

BREAKING THE TIE: EVICTIONS FROM PRIVATE LAND, HOMELESSNESS AND A NEW NORMALITY

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I INTRODUCTION

(a) *The 'normality assumption' and its endurance*

It used to be simple. A landowner was in law entitled to an eviction order if he could prove his ownership and the fact of occupation of the land by the occupier.¹ Where the owner acknowledged that the occupier was in occupation in terms of a valid lease agreement or some other legal right, the owner bore the onus of proving that the right of occupation had been validly terminated. If the owner did not acknowledge that any such right had ever existed, it was for the occupier to prove the existence of the right and that it had not been validly terminated.² This summary of the conditions for the success of the *rei vindicatio* (at least insofar as it applied to immovable property, such as land and buildings) is perhaps the most well known of common law syllogisms. It was the legal expression of what AJ van der Walt has referred to as the 'normality assumption, that a landowner is entitled to exclusive possession of his or her property — this is what is considered the 'normal state of affairs' that will most likely be upheld in the absence of good reason for not doing so.³ At common law, the only good reason for not granting a landowner exclusive possession of his property was the existence of a counter-veiling common law right in the property.

However, the normality assumption, which forms the basis of western liberal ideas of what property relations are and ought to be, is under attack. The Constitution of the Republic of South Africa, 1996 ('the Constitution') has formed the basis for this attack. It has done so by entrenching two defensive rights, which have fought a war of attrition ever since. The first is

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¹ See *Graham v Ridley* 1931 TPD 476.

² See *Chetty v Naidoo* 1974 (3) SA 13 (A). See also Theunis Roux 'Continuity and change in a transforming legal order: The impact of s 26(3) of the Constitution on South African law' (2004) 121 *SALJ* 466 at 471.

³ AJ van der Walt *Constitutional Property Law* (2005) 412.

to be found in s 25(1) of the Constitution, which states that: ‘No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property’. The second comes just a paragraph later, in s 26(3), which states that: ‘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.’ These two provisions, and the subordinate legislation enacted to give effect to the latter, have sparked intense legal and ideological conflicts over land ownership and use in South Africa. They have done so in part because they have upset the normality assumption and replaced it with vast uncertainty. Where once there was certainty about who would win a legal conflict over the possession of land and under what conditions, there was introduced, almost overnight, a new framework in which the only requirement was non-arbitrariness. An owner could not be arbitrarily deprived of the use and enjoyment of his property, yet an occupier could not be arbitrarily evicted from it either.

The gulf between these two propositions, though conceptually vast, was initially filled in by the common law. So property relations in South Africa did not change overnight. Indeed, the only concrete requirement contained in the constitutional provisions replicated above — that there be a court order prior to an eviction — was not unknown in the common law. The common law rules relating to the protection of possession allowed the repossession of property only if there was consent, a statutory right or a court order providing authority for it.⁴ The common law provided a remedy in the form of the mandament van spolie for anyone otherwise dispossessed of property. South African law hardly ever condones self-help.

However, the conditions of arbitrariness specified by the common law were to be radically reformed both in constitutional interpretation and in legislation. The four most important pieces of legislation passed to give effect to s 26(3) of the Constitution are, in order of their adoption: the Land Reform (Labour Tenants) Act 3 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998. The last of these pieces of legislation, commonly abbreviated to the PIE Act, applies where none of the others do. While the first three statutes were intended to apply to specific kinds of occupational rights or types of land (labour tenants and occupiers of communal, native trust or other indigenous land and farm land), the PIE Act applies to all land throughout South Africa, and to occupiers who have no rights of occupation.

