32 of 2000.
[467] See section 1 of *Municipal Systems Act* 32 of 2000.
[468] See *Blue Moonlight* para 26.

housing circumstances beyond their control.[469] At this stage of this study, it is worth noting that the existing legal framework which obliges the municipalities to provide TEAs to the evictees is in line with the Constitution and other various enactments which give effect to section 26 of the Constitution.

4.3 The fulfilment of the duty to provide TEAs by the municipalities

Clark argues that despite years of litigation and numerous judgments, municipalities are still resistant, unable or unwilling to provide TEAs to the evictees.[470] What is interesting about Clark's argument is that he uses the very *Blue Moonlight* case to support his argument.[471] In *Blue Moonlight,* the City of Johannesburg was ordered to provide TEA to the evictees within four (4) months from the date of judgement.[472] However, the City failed to provide the TEA to the evictees despite numerous attempts to force the municipality to comply with the order.[473] It Is in this light that Clark argues that the municipalities are reluctant to provide TEAs to the evictees.

Clark argues that the municipalities are reluctant to implement the progressive legal framework developed in case law since even if called upon to appear in courts they never bring solutions to a problem but to request for postponement after postponement in order to fulfil their obligations.[474] Clark argues further that even if courts grant postponement the municipalities fail to meet the deadline set by the court.[475] As argued by Clark, most of the municipalities across the country have failed to respond to evictions accordingly and to provide TEAs within their respective jurisdictions.[476] Thus, Clark argues that municipalities undermine the constitutional housing rights of the evictees who cannot afford alternative housing of their own.[477] This failure by the municipalities to provide TEAs to the evictees, especially the City of Johannesburg, has attracted a lot of criticism from social and human rights organisations.[478] In 2014,

[469] Ibid para 27.
[470] SERI 2013, 3.
[471] Ibid 4.
[472] *Blue Moonlight* para 104.
[473] SERI 2013, 4.
[474] Ibid 21.
[475] Ibid.
[476] Ibid 4.
[477] Ibid.
[478] Kwamele Sosibo at Mail & Guardian *City of Jo'burg Blamed For Not Providing Homes for Evictees* (2014), accessible at: http://mg.co.za/article/2014-06-12-city-of-joburg-blamed-for-not-providingaccommodationfor-evictees (Accessed on 5 September 2019).

there were about 1000 occupiers of the inner City buildings in the City of Johannesburg who had issued court applications seeking court orders to declare that the City of Johannesburg has failed to discharge its constitutional obligation insofar as the provision of TEAs is concerned.[479] This figure is one of many examples indicating the backlog of TEAs in the major cities.

4.3.1 Case law analysis

4.3.1.1 *Modderklip*

Modderklip is one of the very first eviction cases which demonstrate the government's failure to provide alternative accommodation to the evictees. In this case Modderklip had requested the Ekurhuleni Municipality to evict the unlawful occupiers from its privately owned land, however, this request was rejected by the council.[480] As the result Modderklip decided to institute the eviction on their own behalf and cited the municipality as one of the parties.[481] Accordingly, the eviction order was granted by the High court, however, the sheriff could not execute the order because the execution costs were very high and exceeded the value of the property.[482] After the municipality and other government departments refused to provide alternative accommodation to the occupiers and to assist Modderklip to execute the eviction order, another application was launched in the High court seeking for a declaratory order directing the state to immediately take steps to assist Modderklip execute the eviction order and that the state has simultaneously breached sections 25(1) and 26 of the Constitution.[483]

Again the relief sought by Modderklip was granted, the court held that the provision of alternative land or accommodation to the occupiers would have facilitated compliance with the eviction order.[484] Accordingly, the court held that the government's failure to assist Modderklip and to provide alternative land or accommodation to the occupiers amounted to breach of its constitutional obligation.[485]

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[479] Ibid.
[480] Para 4.
[481] Para 7.
[482] Para 9.
[483] Paras 11-15.
[484] Paras 15-16.
[485] Ibid.

When the matter was escalated to the SCA, the High court's findings, in particular that Modderklip's right to property and the occupiers' housing rights have been infringed by the government's failure to discharge its constitutional duty was upheld.[486] Interestingly, when the matter was further escalated to the Constitutional court, the court confirmed that it was only the state that held the key to the solution of Modderklip's problem.[487] The Constitutional court held that it was impossible to carry out the eviction order in the absence of effective participation by the state.[488]

The Constitutional court further held that it was unreasonable to expect a private entity such as Modderklip to be forced to bear the burden which must be borne by the state to provide alternative land or accommodation to the unlawful occupiers.[489] The court held that the municipality acted unreasonable when it stood idly by and never discharge its constitutional obligation.[490] Accordingly, the Constitutional court upheld that the state was in breach of section 25(1) and section 26 of the constitution by failing to assist Modderklip to executive the eviction order and for failing to properly prepare and make provision for alternative land or accommodation.[491] Liebenberg argues that it was important for the Constitutional court to affirm that the government's abdication of its responsibility towards the unlawful occupiers and the landowners directly affected their property and housing rights.[492] This is so because in terms of the new legal framework eviction disputes cannot be resolved without the provision of TEA to the unlawful occupiers facing risk of homelessness.

4.3.1.2 *Fischer v Unlawful occupiers.*[493]

The similar findings made by the Constitutional court in *Modderklip,* that the state had failed to properly prepare for the provision of alternative accommodation to the unlawful occupiers have recently been reiterated in the case of *Fischer*. The Western

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[486] Para 18.
[487] Para 41.
[488] Ibid.
[489] Para 44.
[490] Para 48.
[491] Para 68.
[492] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010), 285. See *also Dada and Others NO v Unlawful occupiers of Portion 41 of the farm Rooikop and Another* 2009(2) SA 492 (W), where Cassim AJ found that the Ekurhuleni Municipality was not directing enough attention to the improvement and provision of short-term housing. See also *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA), where the SCA found that the Ekurhuleni Municipality did not deal with the issue of provision of short-term housing with enthusiasm as reasonably expected of it.
[493] [2017] ZAWCHC 99, (*"Fischer*").

Cape High court found that the same attitude of reluctance and unwillingness to provide alternative accommodation to the unlawful occupiers which was demonstrated by the Ekurhuleni Municipality in *Modderklip* was the same attitude shown by the City of Cape Town.[494] In *Fischer* the High court found that the City of Cape Town failed to pro-actively plan for the provision of alternative accommodation to the unlawful occupiers.[495]

This case deals with an eviction application instituted in terms of PIE to evict about 60 000 occupiers from the *ad hoc* establishment of an informal settlement called "Marikana" in Cape Town. The application was brought by Mrs Fischer together with other two applicants who were owners of neighbouring properties, for very similar relief (collectively referred to as "the landowners").[496] In the counter application, the occupiers sought for an order declaring that the City had infringed the landowners' section 25(1) right as well as their (occupiers) section 26 right enshrined in the Constitution, on the basis that the City had failed to provide alternative accommodation.[497]

The occupiers also sought for an order directing the City of Cape Town to enter into negotiations to purchase the occupied land for housing purposes, failing that, to expropriate the land.[498] The landowners sought for the same relief sought by the occupiers in the counter application, in case the court was not with them on the buyout or expropriation relief, alternatively they sought for an eviction.[499] The occupiers submitted that the state should bear the burden of housing any unlawful occupier in need of alternative housing.[500] The occupiers argued that the unlawful occupation in this case was as the result of the City's failure to provide housing to them as they were evicted from various areas in Cape Town, as no help was forthcoming from the City and having no other alternative accommodation they ended up occupying the landowners' land.[501] Because of the high number of the unlawful occupiers residing

[494] Para 190.
[495] Para 186.
[496] Para 6.
[497] Para 80.
[498] Ibid.
[499] Para 80-86.
[500] Para 87.
[501] Para 88.

on the land, it was the occupiers' case that eviction on this scale could not be humanely carried out without the meaningful involvement of the state.[502]

It was further the occupiers' case that, if the state had provided them with alternative housing at the time when the occupation began, it would have been able to fulfil its constitutional obligation in terms of section 26 of the Constitution.[503] The occupiers submitted that if the state cannot move them to an alternative accommodation it must just simply acquire the land which they are already in its occupation.[504] With reference to *Modderklip*, the occupiers argued that the SCA has given its nod of approval to expropriation of unlawfully occupied property in situations where it is not possible to provide alternative land.[505] The occupiers argued that section 9(3) of the *Housing Act* authorises the municipality to exercise the power of expropriation, especially when it is unable to purchase the property.[506] On behalf of the City, it was submitted that the relief ordering the City to purchase the property is unfounded. The City argued that there can be no legal duty on anyone to purchase property, therefore, it was argued that the City cannot be placed under a duty to do so.[507]

Accordingly, it was the City's submission that ordering such a buyout would be both inappropriate and incompetent in law.[508] With respect to expropriation, the City argued that the power to expropriate in section 9(3) of the *Housing Act* is not tied to a duty to exercise it.[509] The City argued that for it to expropriate the land it must be willing to do so, in this case the City argued it was unwilling to do so.[510] The City further argued that in *Modderklip* the SCA held that the court cannot order expropriation as it is an administrative act which cannot be exercised by court.[511] The City submitted that the *Housing Act* assigns the municipality the power to expropriate when necessary, therefore, the City argued that it would be inappropriate for the court to usurp that power.[512]

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[502] Para 90.
[503] Para 91.
[504] Para 94.
[505] Para 95. In this regard see *Modderklip* para 64.
[506] Para 100.
[507] Para 115.
[508] Ibid.
[509] Para 119.
[510] Ibid.
[511] Ibid.
[512] Para 121.

The court found that the City's unreasonable conduct and its failure to provide alternative housing to the occupiers constituted a breach of its duty in terms of sections 25 and 26 of the Constitution.[513] Further, the court found that the state failed to provide an acceptable reason why instead of moving such a large number of people, it could not simply acquire the land.[514] The court found that the fact that the City was unable to move the occupiers to an alternative accommodation, it left the landowners and the occupiers alike in an untenable position.[515] Therefore, the court held that the only reasonable course of action was for the occupiers to remain in the landowners' land, thereby enforcing their rights in terms of section 26 of the constitution.[516] However, the court was confronted with the question of how to order the continued occupation of the land without violating the landowners' property rights, and how to achieve this goal without ordering the state to perform in a specific way.[517]

The court held that in dealing with this balancing act it must bear in mind that if eviction is granted, the occupiers will be homeless. On the other hand, the court held that it must consider that landowners had lost the use and enjoyment of their property.[518] The court found that in the circumstances of this case the purchase or expropriation of the land already in occupation was the only solution. The court held that the purchase of land is allowed where the municipality has no alternative land to provide the occupiers.[519] The court held that the fact that the City had no alternative land available necessitated acquisition of the land that the occupiers were already in its occupation.[520] Accordingly, the court declared that the state infringed the landowners' constitutional right to property and the occupiers right of access to adequate housing. The eviction application was dismissed and the City was ordered to enter into good faith negotiations with the landowners in order to purchase the occupied land, alternatively to expropriate. [521]

[513] Para 162.
[514] Para 166.
[515] Para 167.
[516] Ibid.
[517] Ibid.
[518] Para 175.
[519] Para 187.
[520] Ibid.
[521] Para 196-218.