While the valid termination of rights was the end of the line in common law eviction proceedings, the PIE Act requires that eviction proceedings against those who lack common law rights be brought in compliance with

⁴ See *Nino Bonino v De Lange* 1906 TS 120.

strict procedural requirements⁵ and grants the courts a wide-ranging discretion to refuse to enforce an owner's common law rights if they consider that to do so would not be just and equitable, taking into account all the relevant circumstances, including the manner in which the land was occupied, the duration of the occupation and the needs of the elderly, the disabled and households headed by women. Where land has been occupied for more than six months, the availability of suitable alternative accommodation or land must also be taken into account.⁶

Again, the mere passage of legislation (however radical that legislation seemed on paper) did not seem to do much to erode the common law normality assumption. Two judgments of Flemming DJP in eviction proceedings suggest why this was so. Judges may either have simply refused to apply reform legislation, and applied the common law by preference, as Flemming DJP did in *Joubert v Van Rensburg and others*⁷ or they may have simply defined justice and equity law by deciding that equity demanded that the common law remain in tact, as he did in *Betta Eiendomme (Pty) Ltd v Ekple — Epoh*.⁸ This second strategy is echoed in stridently conservative PIE Act decisions such as that of Rabie J in *Groengrass Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and others*.⁹

Nonetheless, the normality assumption was not seriously challenged until judicial interpretations of justice and equity in eviction proceedings began to be informed by the Constitutional Court's judgments in *Government of the Republic of South Africa v Grootboom and others*¹⁰ (hereafter 'Grootboom') and *Port Elizabeth Municipality v Various Occupiers*¹¹ (hereafter *PE Municipality*). *Grootboom* provided the seeds of an answer to the deadlock between rights of ownership and protection of occupation, which the courts had been careful to avoid since the passage of the PIE Act. It also opened up the possibility of a new normality assumption — at least in so far as evictions which may lead to homelessness are concerned. The Constitutional Court's judgment in *Grootboom* required that government have a housing policy which responds reasonably to the needs of the most desperate and provides at least temporary shelter for those with no access to land. The consequences of this interpretation of the positive obligations of the state in giving effect to the right of access to adequate housing¹² were to prove wide-ranging for the enforcement of the right to protection from arbitrary evictions entrenched in s 26(3) of the Constitution and the PIE Act.

⁵ Designed to ensure the 'written and effective notice' required by s 4(2) of the PIE Act.

⁶ S 4(7) of the PIE Act.

⁷ 2001 (1) SA 753, paras 25.4.1 and 25.4.2. The reform legislation in that case was Extension of Security of Tenure Act 62 of 1997, but the general point remains valid.

⁸ 2000 (4) SA 468 (W) para 8.2.

⁹ 2002 (1) SA 125 (T).

¹⁰ 2001 (1) SA 46 (CC).

¹¹ 2005 (1) SA 217 (CC).

¹² Section 26(1) of the Constitution.

(b) The way forward

In the second part this paper, I chart how the rights of access to adequate housing and to protection from arbitrary evictions have been developed in tandem with each other, and have significantly qualified the normality assumption, as courts have begun to refuse to grant eviction orders which could lead to homelessness. I discuss this with reference to three cases: the *Grootboom* case, *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*¹³ (hereafter *Modderklip*) and the *PE Municipality* case. In the third part of this paper, I argue that these cases ought not to be considered as exceptions to the rules of normal property relations, but ought rather to inform a new normality assumption, which applies where an eviction would lead to homelessness. The consequences of this new assumption are two fold: the first procedural and the second substantive. I develop the procedural consequences of what I call the ‘new normality’ by reference to three cases recently decided in the Johannesburg High Court. These are: *Lingwood and another v Unlawful Occupiers of ERF 9 Highlands*¹⁴ (hereafter *Lingwood*), *Sailing Queen Investments v Occupiers of La Coleen Court*¹⁵ (hereafter *Sailing Queen*) and *Blue Moonlight Properties 039 (Pty) Ltd v the Occupiers of Saratoga Avenue* (hereafter *Blue Moonlight*).¹⁶

The substantive consequences of the new normality — though hinted at in *Modderklip* — have not yet been fully considered by the courts. In the fourth and final part of this paper, I sketch out what these might be, by replacing the win/lose common law logic of the old normality with a structured definition of justice and equity in eviction proceedings which distributes the burdens of widespread poverty and landlessness in South Africa much more fairly between occupiers, the state and private property owners.

II TWO SIDES OF THE SAME COIN: HOUSING RIGHTS AND EVICTIONS

In this section of the paper, I chart the impact of three leading cases dealing with ss 25 and 26 of the Constitution and s 4 of the PIE Act. There are two reasons for this survey. This will demonstrate how the courts’ understanding of justice and equity in eviction proceedings which may result in homelessness has come to be heavily influenced by the Constitutional Court’s interpretation of s 26(2) of the Constitution in *Grootboom*.

(a) The right to emergency housing

It must have been an unremarkable, if unpleasant, day for the Wallacedene Sheriff supervising the eviction of Irene Grootboom and her 900 or so

¹³ 2004 (6) SA 40 (SCA).

¹⁴ 2008 (3) BCLR 325 (W).

¹⁵ 2008 (6) BCLR 666 (W).

¹⁶ 2009 (1) SA 470 (W).

neighbours on 18 May 1999. Within 18 months, though, what must have seemed like the entirely unremarkable execution of a run of the mill eviction order had metamorphosed into South Africa's first successful socio-economic rights claim, and the first significant case brought in terms of s 26 of the Constitution. It also indirectly changed the legal complexion of South African property relations.

Once evicted, Grootboom and her neighbours built makeshift shelters on the Wallacedene sports field. However, within a week, the weather turned wintry and the plastic sheeting which Grootboom and her neighbours used for shelter proved unequal to the Cape rainstorms. Grootboom's attorney wrote to the Oostenberg municipality and demanded that it provide the Grootboom community with temporary shelter which, it was claimed, the municipality was obliged to do in terms of s 26 of the Constitution. When the municipality refused to do so, Grootboom's attorneys launched an urgent application in the Cape High Court in order to force the state to provide temporary shelter. The High Court, locating the state's obligations in the child's right to shelter in s 28 of the Constitution, ordered the state to provide temporary shelter to all the children in the Grootboom community and at least one of each of their parents.¹⁷

The state then appealed to the Constitutional Court. By the time the Constitutional Court handed down judgment, the immediate plight of the Grootboom community had been alleviated through a settlement agreement reached between the parties. This left the court at large to pronounce on the general obligations of the state in relation to the right of access to adequate housing. In substance, the court found that there was no direct obligation on the state to provide a specific set of goods on demand to the inadequately housed. In other words, there is no minimum core content in South African law.¹⁸

Rather, the state's positive obligation under s 26 of the Constitution was primarily to adopt and implement a reasonable policy, within its available resources, which would ensure access to adequate housing over time. Much of the judgment was devoted to the requirement of reasonableness in devising medium and long term plans. The court held that, to qualify as 'reasonable', state housing policy must:

- be comprehensive, coherent and effective;¹⁹
- have sufficient regard for the social economic and historical context of widespread deprivation;²⁰
- have sufficient regard for the availability of the state's resources;²¹

¹⁷ See *Grootboom* paras 10 and 11.

¹⁸ See *General Comment 3 on the International Covenant on Economic, Social and Cultural Rights* available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

¹⁹ *Grootboom* para 40.

²⁰ *Grootboom* para 43.

²¹ *Grootboom* para 46.

- make short, medium and long term provision for housing needs;²²
- give special attention to the needs of the poorest and most vulnerable;²³
- be aimed at lowering administrative, operational and financial barriers over time;²⁴
- allocate responsibilities and tasks clearly to all three spheres of government;²⁵
- be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations;²⁶
- respond with care and concern to the needs of the most desperate;²⁷
- achieve more than a mere statistical advance in the numbers of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for.²⁸

The court concluded that, in failing to make reasonable provision for people with literally ‘no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations’²⁹ the housing policy implemented in the Cape Metropolitan area did not adequately give effect to the positive obligations placed on the state in terms of s 26(2) of the Constitution.

Although the *Grootboom* judgment appeared to suck the marrow out of social and economic rights by defining them in terms of highly abstract criteria couched in polycentric language, its emphasis on the need for state policy to respond reasonably to the needs of the most desperate was to have a significant impact on eviction cases. On the face of it, the *Grootboom* judgment obliged the state, within its available resources, to provide temporary shelter for those who have been evicted or face imminent eviction and who cannot find alternative shelter with their own resources. For, while the court in *Grootboom* had shied away from the idea that s 26 could give rise to a right to housing on demand, its focus on the need for the state to alleviate the plight of those in desperate circumstances suggested that, in certain situations, s 26 could ground a claim for shelter on demand.