4.3.1.3 *Blue Moonlight*

Following the ground-breaking *Blue Moonlight* judgement delivered by the Constitutional court on 1 December 2011, the unlawful occupiers in this matter were ordered to vacate the landowner's premises by 15 April 2012.[522] The City of Johannesburg was ordered to provide TEA to the evicted occupiers on or before 1 April 2012.[523] Following this order the City was expected to engage with the occupiers and provide them with TEA. However, the City failed to meaningfully engage with the unlawful occupiers as was ordered by the court despite numerous attempts by the occupiers' lawyers to engage with the City.[524] As the date of eviction loomed without hearing from the City regarding the availability of TEA, and fearing that their clients will be evicted, on 8 March 2012 the occupiers' lawyers launched an urgent application in the Constitutional court seeking to compel the City to comply with the alternative accommodation order and to thus provide the occupiers with TEA.[525]

The occupiers also sought to vary an eviction order until the City had made TEA available to them.[526] Upon receipt of the urgent application the City proposed to provide some of the occupiers with some form of TEA which had gender segregated dormitories.[527] In its offer the City failed to disclose the location of the proposed TEA and the period for which it intended to accommodate the occupiers.[528] Because of lack of sufficient clarity in the proposed offer, the occupiers rejected the offer and persisted with the urgent application.[529] Two days before the matter could be heard on 30 March 2012, the City improved its offer. Now, the City offered to provide TEA to all the occupiers and that it will provide special separate units to families to stay together.[530] However, the City indicated that it will need further two months to execute this offer.[531] Even though the occupiers were willing to agree on a further two months' extension, the landowners were not willing to agree to this further extension.[532]

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[522] *Blue Moonlight* para 104.
[523] Ibid.
[524] Dugard 2014, 269.
[525] Ibid.
[526] Ibid.
[527] Ibid 270.
[528] Ibid.
[529] Ibid.
[530] Ibid.
[531] Ibid.
[532] Ibid.

On 30 March 2012 the application proceeded in the Constitutional court. However, the application was dismissed for lack of urgency.[533] On 13 April 2012, which was two days before the actual date for vacation of the premises as per the court order granted on 11 December 2011, the City had still not made TEA available to the occupiers.[534] Because eviction was approaching and imminent the occupiers' lawyers, again, approached the South Gauteng High court praying for the same relief they sought in the Constitutional court.[535] This time the High court granted the variation of the eviction order and suspended the eviction order to 2 May 2012.[536] The High court ordered the City to make an offer for TEA to the occupiers on or before 30 April 2012. The City was further ordered to report back to the same court on the progress thereof and to allow the occupiers to visit and examine the proposed TEA.[537] Dugard argues that this was a brave and progressive move taken by the High court despite the decision of the Constitutional court to dismiss the same application.[538] Following this High court order which put the City of Johannesburg into terms, the occupiers were ultimately provided with TEA on 30 April 2012.[539]

4.3.1.4 *Hlophe*

Not so long after the High court had compelled the City of Johannesburg to provide TEA to the occupiers who were evicted in *Blue Moonlight*, on 10 April 2013 the South Gauteng High court had to deal with the same issue of municipality's failure to provide TEA to the evictees. In this case, the High court had on 12 June 2012 granted an eviction order of the occupiers residing in the building situated at 191 Jeppe street in Johannesburg.[540] This eviction order was suspended on condition that the City would provide the occupiers with TEA.[541] On 20 November 2012 the City reported that it could not provide TEA to the occupiers because it lacked buildings, financial means and other resources.[542] The City further complained about the overwhelming growing

[533] Ibid.
[534] Ibid 271.
[535] Ibid.
[536] Ibid.
[537] Ibid 271. See also an unreported court order of *Occupiers of Sarofoga Avenue and others v City of Johannesburg and others*, South Gauteng High court case no: 22012/13253 (13 April 2012).
[538] Dugard 2014, 271.
[539] Ibid.
[540] *Hlophe* para 1.
[541] Ibid.
[542] *Hlophe* para 13.

list of evictees who were also waiting to be provided with TEA by the City.[543] By 6 February 2013 the City had still not provided TEA to the occupiers, it requested the court to further suspend the eviction order until it had provided the TEA to those evictees.[544] Accordingly, Lamont J suspended the eviction order and offered the City another opportunity to identify the TEA where it would accommodate the evictees and report back to court by 20 March 2013.[545]

On 20 March 2013 the City submitted a report stating that it could not identify any building to be used as a TEA facility.[546] The City reported that it was impossible to accommodate the occupiers in the foreseeable future due to the lack of available buildings, financial ability and ever growing demand for TEAs from the City.[547] The occupiers then decided to make an application to compel the senior officials of the City, the executive mayor, City manager and director of housing to be personally responsible for the execution of the TEA order.[548] The response of the City was to ask for further suspension of the eviction order for an unknown period of time and to report on how it intended to deal with the issue of TEA.[549] The City's response was criticised by the landowner arguing that it cannot be expected to wait indefinitely in order to regain access and use of its property.[550]

Satchwell J criticised the City's report submitted on 20 March 2013 pointing out that the City was reluctant to comply with its constitutional obligation.[551] Satchwell J further pointed out that in the report there was no indication of any necessary planning and preparation by the City to fulfil its constitutional duty.[552] The City was further criticised by the Court for failing to act in a constitutional and professional manner.[553] Accordingly, Satchwell J ordered the executive mayor, City manager and director of housing to take personal responsibility to ensure that the TEA order is complied with.[554] It was further ordered that if the executive mayor, City manager and director

[543] Ibid.
[544] *Hlophe* para 1.
[545] *Hlophe* para 15
[546] *Hlophe* para 17.
[547] Ibid.
[548] *Hlophe* para 3.
[549] *Hlophe* para 4.
[550] Ibid.
[551] *Hlophe* para 22.
[552] *Hlophe* para 23.
[553] *Hlophe* para 26.
[554] *Hlophe* para 34.

of housing fail to ensure that there is compliance with the TEA order within two months from 3 May 2013 they would be held in contempt of the court order or personally liable for constitutional damages.[555]

4.3.1.5 *City of Johannesburg Metropolitan Municipality v Hlophe*[556]

Aggrieved by the decision of the High court which compelled the functionaries of the City to take personal responsibility to ensure that there is compliance with the TEA order, the functionaries appealed to the SCA. The ground for appeal was that the functionaries cannot be held liable for the provision of TEAs.[557] The functionaries argued that there was no basis for *mandamus*.[558] They further argued that they were never cited in the eviction proceedings from the inception.[559] Accordingly, the contention was that the *mandamus* was wrongly granted because of improper procedure which was followed and that "policy consideration rendered it inappropriate".[560] The SCA dismissed the argument that the *mandamus* was wrongly granted. The SCA was of the view that a party initiating eviction cannot be expected to cite the functionaries from the beginning of the proceedings as this creates the impression that the municipality will not comply with the court order to necessitate that *mandamus* becomes applicable.[561]

The SCA held that it is only when the municipality fails to comply with the court order that the need to look at the functionaries becomes relevant.[562] The SCA found that the decision of Satchwell J was simply to order the functionaries to perform their duties.[563] The SCA further found that the order of Satchwell J was motivated by the constitutional principle of accountability.[564] It was further found that the *mandamus* is one of the ways to secure constitutional accountability through courts.[565] The SCA found that Satchwell J was correct to conclude that the time to hold functionaries accountable

[555] Ibid.
[556] *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 JDR 0541 (SCA) (unreported) (18 March 2015) ("*Hlophe* SCA").
[557] *Hlophe* SCA para 3.
[558] *Hlophe* SCA para 15.
[559] Ibid.
[560] *Hlophe* SCA para 21.
[561] *Hlophe* SCA para 22.
[562] Ibid.
[563] *Hlophe* SCA para 24.
[564] *Hlophe* SCA para 25.
[565] Ibid.

has come and that the functionaries have the statutory obligation to implement the court orders issued against the municipality.[566] Accordingly, the appeal against *mandamus* failed. The occupiers were finally accommodated by the City in January 2016 after the proceedings for contempt of the court order was instituted against the executive major.[567]

4.3.1.6 *Mchunu v Executive Mayor of eThekwini and others (Mchunu)* [568]

On 6 March 2009 the KwaZulu-Natal High court granted an order against the eThekwini Municipality to provide housing to the evicted occupiers within a year from the date of the Court order.[569] This order followed after the court granted an eviction order of the occupiers of Siyanda informal settlement in order to make a way for road construction.[570] The evicted occupiers were relocated to the transit camp on condition that they would live there for a period of not more than a year.[571] However, the occupiers were not provided with proper housing as per the order of the court because their houses were misallocated to other people.[572] Because of this, the occupiers stayed in the transit camp for more than a year while vulnerable to unhygienic and unsafe conditions.[573]

After the investigation conducted by the ombudsperson regarding the misallocation of houses, it was recommended that the municipality should make another allocation of houses to the occupiers.[574] On 13 October 2011 the occupiers' lawyers, the municipality's lawyers and the executive mayor met in an endeavour to make the municipality comply with the court order and to provide houses to the evicted occupiers. However, this engagement was in vain.[575] The occupiers then applied to the KwaZulu-Natal High court seeking to hold the executive mayor, municipal manager and director of housing (the "functionaries") personally responsible to ensure that there

[566] *Hlophe* SCA para 26.
[567] Fick 2017, 80. See Socio-Economic Rights Institute of South Africa *Hlophe and Others v City of Johannesburg* (2016), accessible at http://www.serisa.org/index.php/what-2/housing-and-evictions?id=196:hlophe-and-others-v-city-of-johannesburg-and-othershlophe22-06-2016 (accessed on 10 September 2019).
[568] *Mchunu v Executive Mayor of eThekwini and others* 2013 (1) SA 555 (KZD) ("Mchunu")
[569] *Mchunu* para 1
[570] *Mchunu* para 2.
[571] *Mchunu* para 1.
[572] *Mchunu* para 4.
[573] *Mchunu* para 3
[574] *Mchunu* para 4.
[575] Ibid.

is compliance with the court order.[576] The municipality and its functionaries argued that there was no absolute obligation imposed on the municipality to provide housing to the evicted occupiers.[577] In explaining why the municipality failed to comply with the court order granted on 6 March 2009, the municipality submitted that it was constrained by its budget and the unavailability of accommodation to accommodate the occupiers.[578] It was further argued that to preferentially provide housing to the occupiers would amount to "queue jumping" because this will put them ahead of other beneficiaries in the municipal housing programmes.[579]

Hollis AJ had difficulties in understanding the municipality's position as the occupiers had already been allocated housing in Khulula project but hijacked by other beneficiaries.[580] Hollis AJ rejected the municipality's reason for failing to comply with the court order. It was ordered that the functionaries are constitutionally obliged to take all the necessary steps to ensure that the municipality complies with the court order.[581] It was further held that the functionaries failed to take administrative measures and other necessary steps to ensure that the municipality does provide housing to the occupiers.[582] Accordingly, Hollis J found that the executive mayor, municipal manager and director of housing were personally responsible to ensure that there was compliance with the order to provide housing to the evicted occupiers and that if they fail to take personal responsibility to ensure that the municipality complies with that order within three (3) months, they would be held in contempt of court.[583]

4.3.1.7 *Baron and others v Claytile (Pty) Limited and Another ("Baron")*[584]

In this case the Constitutional court was asked to decide on the duty of the City of Cape Town to provide alternative accommodation to the evictees. It was common cause that the Applicants had no legal right to remain in occupation of the property in question, the only concern was the provision of suitable alternative accommodation by the City.

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[576] *Mchunu* para 5.
[577] *Mchunu* para 6.
[578] *Mchunu* para 7.
[579] Ibid.
[580] Ibid.
[581] *Mchunu* para 21.
[582] Ibid.
[583] Ibid.
[584] 2017 (5) SA 329 (CC).

In the Magistrate court the City submitted a report stating that it did not have available alternative accommodation.[585] The City further indicated that the occupiers who qualified for alternative accommodation in terms of its policies were allocated housing units at Delft Temporary Relocation Area (TRA).[586] Should any housing units become available the City indicated that the occupiers in this case will be relocated to Delft TRA.[587] The housing units at Delft TRA were made of corrugated iron structure, comprising of one room, without electricity and shared toilets.[588]

The Applicants were not happy with the Delft TRA condition and their concern was that even if Delft TRA was to be made available they could not see themselves moving from a brick housing to a corrugated iron structure.[589] Notwithstanding the hardship that was likely to be caused by eviction to the Applicants and the unavailability of suitable alternative accommodation, the Magistrate granted an eviction order in favour of the Respondent.[590] The Magistrate's reasoning was that the Applicants' continued occupation deprived the landowners the right to use their property.[591]

Subsequent to the Magistrate court's decision, the Applicants applied to the Land Claims court for review.[592] The Land Claims court confirmed the decision of the Magistrate court.[593] The court found that the Magistrate court's decision was in accordance with justice.[594] The Applicants then decided to appeal the Magistrate court's decision at the Land Claims court after their review application was dismissed, the appeal was also dismissed. [595]. The Land Claims court found that the farm-owner suffered undue hardship because it could not provide accommodation to its newly employed employees, contrary to its employment policies.[596] It was further held that the Applicants' continued residence prejudiced the Respondent because the Applicants were staying at the property without paying rent, electricity and water.[597]

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[585] Para 13.
[586] Ibid.
[587] Ibid.
[588] Ibid.
[589] Ibid.
[590] Para 14.
[591] Ibid.
[592] Para 15.
[593] Ibid.
[594] Ibid.
[595] Ibid.
[596] Para 16.
[597] Ibid.

The court further found that although availability of alternative accommodation had to be taken into account, it was not a pre-condition for eviction.[598] The Land Claims court held the view that considering availability of alternative accommodation to the evictees would have a far-reaching and chaotic consequence and that this could never have been envisaged by the legislature.[599] It was further held that the provision of alternative accommodation is not the obligation of the landowners but that of the state.[600] Accordingly, the Land Claims court found that in this case the Respondent had shouldered the state's responsibility to provide housing to the Applicants for too long and that this was detrimental to the Respondent.[601]

The Land Claims court also dismissed the application for leave to appeal to the SCA on the ground that no other court would come to a different conclusion.[602] Aggrieved by the decision of the Land Claims court the Applicants petitioned the SCA. However, the application was also dismissed on the ground that the requirement for special leave to appeal were not met.[603] The matter was then escalated to the Constitutional court. In the Constitutional court the events took a different turn, when the City filed its report indicating that it was in the position to secure suitable alternative accommodation for Applicants at Wolwerivier.[604] The City submitted that the housing units at Wolwerivier were suitable and that this offer was much better than what it proposed in the Magistrate court.[605] The City submitted that the housing units at Wolwerivier will be fitted with inside toilets and washbasin, water and electricity.[606] The City further submitted that the accommodation will be fenced with concrete palisade fence.[607]

Pretorius AJ emphasised that the state has the duty to provide alternative accommodation to the occupiers where the evicted occupiers are facing the risk of homelessness.[608] Accordingly, the court found that the City could not escape this obligation by simply submitting a report stating that there is no available alternative

[598] Para 17.
[599] Ibid.
[600] Ibid.
[601] Para 18.
[602] Para 19.
[603] Para 22.
[604] Para 30.
[605] Para 33.
[606] Ibid.
[607] Ibid.
[608] Para 45.

accommodation as it did in the Magistrate court.[609] Pretorius AJ found that the City is constitutionally obliged to provide evicted occupiers with suitable alternative accommodation and the attitude it demonstrated in the Magistrate court was regrettable.[610] Because the City failed to provide TRA when the matter was instituted for the first time in the Magistrate court it was found to be the cause of delay for eviction.[611] As the result the Constitutional court punished the City with the costs order on the basis that it waited for a period of more than five years before it could make a proper offer for TRA and that this offer was only made few days before the matter could be heard at the Constitutional court.[612]

4.3.1.8 *Mogale City Local Municipality v Black Investment* ("*Black Investment*")[613]

Black Investment case is one of the recent decisions where the SCA upheld the High court's declaratory order that the Mogale City Local Municipality failed to fulfil its constitutional obligation to provide TEA to the evictee.[614] This case started in 2013 when the Black Investment decided to institute eviction against the unlawful occupiers at the High court. At this time, it was already established in *Blue Moonlight* that municipalities have the constitutional duty to provide TEAs to the evictees. Based on this instructive precedent the City was accordingly joined in the eviction application in order to fulfil its constitutional duty. However, the City elected not to be a party to the proceedings and did not file its answering papers.[615] As the result the Black Investment launched an interlocutory application for an order to force the City to file a report indicating how it intended to provide TEA to the evictees.[616]

Accordingly, the interlocutory application was granted by the High court and the City was ordered to file its report by 7 November 2014.[617] However the City failed to comply with this order.[618] After several efforts by the Black Investment including threat to launch contempt of court, the City finally complied with the order in January 2015.[619]

[609] Para 46.
[610] Ibid.
[611] Para 53.
[612] Ibid.
[613] (889/2017) [2018] ZASCA 74 (31 May 2018).
[614] Para 1.
[615] Para 2.
[616] Ibid.
[617] Para 3.
[618] Ibid.
[619] Ibid

It was common cause that the occupiers lived in deplorable condition and that the eviction was likely to render them homeless. However, the City in its report did not seriously consider these conditions, instead provided a vague report which was devoid of facts.[620] Because the Black Investment considered the report to be of no assistance in the sense that the City failed to meaningfully engage with the unlawful occupiers they decided to write to the City advising it to provide a proper report and that its failure to do so will exacerbate delay of eviction.[621] The Black Investment further advised in their letter that the failure by the City to play its role in the proceedings will prejudice their ownership rights.[622] The City once again failed to comply with the Black Investment's letter.[623]

It is upon this background that the High court declared that the City failed to fulfil its statutory and constitutional duties owed to the Black Investment and the occupiers and granted a structural interdict directing the manner in which the City was to remedy its breach of its constitutional duties.[624] In making this decision the High court referred to *Modderklip* where the government was declared to have breached section 25(1) and section 26 of the constitution for failing to provide alterative accommodation to the unlawful occupiers.[625] Notwithstanding the order of the High court, the City elected not to comply. When the matter was escalated to the SCA, the SCA found that the City had in the court *a quo* demonstrated a defiant and non-co-operative attitude.[626] In the SCA the Black Investment contended that, "it could not prosecute its eviction application without the City discharging its obligation to the court and occupiers".[627]

The Black Investment further contended that in term of section 26 of the Constitution municipalities have general obligation to make a contingency plan for people facing eviction.[628] Accordingly the SCA held that the City failed to make adequate provision for TEA and thus in breach of the statutory and constitutional obligation it owes to the Black Investment and the occupiers.[629]

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[620] Para 3.
[621] Para 4.
[622] Ibid.
[623] Ibid.
[624] Para 5.
[625] Ibid.
[626] Para 8.
[627] Para 9.
[628] Ibid.
[629] Para 13.

4.3.1.9 Analysis of legal framework developed in case law

The landmark case of *Grootboom* was the first socio-economic rights case in the new constitutional dispensation legal framework to delineate the government's obligation to fulfil the housing right as enshrined in section 26 of the constitution. The case was decided on the basis that the government's housing policy lacked both comprehensiveness and sufficient concern for the needs of the most vulnerable people.[630] In essence, the Constitutional court found that the government had simply failed to fulfil its constitutional duty relating to provision of housing.[631] It is for this reason that the Constitutional court made a declaratory order to the effect that the state was in breach of section 26 of the Constitution. [632] Now it is almost two decades after the *Grootboom* case was decided but the government's action in the area of housing is still found wanting.

The purpose of this study is to argue that, in most cases, the municipalities are failing to pro-actively play their central role in evictions which ultimately hampers the balancing process of the subject rights. This argument is fulfilled in the case law discussed above which succinctly demonstrates municipalities' failure to pro-actively plan for the provision of TEAs, non-cooperativeness in eviction proceedings and defiance to comply with the court orders directing them to provide TEAs to the unlawful occupiers. This argument also finds its support in the academic and research space. Strydom and Viljoen argue that in the context of eviction the shortage of accommodation for vulnerable evictees is evident and it shows that the government "is currently failing to fulfil its constitutional and statutory obligations in relation to housing."[633]

Strydom and Viljoen further argue that this evident failure by government to play its role in evictions makes it difficult or almost impossible for the courts to balance the landowners' interests with those of the vulnerable unlawful occupiers.[634] The argument advanced by Strydom and Viljoen touches at the heart of this study and it supports the

[630] S Wilson 2015, 477 (note 431 above).
[631] Ibid.
[632] Ibid. See *Grootboom* para 99.
[633] J Strydom and S viljoen 2014, 1217 (note 102 above).
[634] Ibid. Strydom and Viljoen further argue that as the result of the municipalities' failure to make provision for TEAs, the courts are faced with the impossible task of "balancing" landowners' property rights with the housing rights of the unlawful occupiers".

precedent set in case law. Mathiba argues that there is no doubt that the conflict between the landowners' property rights and the unlawful occupiers' housing rights is caused by the government's inability and reluctance to provide alternative accommodation to the unlawful occupiers.[635] Mathiba argues that it is only when the government can fulfil its legal obligation to provide alternative accommodation to the homeless that the conflicting interests of the landowners and the unlawful occupiers can be resolved.[636] Therefore, in his study Mathiba recommends that, "an Act of parliament should be enacted and various by-laws at local government level should also be passed which expressly outlaws and talks, in harsh terms, to municipalities which fail to avail alternative accommodation to the homeless individuals."[637]

Mathiba further argues that the alarming number of reported eviction cases where municipalities are exposed as failing to fulfil their obligation to provide alternative accommodation, makes it evident that the current legal framework and policies regulating evictions are not effective enough to force municipalities to fulfil their obligation.[638] Mathiba argues that the current legal framework is like teeth that cannot bite the municipalities that are failing to make provision for adequate alternative accommodation.[639] In concurrence with the argument advanced in this study that the municipalities are, in most cases, non-compliant or in defiance with the court orders directing them to provide TEAs to the evictees, Mathiba argues that the laws governing the state's duty to provide alternative accommodation must be intensified in order to accelerate and ensure compliance by the municipalities.[640]

Mathiba's argument supports the argument of this study that the government is failing to provide TEAs to the unlawful occupiers, and as the result, the conflicting interests between the landowners and the unlawful occupiers in the context of eviction cannot be resolved. Mathiba further makes an interesting argument that this blameworthiness of the government can only be cured by intensifying the laws regulating the government's duty to provide alternative accommodation to the evictees, as he argues that they are like teeth that cannot bite. The argument of blameworthiness of the

[635] GL Mathiba *Assessing the Impact of Section 26 of the Constitution, 1996 on Eviction and Ownership Rights in South Africa* LLB mini-dissertation North-West University (2018) 30.
[636] Ibid 31.
[637] Ibid.
[638] Ibid.
[639] Ibid.
[640] Ibid.

government advanced by Mathiba supports the precedent of case law discussed in this study and strengthens the argument advanced thereof. The argument of this study which seeks to blame the municipalities for failing to fulfil their constitutional obligation in the context of eviction is also supported by Fick.[641]

Fick argues that in evictions the government has been found to be blameworthy for failing to fulfil its constitutional obligation.[642] As established in *Blue Moonlight,* Fick argues that the state is blameworthy for failing to adopt reasonable short-term housing programmes and to implement them reasonably.[643] Notwithstanding the Constitutional court decision in *Blue Moonlight* which directed the City of Johannesburg to develop policies and structured programmes to address its failure to provide TEAs, in 2018 in the case of *Ingelosi House (Pty) Ltd v Howard and Others ("Ingelosi House")*[644] the City of Johannesburg was still struggling to make provision for TEAs.[645]

In *Ingelosi House* the City of Johannesburg was ordered by the High court to provide TEA to the evictees by 31 October 2018, however failed to comply with this order.[646] As the result SERI on behalf of the occupiers filed an application in the High court to enforce the City to comply with the court order.[647] In the application SERI argued that it had been five years since the City was directed in *Blue Moonlight* to plan and budget for TEAs, however has failed to do so.[648] Therefore, the argument advanced by Fick that, in most cases the government has been found to be blameworthy for failing to fulfil its constitutional obligation in evictions is further supported by the recent *Ingelosi House* case. Moreover, with reference to *Hlope* and *Blue Moonlight* Fick argues further that the case law has demonstrated that there is a slow progress in the realisation of the housing rights by the municipalities and that this has resulted in the frustration of the court system.[649]

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[641] Fick 2017.
[642] Ibid 254.
[643] Ibid.
[644](38755/2013) [2014] ZAGPJHC 437. Information and Founding Affidavit for the 2018 application to enforce the provision of TEA order against the City of Johannesburg at the High court is accessible at https://www.seri-sa.org/index.php/19-litigation/case-entries/443-hawerd-nyele-and-others-v-ingelosi-house-pty-ltd-ingelosi-house (Accessed on 7 July 2020).
[645] Ibid.
[646] Ibid.
[647] Ibid.
[648] Para 31 of the Applicants' Founding Affidavit, accessible at https://www.seri-sa.org/index.php/19-litigation/case-entries/443-hawerd-nyele-and-others-v-ingelosi-house-pty-ltd-ingelosi-house (Accessed on 7 July 2020).
[649] Fick 2017, 81.