This is certainly how the state interpreted the judgment, when, in 2004, it adopted Chapter 12 of the National Housing Code, which was meant to provide for Housing Assistance in Emergency Circumstances. The Emergency Housing Policy, as it has become known, was adopted in terms of s 3(4)(g) of the Housing Act 107 of 1997. It provided for municipalities to apply for funding from provincial governments to implement emergency housing programmes. The policy lists a broad range of emergency housing

²² *Grootboom* para 43.

²³ *Grootboom* para 42.

²⁴ *Grootboom* para 45.

²⁵ *Grootboom* para 39.

²⁶ *Grootboom* para 42.

²⁷ *Grootboom* para 44.

²⁸ *Grootboom* para 44.

²⁹ *Grootboom* para 99.

situations, but applies specifically to persons who 'are evicted or threatened with imminent eviction from land or from unsafe buildings, or [who live in] situations where proactive steps ought to be taken to forestall such consequences'.³⁰ Accordingly, *Grootboom* gave rise to a right to emergency housing and a means for its enforcement, at least through the application of the Emergency Housing Policy.

(b) *The Grootboom 'angle' in eviction cases*

Even though *Grootboom* and the Emergency Housing Policy had the potential to revolutionize the way in which the courts responded to private eviction applications which may lead to homelessness, the consequences of *Grootboom* for eviction applications were not immediately seized on by the courts. It appears that the courts needed another exceptional case to take the next logical step in securing the right to housing for people facing eviction. This step was to be taken in the *Modderklip* case.

Modderklip Boerdery (Pty) Ltd was a private landowner of agricultural land in the Benoni area. In May 2000, its land was occupied by a few hundred people evicted from the Chris Hani informal settlement at the edge of Daveyton. Originally, the settlement was no more than 50 shacks. However, by October 2000, the settlement had swelled to well over 4 000 shacks and 18 000 people. At that point Modderklip applied for and was granted an eviction order.³¹ By the time the eviction order became executable the number of people on the land had swelled to 40 000 and the cost of executing the order had grown to R1.8 million, which was more than the occupied land was worth. Modderklip then brought a further application in the Transvaal Provincial Division of the High Court in order to compel the state to execute the eviction order. Modderklip was successful there too and the High Court held that the state was in breach of its constitutional obligations by failing to give effect to the eviction order.³²

Both the eviction and the enforcement order were then appealed to the Supreme Court of Appeal and dealt with together. In a groundbreaking judgment on the clash between s 25 property rights and s 26 housing rights, Harms JA held that:

'Basic to this case is Modderklip's right to its property entrenched by section 25(1) of the Bill of Rights which provides that 'no one may be deprived of property except in terms of a law of general application.' De Villiers J found that the refusal of the occupiers to obey the eviction order amounted to a breach of this right . . . Counsel for the State accepted that this finding was justified. Counsel also accepted that the unlawful occupation of Modderklip's land per

³⁰ 'Emergency Housing Policy' *National Housing Code* (April 2004 Update) 8.

³¹ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W).

³² *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T).

se, even had the eviction order not been granted, amounted to a breach of the section 25(1) right. I agree.

‘The occupiers have a right of access to housing under section 26(1). That it exists is not in issue. Nor is the extent of the right at stake in this case — it is limited to the most basic. But the real issue is not the existence of the right; it is whether State has taken any steps in relation to those who, on all accounts, fall into the category of those in ‘desperate need.’ The answer appears to be fairly obvious; it did not. Does the State have any plan for the ‘immediate amelioration of the circumstances of those in crisis’? The State, at all three levels, central, provincial and local, gave the answer and it is also no. The medium and long term plans at present also provide no apparent solution.’³³

Harms JA went on:

‘There is another angle. To the extent that we are concerned with the execution of the court order, *Grootboom* made it clear that the government has an obligation to ensure, at the very least, that evictions are executed humanely. As must be abundantly clear by now, the order cannot be executed — humanely or otherwise — until the State provides some land.’³⁴

Harms JA concluded that ‘the State was in breach of its obligation to the occupiers [and this] leads ineluctably to the conclusion that the State simultaneously breached its section 25(1) obligations towards Modderklip.’³⁵

Harms JA went on to set out what was expected of the state in circumstances such as the Modderklip case:

‘I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would have also thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after investigation of the circumstances.’³⁶

Harms JA ruled that the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available to them by the state and to require the state to pay constitutional damages to Modderklip for the violation of its constitutionally entrenched property rights.³⁷ Harms JA seems to have simply assumed that the state’s failure to perform its housing obligations was wrongful. In the circumstances of the Modderklip case, this is hardly surprising. There has been no other case in which the standard of wrongfulness for the negligent failure to perform a positive socio-economic rights obligation has been discussed. However, in the context of s 26 obligations, it seems that the standard of wrongfulness would be that of unreasonableness informed by *Grootboom*.

In short, *Modderklip* is authority both for the proposition that evictions which lead to homelessness are a violation of s 26(1) of the Constitution and

³³ *Modderklip* paras 21–2.

³⁴ *Modderklip* para 26 (my emphasis).

³⁵ *Modderklip* para 28.

³⁶ *Modderklip* para 34.

³⁷ *Modderklip* paras 43–4.

that an unreasonable failure to give effect to the obligation to provide at least basic temporary alternative shelter for unlawful occupiers, resulting in the loss of the owner's use and enjoyment of the land, may give rise to an action for constitutional damages.

The *Modderklip* case attracted a great deal of commentary. The case certainly featured a novel and interesting remedy for the clash between property rights and the right of access to adequate housing (in this case in the form of rudimentary shelter). The SCA's order (which survived an appeal to the Constitutional Court) effectively required the state to hold the balance between these two competing rights by providing access to alternative shelter. By providing for constitutional damages, the order held the state to account for its failure to do so.

However, *Modderklip's* potential for restructuring property relations in South Africa was never fully explored. To many traditional property lawyers, the order in *Modderklip* must have seemed a fundamentally undesirable departure from 'normal' property relations necessitated by the sheer scale of the land occupation, the expense of enforcing the usual private law remedy and the supine approach the state had adopted to the clash between the rights at play.³⁸

Even the enlightened commentary on *Modderklip* failed to capture the magnitude of the departure from normal property relations. AJ van der Walt's otherwise insightful and rigorous commentary on *Modderklip*³⁹ summed up its consequences for property relations by stating that:

'Property interests — in this case landownership — are still recognized and protected, but a certain measure of patience and empathy towards the homeless is required from owners and the from courts *in enforcing property rights* to make sure that other, weaker or more marginalized members of society are not treated unfairly *in the process*. This is a clear sign of how the law has been changed by the new constitutional order. The subsequent Port Elizabeth Municipality decision of the Constitutional Court confirmed that this is indeed the way to approach conflicts between s 25 and 26 rights and interests.'⁴⁰

In other words, says the author, the Constitution and the PIE Act simply put a break on the otherwise inevitable process of enforcement of a property owner's common law rights. That break is occasioned by the need for a charitable attitude towards the 'homeless'.⁴¹ This summary is problematic for two reasons. The first is that it does not adequately account for what

³⁸ The final outcome of the *Modderklip* case was raised in the National Assembly and attached to calls for more aggressive legislation to prohibit 'land invasions'. See the internal written question tabled in the National Assembly by Democratic Alliance MP AH Nel on http://land.pwv.gov.za/Executive_Services/2005%20Questions/Na-ques.1392.DOC last visited on 3 October 2008.

³⁹ AJ van der Walt *The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the Modderklip case* (2005) 21 *SAJHR* 144–161.

⁴⁰ *Ibid* 159 (my emphasis).