Despite the principle set out in *PE Municipality* and *Blue Moonlight* that the municipality must provide alternative accommodation to people facing risk of homelessness after eviction, the municipalities are still struggling to fulfil this well-established principle. The conceivable argument demonstrated by *Hlophe* and *Mchunu* is that they create the necessary precedent to hold the municipalities' senior officials personally responsible for ensuring that evictees are provided with TEAs by the municipality. Even though *PE Municipality* and *Blue Moonlight* principle do not suggest that municipalities must always provide TEAs immediately, the unreasonable delay to provide accommodation to the evictees amounts to the municipality's failure to fulfil its constitutional duty.

This failure by the municipalities to provide TEAs to the evictees when called upon to do so interferes with the landowners' common law right to peaceful use and enjoyment of private property in the sense that the landowner cannot access and enjoy his property until the evictees are accommodated elsewhere by the municipality. To a greater extent, it has been learned from *Modderklip* that this amounts to violation of section 25(1) of the Constitution.[650] The precedent value of *Modderklip* is that the government's failure to assist the landowners to execute the eviction order by providing alternative land or accommodation to the unlawful occupiers amounts to simultaneous breach of the landowners' property rights and occupiers' housing rights.

Therefore, *Mooderklip* indicates that where there is risk of homelessness, the courts cannot effectively order the eviction of the unlawful occupiers without the meaningful involvement of the state. Therefore, if the government is non-cooperative in the eviction proceedings or fails to provide alternative accommodation to the unlawful occupiers the landowners' property rights will be compromised by continued occupation of their property by the unlawful occupiers. It is quite worrying to imagine that the landowners in *Hlophe* had to wait for almost four years after the eviction order was granted before they could regain their property. This unreasonable delay was triggered by the municipality's reluctance to provide TEA to the evictees. For as long as the evictees had not been provided with TEA, the landowners could not access or use their property. It is arguable that this failure by the municipalities to provide TEA to the evictees has far-reaching repercussions on the landowner's rights.

[650] *Modderklip* para 28. See discussion in chapter 3 above.

Hlophe and *Mchunu* reflect badly on the municipalities since they demonstrate that until you take the municipality to court and compel its senior officials to be personally responsible for the provision of TEA, the *PE Municipality* and *Blue Moonlight* principle cannot be fulfilled. Clark argues that *Hlophe* and *Mchunu* have strengthened the legal enforcement mechanisms in the eviction law jurisprudence.[651] He argues that this jurisprudence is very impressive as it firmly established the constitutionally secure position of occupiers facing the risk of homelessness.[652]

Arguably, the purpose of the Constitutional court in both *PE Municipality* and *Blue moonlight* was to warrant maximum protection to the unlawful occupiers' right of access to adequate housing enshrined in section 26 of the Constitution. However, the municipalities do not seem to appreciate this purpose underlying the fundamental *PE Municipality* and *Blue Moonlight* principle. The cases discussed in this chapter hit at the heart of the problem that this study seeks to explore. These cases demonstrate that if the municipalities fail to fulfil their constitutional obligation insofar as the provision of alternative accommodation or TEA is concerned, the courts cannot be able to balance the landowner's right to peaceful use and enjoyment of their property with the unlawful occupier's right of access to adequate housing.

Dugard argues that this failure by the municipalities to provide TEA frustrates the entire eviction process.[653] This is the same argument advanced by Fick that the municipality's failure to provide accommodation to the evictees results in the frustration of the court's system. This frustration is evident in the discussed *Baron* case where the Constitutional court punished the City of Cape Town with the cost order for failing to provide alternative accommodation to the occupiers, which caused the delay of eviction for almost five years.

This frustration is further evident in the discussed recent *Black Investment* case where the Mogale City demonstrated an attitude of defiance and non-cooperativeness when called upon to discharge its constitutional duty in the eviction proceedings. The failure by the municipality to discharge its role implicitly envisaged by statute as shown in the discussed case law and more recently in *Black Investment* and *Ingelosi House* upsets the entire eviction process and hampers the court's ability to make decisions which

[651] SERI 2013, 22.
[652] Ibid.
[653] Dugard 2014, 278.

are truly just and equitable.[654] Therefore, the argument advanced by Clark, at the beginning of this chapter, that the municipalities are failing to implement the progressive legal framework developed in case law is evident in the recent *Black Investment* case as well as in the recent SERI application to enforce the City of Johannesburg to comply with the eviction order in *Ingelosi House* case.

It is argued that the municipalities' failure to comply with the eviction court orders directing them to provide alternative accommodation "signals a worrying tread for the government to ignore court orders, significantly undermining the right of the poor people to adequate housing".[655] Moreover, "this tread also signals the need for human rights lawyers to move away from a largely reactive approach to housing litigation and to actively strategise around pro-active legal options to ensure that the government complies with its housing-related positive obligation, particularly in the context of alternative accommodation it offers to households facing evictions".[656]

Despite the landmark cases of *PE Municipality* and *Blue Moonlight* which established that justice and equity requires municipalities to provide TEAs in all eviction matters where there is risk of homelessness, it is argued that evictions in South African cities continue without the provision of TEAs.[657] As the result, occupiers and landowners have had to go back to courts on several occasions to enforce the government to comply with the court orders and to provide TEAs to the occupiers.[658] It is further argued that this failure by the municipalities to uphold court orders directing them to provide TEAs as recently shown in *Ingelosi House* is a deep worrying development.[659] Dugard argues that even in situations where municipalities finally provide TEAs, they provide unsuitable or substandard accommodations which violate multiple human rights.[660] In light of Dugard's argument, the next section deals with the conditions and standard of TEAs provided by municipalities.

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[654] See *ABSA Bank v Murray* 2004 (2) SA 15 (C) para 41.
[655] J Durgard et al "The right to housing in South Africa "2016 *Socio-economic rights: progressive realisation* 155-262, 29.
[656] Ibid.
[657] Durgard 2016(note 655 above), 30.
[658] Dugard 2016, 30-31.
[659] Durgard 2016, 31.
[660] Dugard 2014, 278.

4.3.2 The standards and conditions of TEA

TEAs are not limited to structures erected on land as the facility so provided by the municipality must include basic services and respect fundamental human rights of the inhabitants.[661] In terms of EHP, the basic services for any emergency or temporary accommodation include the provision of water and proper sanitation.[662] In special circumstances the basic services also include electricity and road infrastructure.[663] These EHP standards are generally regarded as guidelines and the courts do not strictly apply them.[664] When choosing the geographical location for TEA facilities, the municipalities must carefully consider the interests of the occupiers. In *PE Municipality,* the occupiers did not accept the accommodation proposed by the municipality because it was situated in an overcrowded crime infested area.[665] In *City of Johannesburg v Changing Tides,* the court held that the geographical location of TEA must not be distant from the occupiers' place of employment and children's schools.[666] In *Baron* the Constitutional court accepted the offer made by the City of Cape Town to transport children from the TEA facility to schools and back to the facility.[667] What was done by the City of Cape Town suggests that if the TEA is distant from the schools or the employment area, the municipality must provide transport to the occupiers to remedy the challenges posed by the distance.

Even though EHP requires the municipality to provide electricity and roads only in exceptional circumstances, the courts often require a standard above what is prescribed by EHP and the National standard.[668] This is evident in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* where the municipality was required to provide electricity and tarred road.[669] Fick argues that it

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[661] Fick 2017, 105; *Grootboom* para 35; and *Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC). See generally Chenwi L "Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions" (2008) 8 *Harvard Law Review* (*Harv L Rev*) 105.
[662] Department of Human Settlement *Emergency Housing Programme* (2009) part B 2.5.A.
[663] Ibid B 2.5.A.; Department of Human Settlement *National Norms and Standard (*2009) para 2.1.7.
[664] Fick 2017, 108. See also J Van Wyk "The complexities of providing emergency housing assistance in South Africa" (2007) J.S. Arf. L 35.
[665] *PE Municipality* para 2.
[666] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) 56. See also *Blue Moonlight* para 56.
[667] *Baron* para 38-40.
[668] Human Settlement *National Norms and Standard (*2009).
[669] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) 7.

is not clear why the court requires such a high standard in a "temporary" accommodation.[670] The provision of TEA entails not only the delivery of buildings and basic services but also the conditions attached to the facility.[671] The fundamental difficulty with *Blue Moonlight* is that the Constitutional court gave no guidelines on the social condition of the TEA.[672] Cameron J argues that even though the Constitutional court did not give clear guidelines in *Blue Moonlight*, the City was still expected to act reasonably in its provision of TEA.[673] Because of the lack of sufficient details or guidelines in *Blue Moonlight* the TEA provided by the City following the *Blue Moonlight* judgement violated multiple human rights of the evicted occupiers. This resulted in the matter of *Dladla and Another v City of Johannesburg and Other*[674] where the occupiers challenged the constitutionality of the social conditions set by the City in the TEA. In light of this, Dugard criticises the municipalities for failing to provide adequate TEAs.

The residents in the *Dladla* matter were the subjects of the *Blue Moonlight* judgement who subsequent to their eviction were moved by the City of Johannesburg to a TEA called Ekuthuleni residence.[675] The social conditions of Ekuthuleni residence were governed by two rules namely, (i) the lockout rules and (ii) family separation rules.[676] The former required the residents to be out of the TEA between 8h00 and 17:30 every day and to return back by 20h00.[677] The latter required heterosexual couples to leave in separate single-sex dormitories and children above 16 years to be separated from the parent or caregiver of opposite gender to stay in the relevant single-sex dormitories.[678] The implications of the lockout rules was that the residents were not allowed to remain in the TEA during the day and if they come back after 20h00 they were not allowed to enter the TEA.[679] As a result, some residents found themselves sleeping on the streets until the following day.[680] The implications of the family

[670] Fick 2017,111.
[671] *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC) *("Dladla")* para 57.
[672] *Dladla* para 57.
[673] Ibid.
[674] See note 671 above for full citation.
[675] *Dladla* para 1.
[676] *Dladla* para 3.
[677] Ibid.
[678] *Dladla* para 3 and 12.
[679] *Dladla* para 10.
[680] Ibid.

separation rule was that the heterosexual couples could not see or visit each other inside the TEA or to bond with their children.[681]

In the Constitutional court the heterosexual couples argued that being accommodated in separate dormitories enforced separation of their marriages and that it "felt like a divorce".[682] It was further argued that the separation of children above 16 from the parents of opposite gender perpetuated gender stereotypes.[683] The residents submitted that the City of Johannesburg had in principle not complied with the *Blue Moonlight* judgement.[684] The argument was that the social condition of the TEA was inconsistent with the right of access to adequate housing entrenched in section 26 of the Constitution.[685] The residents argued that the social condition of the TEA was oppressive in nature and that the rules were designed to indirectly force them to leave the TEA and go back onto the streets.[686]

As such, the residents contended that their rights to human dignity, freedom and security of the person and privacy were violated by the rules.[687] The residents further argued that the rules violated the international human rights law because they were coercive, demeaning and disproportionally affected women.[688] The interpretation given to *Blue Moonlight* by residents was that the City was ordered to provide not just a temporary accommodation but a "home" which is akin to permanent housing.[689] In this light, the residents argued that the rules deprived them of certain basic characteristic of a home.[690] To this end, the residents further submitted that the City violated their right of access to adequate housing.[691]

The Constitutional court found that the residents were entitled to protection of their constitutional rights in section 10,12, and 14 of the Constitution.[692] The court held that the lockout rules violated the residents' right to human dignity because it was cruel,

[681] Ibid.
[682] *Dladla* para 12.
[683] Ibid.
[684] *Dladla* para 25.
[685] Ibid.
[686] Ibid.
[687] *Dladla* para 26.
[688] *Dladla* para 29.
[689] *Dladla* para 30.
[690] Ibid.
[691] Ibid.
[692] *Dladla* para 47.

condescending and degrading.[693] It was found that the lockout rules forced the residents to live on the streets during the day with no place to rest and during this duration the court found that the residents did not have privacy [694] The court further held that the family separation rules eroded the privilege of intimacy and love between couples, parents and children and siblings.[695] It was further found that the impugned rules materially affected the movement of the residents because they were not allowed to visit each other within the TEA.[696] Accordingly, the Constitutional court found that the City of Johannesburg violated residents' rights to dignity, freedom and security of the person, and privacy under sections 10, 12 and 14 of the Constitution.[697]

4.3.3 The enforcement mechanism of TEA orders

At this stage of this study, it is apparent that the municipalities are mostly blameworthy for failing to pro-actively participate in eviction proceedings and to effectively plan for the provision of TEAs to the evictees as required by the existing legal framework. Even where the municipalities ultimately provide TEAs, some municipalities provide unsuitable or inadequate facilities. Theoretically, the right to peaceful use and enjoyment of private property can be perfectly balanced with the right of access to adequate housing. However, the balancing of these rights depends on the practical provision of the TEAs by the municipalities. If the practical provision of TEAs cannot be achieved, the entire balancing procedure becomes a constitutional nightmare. Even where the municipality does provide TEAs and moves the occupiers from the private landowner's property, if the TEA so provided falls short of the expected standard, the municipality would be deemed to have failed to fulfil its constitutional duty. In such circumstances, the balancing procedure is still compromised.

Hlophe demonstrates succinctly that it is hard to enforce TEA orders against certain municipalities. For example, *Blue Moonlight* was not a final victory for the unlawful occupiers because even after the court order directing the municipality to provide TEA had been granted, the municipality still unreasonably extended the duration of the entire process until *mandamus* was granted against the senior officials. Following the

[693] *Dladla* para 48.
[694] *Dladla* para 48-50.
[695] *Dladla* para 49.
[696] *Dladla* para 51.
[697] *Dladla* para 53.

development of the eviction law jurisprudence in *Blue Moonlight,* the hopes were that the municipalities will start providing adequate and suitable temporary accommodations to the evictees. However, *Dladla* shows that the municipalities are still not clear on what is exactly expected of them insofar as the provision of TEAs is concerned. It is for this reason that the City of Johannesburg subsequently provided TEA which violated multiple human rights of the evicted occupiers.

Hlophe and *Dladla* demonstrate the dual problems of the current enforcement mechanism. The former demonstrates that the municipality may unreasonably delay the provision of TEA notwithstanding the court order directing it to do so. The latter demonstrates that even where the municipalities ultimately provides TEA, they provide inadequate facilities. The purpose of section 26(3) of the Constitution is to ensure that there is orderly resettlement of the evicted occupies after eviction, as Cloete puts it.[698] However, this cannot be achieved if the municipalities fail to provide proper TEA after the eviction proceedings. Thus, Dugard argues that even though the Constitutional court set a good precedent in *Blue Moonlight,* the enforcement of the eviction orders against municipalities has been a "lengthy convoluted and expensive effort".[699] Dugard argues that the effort that needs to be put by the evicted occupiers, private landowners and their lawyers to force the municipality to provide suitable TEAs had been continuously frustrating.[700]

Interestingly, Dugard argues that this failure by the municipalities to play medium role in evictions "is only aided and abetted by the Constitutional court's disposition toward judicial avoidance in socio-economic rights cases".[701] She argues that the courts are reluctant to provide adequate content to the right of access to adequate housing.[702] Dugard argues further that the lack of sufficient content on the housing rights is the reason why municipalities provide inadequate TEAs.[703] Dugard argues that the legal gap which results from the municipalities' failure to provide TEAs is caused by courts' failure to provide oversight or structural interdict.[704] Dugard further argues that this non-compliance by the municipalities to provide suitable TEAs is an indication that it

[698] Cloete 2016, 83.
[699] Dugard 2014, 278.
[700] Ibid.
[701] Ibid.
[702] Ibid.
[703] Ibid.
[704] Ibid.

is now time for the courts to adopt a new approach on the stance and the content of socio economic rights.[705] It has been established that the municipalities' failure to provide TEA to the evictees is the cost to the balancing procedure of the subject rights. Inasmuch as the municipalities appear to upset the entire balancing processes, one has to be cognisant of the challenges faced by the municipalities regarding the provision of housing in general and other basic services to their communities. The following sections thus discuss these challenges and how they have affected the municipalities' duty to provide TEAs to the evictees.

4.4 The potential problems with the municipalities' duty to provide TEAs

4.4.1 The general overview of the housing demand

South Africa consists of 278 municipal governments.[706] Seedorf and Sibanda point out that this number of municipalities is sufficient to ensure that the local governments meet the needs and demands of its inhabitants.[707] Seedorf and Sibanda argue that this number of municipalities ensures that government can reach each and every area of the country and that the government's revenues are properly spent.[708] Notwithstanding the reasonable number of municipal governments, the municipalities are struggling to get to the bottom of the housing demands, especially in the major cities.[709] This is perpetuated by the huge housing backlog across the country. By 1994, the housing backlog across the country was estimated at 1.5 million household.[710] In 1994, this backlog was estimated to be increasing by 178 000 units a year due to fast population growth.[711] Since 1994, the housing demand has extremely increased at a

[705] Dugard 2014, 278. See also *Zulu and others v eThekwini municipality and others* 2014 (4) SA 590 (CC) where the municipality also failed to comply with the court order. See also Liebenberg 2010, 424-438.
[706] This informational is accessible at: https://www.gov.za/about-government/government-system/local-government(Accessed on 5 September 2019).
[707] S Seedorf and S Sibanda "Separation of powers" in Woolman S and Bishop M (eds) *constitutional law of south Africa* 2 end (2013) 12.
[708] Ibid at 12-14.
[709] Major cities like, The City of Johannesburg; City of Tshwane; City of Cape Town; Ekurhuleni Metropolitan Municipality; and eThekwini Municipality.
[710] MR Tomlinson "Why can't we clear the housing backlog."*Politics Web* 6 (2015). See also K Wilkinson "Factsheet: the housing situation in South Africa" *Africa Check* (2014).
[711] Liesi Pretorius "Housing in SA: 3 FAQS answered" *City Press* (12 April 2019).

faster rate more than any items in the government's budget and "by more than just inflation".[712]

In 2017 Stats SA's general household survey found that 2.2 million household lived in "makeshift structures not erected according to approved architectural plans, for example shacks or shanties in informal settlements or in backyards".[713] By 2018 the minister of human settlement, Nomaindia Mfeketo announced that the national housing backlog was close to 2.1 million which is 600000 more than 1994.[714] Despite the government's effort and commitment to provide housing to the people, the budget and limited resources seem to be a major constraint. The national housing backlog affects the manner and form in which the municipalities provide TEAs. Now, the issue relates to the contributory factors to this housing backlog. Arguably, human migration, which has extremely increased population growth and demand of basic services in the major cities is deemed to be one major factor.[715]

The new constitutional dispensation came with the abolishment of influx control legislations. This resulted in many people moving from different parts of the country, including foreign nationals to the major cities with the hope of securing a better life and employment.[716] Notably, when people move from different areas of the country, especially those from rural areas, they usually have no financial means to acquire proper housing of their own. As such, when they arrive at the cities, they occupy inadequate housing.[717] Some occupy hostels, shacks and backyard rooms.[718] Fick argues that migration has increased the demand for housing in major cities.[719] The high demand of housing in the cities is also caused by high level of unemployment and poverty.[720]

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[712] Fick 2017, 19. See also Tomlinson 2015 (note 710 above); Socio-Economic Rights Institute of South Africa *A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice* (2011) 33.
[713] L Pretorius "Housing in SA: 3 FAQS answered" *City Press* (12 April 2019).
[714] Ibid. See also Fick 2017, 19.
[715] See *Betta Eiendomme v Ekple-Epoh* 2000 (4) SA 468 (W).
[716] L Chenwi "Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions" (2008) 8 *Harvard Law Review* 105, 113; J Pienaar "Unlawful occupier in perspective: history, legislation and case law" in Mostert H and De Waal M (eds) *Essays in Honour of CG van der Merwe* (2011) 309; and H Mostert "Landlessness, housing and the rule of law" in Mostert HD, MJ (ed) *Essays in Honour of CG van der Merwe* (2011) 80. PISA is a good example of influx control Act. See also *Slums Act* 53 of 1934; *Group Areas Act* 41 of 1950.
[717] Fick 2017, 21.
[718] Ibid. See also *Betta Eiendomme v Ekple Epoh* 2000 (4) SA 468 (W).
[719] Fick 2017, 21.
[720] See housing backlog discussion at SERI (2011), 33-41.

The housing backlog has resulted in land invasion and unlawful occupation of the state and private landowner's properties. The unlawful occupation is also perpetuated by political land grabbing ideologies which encourage people to occupy land and properties they do not own.[721] When all these people are evicted, they become a burden to their municipalities. This has caused the municipalities' housing programmes to be less effective due to the unbearable demand of both temporal and permanent housing.[722] Fick argues that the reason why the housing demand beats the housing allocated budget is also caused by poor intergovernmental relations, corruption and maladministration.[723]

4.4.2 Availability of resources

The municipalities have the duty to provide TEAs to the evictees and this duty is logically linked to section 26(2) of the Constitution. Accordingly, the duty is subject to the availability of state's resources.[724] As such, the court cannot order the municipality to provide TEA if the municipality does not have sufficient resources to comply with such an order. In *Blue Moonlight*, it was argued that it would be legally wrong for any court to oblige the municipality to go beyond its available resources in order to provide TEA to the evictees.[725] It was further argued that to expect the municipality to do what is beyond its available resources would amount to incurring unauthorised expenditure.[726] The state has the duty to persuade the court that it lacks sufficient resources to provide temporary or permanent housing. This is because all the information regarding the programmes and actions of the state as well as the available states resources, are usually at the disposal of the state.[727] In *Baron,* the City of Cape Town was able to persuade the Constitutional court that the TEA it provided was the

[721] See Nick Krige "Julius Malema land grab case postponed by Newcastle magistrate's court" The South African (8 July 2019), where it is reported that at rallies in 2014 and 2016, Julius Malema urged Economic Freedom Fighters (EFF) supporters to occupy land in Bloemfontein and Newcastle without the proper consent.
[722] J Pienaar *Land Reform* (2014) 660; J Pienaar "Unlawful occupier in perspective: history, legislation and case law" in Mostert H and De Waal M (eds) *Essays in Honour of CG Van der Merwe* (2011) 309-310, 315.
[723] Fick 2017, 22. See also Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 10-11; and Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 8.
[724] See section 26(2) of the Constitution.
[725] *Blue Moonlight* para 72.
[726] Ibid.
[727] Fick 2017, 282.

least it could provide within its available resources.[728] However, in *Blue Moonlight* the submission that the City of Johannesburg did not have resources was rejected.[729]

Likewise, in *Hlophe* the City of Johannesburg also argued, not for the first time, that it could not provide TEA to the evictees due to limited resources.[730] Again, this argument was viewed as *plea in misericordiam* by the South Gauteng High court. In *Mchunu,* the eThekwini Municipality also submitted that it could not comply with the order to provide housing to the evictees because it lacked sufficient resources to do so.[731] Arguably, the availability of resources is an important factor as Yacoob J puts it in *Grootboom* that it is the test to measure the states' ability to fulfil its housing obligation.[732] The concern, therefore, has more to do with the extent to which the court can intervene if the municipality fails to provide TEA to the evictees due to the scarcity of resources. The doctrine of separation of powers makes it hard for the courts to intervene on the issues of state's resources.