⁴¹ Of course, the occupiers in *Modderklip* were not 'homeless'. Homes they had. It was property rights that they lacked. That was the point.

happened in *Modderklip*. As the author had been otherwise careful to point out, the question in *Modderklip* was not, ‘how do we eliminate the negative consequences for the poor of the enforcement of normal property relations?’, it was rather, ‘whose rights come first — those of the occupiers or those of the owner?’. The lesson from *Modderklip* is therefore not one in how to be nice to the poor, it is rather that the interests protected by the right of access to adequate housing may well, in certain circumstances, trump common law ownership rights. In other words, the PIE Act, in appropriate cases, has substantive, and not merely procedural, consequences. The eventual removal of the occupiers from the land would not be the inevitable result.⁴² While compensation may be payable to the owner as a consequence, this does not change the fundamental truth of the limitation of the rights associated with ownership.

The second defect of this summary is that it does not consider or adequately account for the patterns of structural disadvantage created by property relations in South Africa and the potential of the remedy in *Modderklip* to contribute toward addressing them. If *Modderklip* is seen as a limitation of property rights in order to enforce housing rights, rather than an invocation for patience and empathy for the poor in the enforcement of the existing common law regime, then its potential to lead to a more principled and equitable resolution of all evictions which might lead to homelessness can be recognized. The manner in which this might be achieved will be considered in section 4 below.

(c) *PIE and its constitutional matrix*

The *PE Municipality* case, the locus classicus on the interpretation and enforcement of the PIE Act was notable for its insistence on the need to take account of the nature, adequacy and extent of the performance of the state on its housing obligations in considerations of justice and equity in eviction proceedings. While it is true that *PE Municipality* stressed the need to approach eviction applications with patience and empathy, and to take account of the fact that each case has unique dimensions, the judgment laid down important general principles by reference to which eviction applications ought to be decided. The broad constitutional ‘matrix’ for the interpretation of PIE was introduced by Sachs J in the following terms:

‘PIE has to be understood, and its *governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix* . . . As with all determinations about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human dignity, freedom and equality.’⁴³

How this affirmation manifests itself must be determined sensitively by the courts on a case-by-case basis. *PE Municipality* devotes several paragraphs to

⁴² The land in dispute in *Modderklip* — the Gabon Informal Settlement — remains occupied at the time of writing.

⁴³ *PE Municipality* paras 14–15 (my emphasis).

the social and historical context in which PIE adjudication takes place and the new duties PIE places on the courts. However, more than just telling the courts *how* to approach PIE applications, *PE Municipality* goes some way towards telling the court what to do. This guidance comes in para 28 of the judgment, where it is pointed out that there is no:

‘unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, *a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.*’⁴⁴

This passage is not quoted as often as it should be. When it is, the emphasis is often on the first sentence at the expense of the second.⁴⁵ However, seen in its proper context, the principle is clear: unless there are special circumstances justifying a departure from the general rule, eviction orders should not be granted if they would lead to homelessness. The classic special circumstance, implicit in the passage quoted above, is a recent land occupation where the occupiers are not ‘settled’ and their occupation has not become regular and undisturbed. Indeed, the PIE Act itself recognizes that persons in occupation for less than six months enjoy a lower level of protection than those who are more settled.⁴⁶

Furthermore, the judgment goes on to state that a court’s decision on the justice and equity of an eviction may involve a more wide-ranging enquiry into the reasonableness of the state’s housing programme. In relation to deciding whether suitable alternative accommodation can be made available to the occupiers, Sachs J states:

‘The problem will always be to find something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers and those in the line for formal housing. In this respect it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone be treated with care and concern; if the measures [taken to implement a housing programme] though statistically successful fail to respond to the needs of the most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress can be avoided. Thus it would not be enough for a municipality to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of

⁴⁴ *PE Municipality* para 28 (my emphasis).

⁴⁵ For a classic example, see the judgment of Harms ADP in *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (6) SA 417 (SCA) para 39, where the first sentence is quoted as the authoritative position on the constitutional duties of a local authority in eviction proceedings and the second sentence is left out altogether.