The government has the sole duty to plan for its programmes and to accordingly budget for those programmes. The courts should not intervene to the budgeting plan of the state unless the budget is unconstitutional.[733] In terms of EHP the municipality is required to identify situations requiring emergency housing within its jurisdiction and to properly budget for such events.[734] This would include proper planning and budgeting for TEAs. In situations where the municipality runs out of resources to execute its housing plans, it may apply for funding assistance from the provincial government.[735] Accordingly, if the municipality successfully persuades the court that it had properly budgeted for TEAs, but has exhausted its resources the court cannot order the municipality to provide TEA immediately. However, the court can order the

[728] *Baron* para 50.
[729] *Blue Moonlight* para 71, 74 and 96.
[730] *Hlophe* paras 12, 13 and 17. See also S Liebenberg "The interpretation of socio-economic rights" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 33.
[731] *Mchunu* para 7
[732] *Grootboom* para 46.
[733] Fick 2017, 282.
[733] *Baron* para 258.
[734] Department of Human settlement *Emergency Housing Programme* (2009) part B 3.1. Also see Fick 2017, 120.
[735] Department of Human settlement *Emergency Housing Programme* (2009) part B 3.4.1.

municipality to apply to the provincial government for funding.[736] The rationale for doing so is that the court cannot order the municipality to do what is impossible.[737]

Brookway Property 30 (Pty) Ltd v People Who Intend Invading Portion 150 of the Farm Zandfontein 317 J.R. Portion 124[738] is the precedent case where the court accepted the City of Tshwane's submissions that it lacked sufficient resources to provide TEAs to the evictees.[739] In this case, the City of Tshwane fully disclosed the difficulties which had led to the City being unable to immediately provide TEA to the evictees.[740] The City further reported on its programmes which were designed to deal with the TEAs and how the demand of TEA beat its budget.[741] Accordingly, the court ordered the City to apply for funding from the provincial government.[742] In a situation where both the provincial and national government also lack funds to assist the municipalities to provide TEAs, the court will be left with no choice other than to postpone the state's duty to provide TEA to the next budget cycle.[743]

In a situation where the municipality has unreasonably failed to budget for housing, the municipality cannot make an argument that it lacks resources to provide TEA and such argument should be rejected. In *Blue Moonlight*, the City of Johannesburg argued that it was impossible for it to provide TEA to the evicted occupiers because it lacked the resources to do so.[744] This argument was rejected on the basis that the City had incorrectly budgeted for its housing programmes.[745] The City's report was found to be vague in that it did not explain why it could not meet the housing demands of the evictees.[746] The court also found that the City had been operating in a financial surplus and that there was no evidence that the City was unable to reallocate funds to meet

[736] Fick 2017, 121. See also A Pope "The alternative accommodation conundrum: trends and patterns in eviction jurisprudence" (2011) 25 *Speculum Juris* 134, 140; *Ives v Rajah* 2012 (2) SA 167 (WCC).
[737] M Bishop "Remedies" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 9-76; A Pillay "South Africa: Access to land and housing" (2007) 5 *International Journal of constitutional Law* (*Int'l J Const L*) 544555; M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *SAJHR* 383 406; C Smith "Eviction - need for a way out" (2014) *De Rebus* 40-42; and J Van Wyk "The role of local government in evictions" (2011) 14 *PER* 50 67.
[738] (33786/2010) [2010] ZAGPPHC 129.
[739] *Brookway Property 30 (Pty) Ltd v People Who Intend Invading Portion 150 of the Farm Zandfontein 317 J.R. Portion 124* (33786/2010) [2010] ZAGPPHC 129 para 44.
[740] Ibid para 18.
[741] Ibid paras 18-20.
[742] Ibid para 44.
[743] Fick 2017,121.
[744] *Blue Moonlight* para 68.
[745] *Blue Moonlight* para 69.
[746] *Blue Moonlight* para 71.

the demand for TEAs.[747] Moreover, the City could not provide any information relating to its general budget.[748] Due to the vagueness of the City's argument regarding the unavailability of resources, the court was not persuaded that the City was constrained by limited resources.[749]

What the Constitutional court did in *Blue Moonlight* was to scrutinise the municipality's budget and found that the surplus funds could be used to finance the TEA.[750] Arguably, scrutinising the municipal budget and ordering the municipality to rearrange its funds for TEA by the court interferes with the doctrine of separation of powers and has far reaching budgetary implications. However, it appears that this approach is a golden move to holding the local governments accountable. In *Minister of Health v Treatment Action Campaign,* the Constitutional court held that the courts should not stop from making orders simply because they have budgetary and resources implications.[751] However, the court cannot order the municipality to provide TEA if there is sufficient evidence that the municipality lacks resources to do so.

While it is true that the court cannot order the municipality to do what is impossible, the argument that the municipality lacks resources cannot be made in vain or as a disguise for the municipality to escape its constitutional obligation. It is for this reason that the City of Johannesburg's case of unavailability of resources was rejected in *Blue Moonlight* because the case was pursued with the intention to escape the obligation.

Whereas it is true that the population is forever growing in the major cities and that the TEA demand has in general increased due to unlawful occupation, it cannot be vaguely accepted that the municipalities lack sufficient resources to provide TEAs. If the Constitutional court could find surplus in the City of Johannesburg's budget in *Blue Moonlight* and accordingly direct the municipality to use from those surpluses to self-fund TEA, it shows that the municipalities have no will to properly budget and allocate funds for TEAs. In *Baron* the City of Cape Town submitted a report in the Magistrate court stating that it had insufficient resources to provide alternative accommodation to the evicted farm-dwellers and that it did not foresee having alternative accommodation

[747] Ibid.
[748] *Blue Moonlight* para 74.
[749] Ibid.
[750] Ibid.
[751] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 8.

available in future.[752] The City's report lacked sufficient clarity on how it had budgeted for alternative accommodation programmes and how it exhausted its resources.

Pretorius AJ criticised the attitude of the City of Cape Town arguing that the City could not escape its obligation by simply submitting a report stating that there is no available alternative accommodation.[753] The case of *Mchunu* is even more interesting because the eThekwini municipality had already allocated housing to the evicted occupiers, although the houses were hijacked by other beneficiaries.[754] Nonetheless, the eThekwini municipality pursued a case of unavailability of resources whereas the hijacking was the results of its own fault and improper planning. Accordingly, Hallis AJ found that the pursued case of limited resources was not founded.[755] Therefore, it is not always the case that the municipalities are constrained by limited resources since sometimes they fail to provide TEAs due to lack of constitutional will, improper planning and inadequate budgeting.

4.4.3 The managed care model of TEAs

It can be gleaned from the foregoing discussion thus far in this chapter that the demand for TEAs from municipalities is speedily increasing. TEA means "temporary emergency accommodation", now the question is, how does the municipality keep TEA "temporary"? The TEA orders have far reaching management implications. The courts have not given guidelines on how to keep TEAs temporary as they were meant to be. The law enjoins that the evicted occupiers must remain in the TEA provided by the municipality until they can afford alternative accommodation of their own.[756] Notably, many South Africans cannot afford housing. Therefore, when they are provided with TEA, it becomes a permanent home for them. Because of this, it has become almost impossible for the municipalities to manage temporal residence of the evictees in the TEAs. As such, the municipalities find themselves in a situation where they have to build more TEA facilities instead of managing those that they have already

[752] *Baron* para 13.
[753] Ibid para 46.
[754] *Mchunu* para 7.
[755] Ibid.
[756] See *Dladla v City of Johannesburg* 2014 (6) SA 516 (GJ) para 8 (This is the judgement of the High court).

provided. This has serious and far-reaching budgetary implications to the municipalities.

In *Dladla v City of Johannesburg* ("*Dladla* HC")[757] the City of Johannesburg had intended to evict the unlawful occupiers who had occupied the TEA for more than six months, thus exceeding the 'temporary' timeframe. In this case, the City had reserved the right to evict the occupiers after a six months' period without a court order.[758] However, the City was interdicted from further evicting the evicted occupiers without following the PIE procedure.[759] In the previous chapter, it has been established that PIE protects the unlawful occupiers from being evicted without alternative accommodation. It has also been established that the duty to provide alternative accommodation, herein also referred to as TEA, rests on the shoulders of the municipality.

To this extent, it is difficult to understand how the City of Johannesburg would have further evicted the evictees from the very same alternative accommodation which it was ordered to provide. The purpose of the TEA order is to save the unlawful occupiers from the risk of homelessness. Therefore, if the City were to make an application to further evict the evictees in its TEA the issue of homelessness was still going to be a problem for which the City has the duty to solve.

Dladla HC suggests that even if the municipality can stipulate a reasonable short period to accommodate the evictees in order to manage the temporariness of the TEA, the law does not allow the municipality to terminate the residence of the evictees in the TEA unless the evictees can afford alternative accommodation of their own.[760] TEAs are not supposed to be a permanent housing solution. If this were to be the case, everyone would love to be evicted in order to be provided with permanent housing. Making TEAs permanent would frustrate the entire government's permanent housing programmes and would promote the queue-jumping access to housing. The question of temporariness is reminiscent of *Dladla's* case wherein the City of Johannesburg provided TEA with strict lockout and family separation rules. The purpose of these strict rules, as was argued by the City at the time was not to

[757] Ibid.
[758] Ibid para 27.
[759] Ibid para 8.
[760] Fick 2017,112.

undermine the constitutional rights of the occupiers but was to discourage the attitude of staying in the TEA permanently.[761]

In this respect, the reasoning of the SCA judgement is significant. Even though these rules were found by both the High court and the Constitutional court to be unconstitutional, the SCA took a completely different reasoning. The SCA found that the rules were not unreasonable but that the purpose was "to discourage an attitude of dependence".[762] In this matter, the occupiers wanted to leave and come back to the TEA at any time and to be free to sleep together as couples. The SCA found that the evicted couples' rights to intimacy and love is not absolute.[763] The court found that the partners did not have the right to sleep together everywhere and in whatever circumstances.[764] Accordingly, the SCA found that the evicted couples' right had "to yield, albert temporarily, to broader practical demands" of TEA.[765]

The SCA further found that the TEA was a "temporary" accommodation and that the occupiers could not claim freedom to leave and return to the facility at their own terms and to even sleep together as couples as if they were in their permanent homes.[766] Arguably, this reasoning on the part of the SCA is sound in relation to the attempt to keep the TEAs "temporary". The SCA reasoning discourages the attitude of dependence and comfort zone. In support of the SCA's decision, it can be argued that the limitation of the evictees' right to dignity, freedom and security of the person, and privacy in sections 10, 12 and 14 of the Constitution as regards the TEA is reasonable in order to discourage the attitude of dependence. Unfortunately, this decision of the SCA was short lived and thus holds no water in the eviction law jurisprudence as it was soon overturned by the Constitutional court.

The downside of the Constitutional court's decision in this respect is that it does not speak to the issue of managing temporariness of the TEAs. On the contrary, the Constitutional court appears to be too protective of the unlawful occupiers' rights which can be reasonably limited in the process of managing temporariness of the TEA.

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[761] *Dladla* para 23.
[762] *Dladla* para 22.
[763] Ibid.
[764] Ibid.
[765] Ibid.
[766] *Dladla* para 23.

By incorporating the elements and features of the permanent 'home' in the TEA facility the Constitutional court has ultimately converted TEAs into a permanent form of housing. Notably, managing temporariness of TEAs at the expense of limiting the fundamental human rights of the evictees has grave implications to the constitutional law jurisprudence. The right of access to adequate housing is the progressive right which means that the state is not expected to rush the process of managing the temporariness of the TEAs if that would mean to undermine the fundamental constitutional rights of the evictees. In this light, it is arguable that the municipalities have to develop the policies and measures which will manage the temporariness of the TEAs without violating the fundamental constitutional rights of the evictees.