⁴⁶ See s 4(6).

time in the most effective way. The existence of such a programme would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual order should be made in a particular case'.⁴⁷

Perhaps more convincingly than any other passage in a decision on the PIE Act and ss 25 and 26 of the Constitution, this paragraph obliterates the boundary between public law and private law. What was implicit in *Modderklip* is made explicit in *PE Municipality*. In other words, it is a defence to a settled occupier in an eviction application to set out that there is no alternative accommodation available to him, that the government has not taken reasonable measures to put one in place and that his eviction in these circumstances would lead to homelessness.⁴⁸ Absent special circumstances (which would probably be either some form of bad faith on the part of the occupier or a competing constitutional interest in the property by the owner),⁴⁹ there is no reason to believe that such a defence could not succeed.

III THE NEW NORMALITY: PROCEDURE

(a) *Why patience and empathy are not enough*

Evictions which might lead to homelessness are, then, fundamentally constitutional matters.⁵⁰ An eviction which might lead to homelessness gives rise to more than a difficult practical dilemma in which a court is required to find ingenious ways of preserving an owner's common law rights while at the same time finding some practical alternative for the occupiers. A court hearing an eviction application which may lead to homelessness is presented with a clash of competitive rights. To be sure, the consequences of the enforcement of these rights must be worked out on a case-by-case basis. A land invader who was not compelled to occupy out of necessity but did so out of a desire to gain some sort of unfair advantage, or an affluent tenant simply pleading potential homeless in order to delay the process will give given short shrift by the courts. There will, though, be many instances in

⁴⁷ *PE Municipality* para 29.

⁴⁸ It is now something close to a rule of law that 'the government's obligations in terms of section 26(2) of the Constitution mean that eviction *sought by the state* should not occur without the provision of alternative housing'. See *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and others* [2009] ZACC 16 at para 170 (my emphasis).

⁴⁹ For example, the property could also be the owner's home and therefore the owner's common law right to exclusive possession could be protected by s 26(1) of the Constitution just as easily as s 25(1) of the Constitution. There is no reason to suppose that an eviction would not be just and equitable if the property was instrumental to any other compelling interest protected by the Bill of Rights, but this would have to be considered on a case-by-case basis.

⁵⁰ *City of Johannesburg v Rand Properties* 2007 (1) SA 78.

which common law property rights and occupiers' housing rights will be equally competitive.

In these circumstances, the 'patience and empathy' called for by Van der Walt is an incomplete solution not only because it suggests that a defence to a private eviction application is a plea for charity rather than an assertion of rights, but also because patience and empathy are likely to be in short supply where deep-seated rights and interests clash. Both the Constitutional Court and the Supreme Court of Appeal have shown little difficulty in frustrating the enforcement of the old property law regime. Yet they have not yet set out with sufficient regularity and precision what processes and principles should replace it, at least where evictions which lead to homelessness are concerned.

What the Constitution, the PIE Act and the higher courts have done (to their credit) is to equalize what used to be an inherently unequal and oppressive relationship. They have created a tie between property rights and housing rights. But that is not enough. Powerful commercial interests underlay common law property rights. These interests will not lie dormant for long. In addition, the circumstances of unlawful occupiers are often far from ideal. The kinds of eviction applications which are likely to lead to a stalemate are precisely those which concern very poor people who have found a makeshift housing solution in a shack on open land or in a dilapidated building — often in appalling conditions. They want, need and expect more from their housing rights than that. So while rights of ownership and occupation may be equally competitive, they are not in equilibrium. Something more is required.

The law must provide a principled, non-arbitrary solution to the stalemate. It must consist of more than patience and empathy from property owners and the courts. Patience and empathy are inherently subjective and arbitrary, and will lead to a diverse set of results depending on who displays them and at what time. While courts can and must be asked to find 'concrete, case specific'⁵¹ solutions to particular cases, they must be guided by broader procedural and substantive principles which have yet to be fully entrenched in South African law. What is needed, as set out above is a 'new' normality assumption and a 'new' *rei vindicatio* to give effect to it. While the new normality has not yet been fully developed in South African law, its seeds can be found in the decisions canvassed in the last section. Not surprisingly it is heavily dependent on the state to hold the balance between unlawful occupation and ownership, and for the state to devise and implement a reasonable housing policy.