It appears that the courts have never defined temporary accommodation based on specific period of time but that the evicted occupies must be permitted to reside in the temporary accommodation until such time that they can afford their own housing. In *PE Municipality* the Constitutional court accepted that the evicted occupiers had to be accommodated in the municipal TEA until permanent accommodation in the government's housing programme became available.[767] In *Hlophe,* the High court ordered the City of Johannesburg to provide TEA where the evictees would reside in until permanent housing was made available to them.[768] Thus, Fick argues that in the existing legal framework temporary means "until permanent housing is provided".[769]

Cognisance of the housing backlog discussed in the above sections of this chapter, it is arguable that it is hard to keep the TEAs temporary because the temporariness depends upon provision of permanent housing or change of the personal circumstances of the evictees. This means that if the state struggles in providing permanent housing to the people, as it usually happens, the TEA remains a home of the evictees until such time that the state can provide permanent housing. In light of the ever-growing population, poverty and unemployment in the major cities[770] it does not appear that the economic circumstances of the evictees will change anytime soon.

[767] Para 55.
[768] *Hlophe* para 6-7.
[769] Fick 2017, 133.
[770] See A report to the High-Level parliamentary committee from the Centre for Development and Enterprise dealing with the triple challenge, accessible at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_WG1_CDE_Draft_Report_response_to_committees_comments_24.4.17.pdf, (accessed on 5 October 2019).

Consequently, they will continue to occupy the TEAs until such time that their economic situation has changed.

4.5 Concluding remarks

It is almost eight (9) years since the *Blue Moonlight* case was decided. It is notable, though, that despite this landmark judgement the municipalities still appear to be reluctant or unwilling to develop policies and other reasonable measures to provide TEAs to the evictees. Thus, despite numerous attempts by the occupiers, the landowners and the lawyers to compel the municipalities to play their central role in evictions, the municipalities are disinclined to meaningfully engage with the evictees.[771] This failure by the municipalities violates the landowners' right to peaceful use and enjoyment of private property and to a certain extent it violates section 25(1) of the Constitution. This is so because in terms of the new legal framework the unlawful occupiers must remain in the landowner's property until alternative accommodation is made available by the municipality. It has also been established in this chapter that this failure violates the evictees' right of access to adequate housing and ultimately hampers the court's ability to balance the subject rights in eviction proceedings.

Moreover, this failure has adverse effects to the development of the eviction law jurisprudence. It has been learned from chapter two of this study that the apartheid government eviction laws were so inhumane to the extent that evictions instituted during apartheid era destroyed not only the homes of the evictees but stripped them of their dignity. It is even worse that the state did not have the duty to provide alternative accommodation to the evictees. It is upon this miserable background that the Constitutional court in *Blue Moonlight* sought to transform the eviction law by imposing a duty on the municipalities to provide alternative accommodation to the evictees in order to redress the injustices of the past. Notwithstanding this great effort put by the Constitutional court, the municipalities have not fully adapted to this well-developed jurisprudence.

However, even though municipalities seem to be dragging feet, one must recognise the fact that, to certain extent the duty imposed on the municipality to provide temporary housing is a heavy burden. Notably, two critical issues have been discussed

[771] SERI 2013, 3.

in this chapter namely, (i) the far-reaching budgetary implications of TEAs and (ii) the failed managed care model of the TEAs. These issues are critical and cannot be overlooked. In the following final chapter, this study makes recommendations *inter alia* on how to deal with these critical issues.

CHAPTER 5

Conclusion and Recommendations

5.1 Conclusion

Chapter one of this study sought to introduce the study by: laying out the background upon which the study is founded; exposing the research problem, alluding research questions that the study sought to probe, discussing preliminary literature review and study purpose; demarcating the study and clarifying specific terminological points. Chapter two focused on two eviction remedies namely, the *rei vindicatio* and PISA. However, before discussing these remedies, the legal and historical context of the concept of ownership was discussed. This discussion was informed by the view that for one to better understand the legal remedy one must first learn about the right which the remedy seeks to protect. In this context the supposition was that: the stronger the right, the stronger the remedy.

Accordingly, chapter two established that in the pre-constitutional dispensation ownership was an absolute right and for this reason the remedies were afforded the same status of an absolute right. At common law ownership is defined as the most comprehensive real right a person can have in relation to a thing.[772] Accordingly, the landowner was entitled to deal with his property in any way he deemed fit.[773] Even though ownership was defined as the comprehensive real right it was never absolute in both Roman law and Roman-Dutch law.

When the Roman-Dutch law concept of ownership was brought in South Africa, it was influenced by the ideas of the Pandectists who defined ownership as an absolute power granted by the law to the owner in order to enforce his will against the non-owners.[774] The Pandectists' definition was largely characterised by the element of absoluteness. To this extent, the Pandectists' definition guaranteed the landowners an absolute right to evict any person interfering with their peaceful use and enjoyment of private property. Because of the absoluteness of ownership, the social implications accompanied by the enforcement of ownership rights against the non-owner were of

[772] *Gien v Gien* 1979 (2) SA 113 (T). See discussion in chapter 2 above.
[773] Lewis 1986, 241.
[774] Dhliwayo 2015, 82.

no consequence. To put it differently, the landowner had an absolute right to exclude the non-owners or to evict the unlawful occupiers and the socio-economic interests of the non-owners were not considered. These ideologies formed part of the early South African law. Accordingly, in the pre-constitutional dispensation ownership was characterised by the notion of absoluteness. Thus, if the landowner's use and enjoyment was compromised by unlawful occupation, he had an absolute right to evict the unlawful occupiers.

Chapter two discussed the nature and the scope of the *rei vindicatio* as the common law eviction remedy. What is important to note is that when the landowner instituted eviction proceedings in terms of the *rei vindicatio,* the court had no discretion to consider the social implications of eviction to the evictees. Whether the evicted occupiers would be rendered homeless as the result of eviction was immaterial. Moreover, the state had no obligation whatsoever to provide alternative housing to the evictees. Thus, there is no doubt that eviction processes were absolutely in favour of the landowner and that they destroyed the homes of the unlawful occupiers.

At the time when the *rei vindicatio* was already in place, the apartheid government introduced PISA as a statutory remedy. As demonstrated in chapter two, PISA was a drastic statutory remedy in that it was premised on the *mala fide* motives of the apartheid government to vigorously and effectively protect whites' property.[775] Chapter two fairly examined the provision of PISA and it has been established in the examination that the remedy sought to predominately afford strong protection to ownership. PISA did not consider the interests of the unlawful occupier at all. What was worse about PISA is that, it criminalised the act of unlawful occupation in order to severely punish the unlawful occupiers. The impact of PISA could be felt through homelessness and socio-economic harm it caused to the majority of black South Africans. In terms of PISA*,* just like in the case of the *rei vindicatio*, the court could evict the unlawful occupiers notwithstanding the risk of homelessness to the evicted occupiers and without directing the state to provide alternative accommodation. Arguably, this absolute protection of ownership was based on the absoluteness ascribed to the right of ownership.

[775] Muller 2011, 54; See discussion in chapter 2 above.

With the advent of the new constitutional dispensation, the notion absoluteness in the institution of ownership fell away. Now, the eviction remedies are subject to section 26 of the Constitution. Chapter three demonstrates a shift from the pre-constitutional dispensation legal framework which viewed the ownership right as largely sacrosanct.[776] In terms of the new legal framework, the landowner does not have automatic right to evict. Even though the common law right to peaceful use and enjoyment of private property is still respected as the component feature of ownership, this right does not enjoy absolute protection. If the landowner institutes eviction, the court must consider the socio-economic impact of such eviction to the unlawful occupiers. For example, if the impacts are brutal, the court may refuse or suspend eviction. Out of five eviction statutes, this study focused only on PIE. This new statutory eviction remedy repealed PISA.

PIE gives effect to section 26 of the Constitution as it ensures not only that no person is evicted without a court order but further protects the unlawful occupiers against arbitrary eviction. In terms of PIE*,* the court may only grant eviction if it is just and equitable to do so after considering all the relevant factors. Justice and equity require the court to consider *inter alia* the availability of alternative accommodation for evictees. The courts are enjoined to ensure that there is orderly resettlement of the evicted occupiers after eviction. Even though some scholars criticise the new legal framework, pointing out that it is pre-dominantly in favour of the evictees, this study does not accept this criticism levelled against the new legal framework. In chapter three, the view of those scholars who construe the new legal framework as a golden move towards development and transformation of South African eviction law was corroborated.

The existing legal framework is the result of the paradigm shift from a position where eviction processes were predominantly in favour of the landowner to the one where fairness, justice and equity prevail. The new legal framework allows the landowner to evict the unlawful occupiers where the use and enjoyment of his property is compromised by unlawful occupation. However, during this process the unlawful occupiers' right of access to adequate housing also need to be respected and protected. In this respect, the courts have the duty to balance the landowners' and

[776] See SERI 2013, 25. See also the extensive discussion in chapter 3 above.

unlawful occupiers' opposed interests by infusing the principle of justice and equity in the eviction processes. What presents difficulties to the existing framework is the municipalities' failure to provide alternative accommodation to the evictees. It has been established in chapter three that the municipalities always have legitimate interest in evictions and that they are enjoined to provide TEAs to the evictees. Thus, for as long as the municipalities fail to provide TEAs to the evictees, the court may not authorise eviction until alternative accommodation is made available. This means that the landowner will have to continue to accommodate the unlawful occupiers until alternative accommodation is provided. The municipality's delay to provide alternative accommodation will also mean delay for the landowner to gain access to the exclusive use and enjoyment of his property.

Thus, Stuurman and Walters argue that the existing legal framework is predominately skewed in favour of the evictees to the extent that PIE violates the landowners' common law right to peaceful use and enjoyment of private property as well as section 25(1) of the Constitution. In chapter three, this argument is rejected, and the criticism is levelled against the municipalities for their reluctance and unwillingness to provide TEAs to the evictees. Arguably, the municipality's failure to effectively play its role in evictions hampers the court's ability to properly balance the landowners' interests with those of the unlawful occupiers. Therefore, this study rejects the argument advanced to the effect that the existing legal framework is predominantly in favour of the evictees. Furthermore, the argument that PIE over remedied PISA and the *rei vindicatio* and such remedying act is deemed unconstitutional is rejected.

The premise of this study was that the municipalities are failing to discharge their constitutional obligation to provide alternative accommodation or TEAs to the unlawful occupiers. Consequently, the balancing of the right to peaceful use and enjoyment of private property with the right of access to adequate housing has become difficult to achieve. This proposition has been successfully tested and corroborated in this study. In chapter four, it has been stablished that notwithstanding the landmark *Blue Moonlight* judgement which sought to transform the eviction law by imposing a duty on the municipalities to provide alternative accommodation to the evictees as a way of redressing the injustices of the past, the municipalities have demonstrated the inability to play their medium role. In chapter four, it has been learned that the municipalities' delay to provide alternative accommodation notwithstanding the court

orders ordering them to do so has serious implications to the eviction law jurisprudence as it frustrates the entire eviction process. In this study, sufficient case law has been used to demonstrate the municipalities' failure to provide alternative accommodation to the evictees. What transpires from the foregoing discussion is that the municipality's failure to play its critical role in evictions hampers the balancing process.

However, even though municipalities show to be dragging feet, it has been demonstrated that the duty imposed on the municipalities requires a lot of planning and resources. The general national housing backlog, migration in the major cities, poverty and unemployment, amongst other factors, have resulted in the increase of unlawful occupation. Because of this, the landowners always seek evictions to protect their rights especially in the major cities like the City of Cape Town and the City of Johannesburg. Consequently, the demand for TEAs has unbearably increased.

Notably, it has also been established that it is difficult for the municipality to further evict unlawful occupiers from its TEAs unless there is enough and conclusive evidence of change of personal circumstances. Thus, it has been argued that it is difficult to sustain the TEA facilities. These issues are critical and cannot be overlooked as they account, amongst other things, for why the municipalities fail to provide TEAs. In the following final section, recommendations *inter alia* on how to deal with these critical issues are made. The findings of this study are that the eviction law in South Africa has been impressively developed in case law in line with the values and meaning of the Constitution. However, the findings of this study show that it is difficult to achieve this great development in the practical context where the municipalities fail to play their role as required.

5.2 Recommendations

5.2.1 Buyout and expropriation

In Fischer, Fortuin J began her judgement with the following question:

> "What does one do with 60 000 people when neither the owner of the land on which they reside, nor the local authority in whose jurisdiction they live, can or want to accommodate them?"[777]

In this question Fortuin J is expressing the difficult of balancing the landowners' interests with those of the unlawful occupiers in a situation where the municipality is unwilling or unable to provide alternative accommodation, which is exactly the problem that this study sought to explore.

In light of the *Fischer* judgement this study recommends that municipalities must start to consider making the buyout and expropriation part of its eviction policies. Now that Fortuin J has interpreted section 9(3) of the *Housing Act* as peremptory in situations where the municipality has no available alternative land or accommodation, the municipalities must draft policies and well-structured programmes dealing with buyout and expropriation in the context of evictions. The municipalities have always been of the view that the court cannot order expropriation because this is an administrative act which cannot be exercised by the court, Fortuin J has corrected this misplaced understanding of law. Therefore, in light of *Fischer* case the municipalities must start engagements with the national and provincial governments and make proper budget proposal for the purpose of buyout and expropriation of land in the context of evictions.

It has been learnt through case law that sometimes municipalities fail to provide alternative accommodation to the occupiers due to the fact that it does not have available buildings or suitable land to accommodate a high number of unlawful occupiers, which leaves both the landowners and occupiers in an untenable position. It has also been learnt that in matter of this nature some landowners would be willing to sell their unlawfully occupied land or buildings to the state for the purpose of housing, however, the municipalities have demonstrated an attitude of unwillingness to enter into a good faith negotiations with the landowners in order to purchase the land. Therefore, one of the best ways in which municipalities can intervene and

[777] Para 1.

enhance provision of alternative accommodation for the desperate and vulnerable occupiers is to buyout or expropriate the property already occupied by unlawful occupiers, obviously this will be guided by the circumstances on the case by case basis.

Municipalities are statutory authorised to expropriate property for housing purposes and this is in line with the state's redistribution mandate.[778] Municipalities may expropriate land by notice in the *Provincial Gazette* if that is for the purpose of housing people, especially where it is unable to purchase the land from the private landowner after reasonable negotiations.[779] There is no doubt that in the context of eviction expropriation would be in the public interest as sanctioned by the Constitution. The positive outcome of buyout or expropriation is that the occupier's tenure of land would thereby effectively be transformed from unlawful occupation to lawful and secure rights.[780]

Therefore, the power of expropriation in the context of eviction could be used to circumvent the eviction and relocation of unlawful occupiers and allow them to continue with occupation.[781] This housing approach is a best approach which will avoid disruptions and time-consuming process of finding suitable TEAs, on the other hand the landowners would be compensated in a just and equitable manner. Therefore, in light of Fortuin J's impressive interpretation of section 9(3) of the *Housing Act* this study recommends that buyout and expropriation in the context of eviction must be considered and crafted into municipalities' policies. One may immediately argue that buyout or expropriation will consume a lot of budget, however if properly budgeted and well planned, this is a best approach in massive eviction cases and where municipality has no alternative land to provide TEA.

5.2.2 Constitutional damages

In this study, it has been learned that the municipality's failure to provide TEA to the evictees violates the unlawful occupiers' right of access to adequate housing. It has also been learned that this has the potential of depriving the landowner of his right to

[778] AJ Van der Walt & S Viljoen "The constitutional mandate for social welfare–systemic differences and links between property, land rights and housing rights" 2015 *PELJ* 1035-1090, 1071-1072.
[779] See section 9(3) of the Housing Act.
[780] Van der Walt & Viljoen 2015, 1072 (note 778 above), 1072.
[781] Ibid.

use and enjoy private property and to certain extent violates section 25(1) of the Constitution. The question is, what is the available recourse to remedy this breach or violation of the subject rights by the government. This study recommends that the courts should not hesitate to award constitutional damages as a way of discouraging continuous state's failure to fulfil its constitutional obligation. It is not fair that the landowner has to wait for indefinite period before the state accommodates the unlawful occupiers elsewhere whilst shouldering the housing responsibility of the state without being compensated.[782] In situations where the municipality is unable to find alternative land to build TEAs or to at least outsource the building to be used as TEA facility, the municipality should be ordered to pay each evictee a reasonable rental fee in order to secure alternative accommodation of their own.

The courts enjoy a wide discretion to award constitutional damages where the state has violated the constitutional rights of its citizens especially "where circumstances make it appropriate particularly in cases of glaring and continuous state failure to adhere to its constitutional obligation".[783] Although the remedy of constitutional damages is not new in South African law, it is, however, not properly implemented in the eviction law jurisprudence.[784] The recent *Life Esidimeni arbitration award* is one of the good precedents dealing with constitutional damages.[785] In *Life Esidimeni* the mental health care patients and their families were awarded constitutional damages against the government for failing to fulfil its constitutional duty.[786]

In the context of eviction, constitutional damages will be a rectifying mechanism in circumstances where the state has violated the constitutional rights of both the

[782] For example, in situation where the landowner purchased the property or land for purposes of development or any other commercial reasons, the municipality should compensate the landowner for any reasonable amount of money he would have made but for the municipality's failure to accommodate the evictees elsewhere.
[783] Helen Suzman Foundation "Constitutional damages: Recent decisions in focus" 2018, available at https://hsf.org.za/publications/hsf-briefs/Constitutional-damages-recent-decisions-in-focus (30 May 2019).
[784] See *Fose v Minister of Safety and security* 1997 (3) SA 786 (CC) where the Constitutional court dealt with the issue of constitutional damages at the early stage of our constitutional democracy.
[785] This arbitration award is available at http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf (accessed on 28 July 2019).
[786] Ibid. See also *Komape and others v Minister of Basic Education* [2018] ZALMPPHC 18*;* and *MEC for Department of Welfare v Kate* [2006] ZASCA 49 where the SCA had to deal with the unreasonable delay by the department of welfare to properly consider the application for social grant.

landowners and the unlawful occupiers.[787] At this stage of this study it has already been established that the municipalities are failing to provide alternative accommodation to the evictees. It has also been established that the municipalities are reluctant to comply with eviction court orders directing them to provide TEAs to the evictees. Therefore, this study recommends that constitutional damages is an appropriate relief.

5.2.3 *Mandamus*

Mandamus is an order of court directing a party to do something or to refrain from doing something.[788] Municipality is a juristic person which operates through its functionaries. Just like a company, the directors are expected to demonstrate the highest standard of care in the company they owe fiduciary duty at.[789] Directors are said to be personally responsible for the management of the affairs of the company.[790] The same thing applies to the municipal functionaries as they are responsible for ensuring that the municipality complies with the eviction orders directing them to provide TEAs to the evictees. What makes *mandamus* a strong enforcement mechanism is that if the functionaries fail to act as per the court order they could be held in contempt and be imprisoned. It is now the time to hold the municipal functionaries personally responsible in situations where the municipalities fail or unreasonably delay to provide TEAs to the evictees. Therefore, this study recommends that the *mandamus* should be immediately issued by the courts where there is failure by the municipality to provide TEAs to the evictees.

5.2.4 Employment opportunities and skills development of the evictees

This study has found that it is hard for the municipality to further evict the occupiers from TEAs unless their personal circumstances have changed. If the personal circumstances of the evictees can be changed by equipping them with necessary skills to find jobs, they will ultimately move out of the TEAs and find alternative

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[787] Helen Suzman Foundation "Constitutional damages: Recent decisions in focus" 2018, accessible at https://hsf.org.za/publications/hsf-briefs/constitutional-damages-recent-decisions-in-focus (accessed on 30 August 2019).
[788] See *Sibiya and Others v Director of public prosecution* 2005 (5) SA 315 (CC) paras 5-9.
[789] *Cyberscene Ltd and Others v Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) where the court found that a director in a company stands in a fiduciary relationship.
[790] FHI Cassim et al *Contemporary company law* 2 ed Cape Town (2012) 509. See section 76 of *Companies Act* 71 of 2008.

accommodation of their own. For example, most of the unlawful occupiers who were evicted in *Blue Moonlight* did not have formal employment as they depended on the informal sector in the central business district to make a living.[791] The average income per household was estimated at R940 per month.[792] After eviction the evicted occupiers were accommodated by the City of Johannesburg in one of its TEAs. The City had reserved the right to evict the occupiers after a six months period without the court order. However, this could not happen because the evicted occupiers' personal circumstances had at that time not changed.[793]

Therefore, this study recommends that the municipalities should develop policies and programmes to further improve the lives of the evictees in the TEAs. This development will ultimately contribute to the sustainability of TEAs. This study has established that the sustainability of TEAs can strengthen the municipalities' capacity to accommodate more evictees. If the municipality's capacity is strengthened to this effect the subject rights will be properly balanced. Employment and skill development is a good strategy to evict the unlawful occupiers from the TEA and to ultimately keep up with the demand for TEAs.

In a homelessness survey conducted in Scotland, Sandars and Reid found that people do not move out of temporary accommodation simply because the local authorities do not proactively support the homeless people to find alternative accommodation of their own.[794] Sandars and Reid further argue that people occupying state temporary accommodations need programmes which will boast their personal progress and enable them to move out of temporary housing.[795] This study recommends that the municipalities should equip the evicted occupiers with necessary skills, education, mental health support and support them to find employment as a way of helping them make a success of alternative accommodation and future housing.

[791] *Blue Moonlight* para 6. See chapter 3 and 4 of this study where *Blue Moonlight* judgement is discussed.
[792] Ibid.
[793] *Dladla* HC para 27. See discussion in chapter 4 of this study.
[794] B Sanders & B Reid "'I won't last long in here': experiences of unsuitable temporary accommodation in Scotland" (2018) 40, accessible at https://www.crisis.org.uk/media/239523/i_wont_last_long_in_here_experiences_of_unsuitable_temporary_accommodation_in_scotland_-pdf.pdf(accessed on 24 May 2019)
[795] Ibid.

5.2.5 Proper planning and budgeting

In chapter four, it has been learned that sometimes municipalities fail to properly plan and budget for TEAs. A good example is the City of Cape in the recent *Fischer* case where the court found that the City appeared to be unprepared to make provision for alternative accommodation to the evictees and that it did not have effective plan for massive evictions. Another example is the City of Johannesburg, in *Blue Moonlight* the Constitutional court found that the City failed to properly budget for TEAs notwithstanding the record showing that the City had been operating in a financial surplus.[796] In this regard, the court found that the "City had itself to blame for its unpreparedness to deal with the occupiers' plights".[797] It is apparent that the municipalities' inability to provide TEAs is also caused by improper planning and budgeting for these facilities. Therefore, this study recommends that the municipalities must develop new strategies and policies which will assist them to properly plan and budget for TEAs.

[796] *Blue Moonlight* para 71, see discussion in chapter 4 above.
[797] Ibid,

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Sithelo Magagula (214503954)
School Of Law
Howard College

Dear Mr Sithelo Magagula,

Protocol reference number: 00005147
Project title: BALANCING THE RIGHT TO PEACEFUL USE AND ENJOYMENT OF PRIVATE PROPERTY WITH THE RIGHT OF ACCESS TO ADEQUATE HOUSING AND THE GOVERNMENTS LEGITIMATE INTEREST THERETO.

Exemption from Ethics Review

In response to your application received on 9 January 2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely

[redacted]

Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law