How the state might hold the balance in a regular and predictable way is suggested in three recently decided cases in the Johannesburg High Court. These cases have established important new requirements relating to the role of the state in private eviction applications which may lead to homelessness.

⁵¹ *PE Municipality* para 22.

These requirements: joinder, stay, the production of a report and the duty to facilitate mediation are dealt with in more detail below.

(b) *Joinder and stay: Sailing Queen Investments v the Occupants La Colleen Court*⁵²

Evictions (at least those which might lead to homelessness) are now public law matters. Yet most eviction applications are instituted with just two private parties joined — the owner and the occupier(s). It is true that s 4(2) of the PIE Act requires that notice be given to the municipality having jurisdiction over the property that an eviction application is being brought two weeks before it is due to be heard. Furthermore, s 4(7) of the PIE Act requires that the court must consider whether land has been made available, or can reasonably be made available by the owner or the state. Yet where the state is not a party to the proceedings, it is hard to see how it can be required to provide alternative accommodation or can be bound by an order requiring it to take into account, and devise and implement a housing plan to cater for, the particular occupiers cited in a particular eviction application.

Responding to this difficulty, Jajbhay J recently held in *Sailing Queen* that the Johannesburg municipality had a direct and substantial legal interest in evictions which might lead to homelessness in its area of jurisdiction. Accordingly, he ordered the joinder of the municipality to the proceedings and stayed the eviction application pending a report on the availability of alternative accommodation being delivered by the municipality.

In *Sailing Queen*, a group of desperately poor people in occupation of a small block of flats in Yeoville, Johannesburg faced eviction by a developer who had bought the property and intended to upgrade it for occupation at rates of rental far beyond the current occupiers' means. The occupiers responded to the developer's eviction application by bringing an application for joinder of the municipality. The occupiers claimed that their eviction from the property would render them homeless and that s 4(7) of the PIE Act required a court to consider whether the municipality could or should be ordered to provide them with alternative accommodation before it could decide whether an eviction would be just and equitable.

The owner's defence to the joinder application was based on an earlier decision of the Johannesburg High Court⁵³ in which Boruchowitz J decided that there was no authority for the proposition that the state was a necessary party to eviction proceedings, because the PIE Act did not require a court to enquire into the reasonableness of state housing policy — simply whether an eviction order was just and equitable in a particular case. In other words, the position of the municipality and the policies it had adopted were simply a given set of facts to be taken into account in the exercise of the court's discretion on whether or not to grant an eviction order.

⁵² 2008 (6) BCLR 666 (W).

⁵³ *Xantium Trading (387) Pty Ltd v Molefe and others* (unreported) WLD case number 23759/05.

The decision in *Xantium Trading*, so obviously at odds with the law developed in *PE Municipality*, was rightly departed from in *Sailing Queen*, in which Jajbhay J held that the question to be answered, in the first instance, was whether the joinder was legally necessary. In other words did the Johannesburg municipality have a direct and substantial legal interest in the relief claimed by the owner? On the facts of the case, the Judge held that any order for the occupiers' eviction:

'... cannot be sustained or carried into effect without triggering the constitutional obligations of the City (Section 26(2) of the Constitution of the Republic of South Africa, 1996) and as such, the City is a necessary party and should be joined in these proceedings.'⁵⁴

Jajbhay J furthermore found it necessary to deal with the owner's contention that Rule 10(3) of the Uniform Rules of Court did not allow for joinder of a party at the instance of a defendant or a respondent. The Judge conceded that, although it was a plausible interpretation of Rule 10(3) that it did not envisage joinder at the instance of a defendant or respondent, this was not the only possible interpretation. Since Rule 10(3) did not obviously preclude joinder at the instance of a defendant or respondent either, it was for the court to interpret the Rule. This must be done, the Judge held, in a manner which is consistent with the court's duty under s 39(2) of the Constitution, which requires the court to promote the spirit purport and object of the Bill of Rights. Since joinder in this case (and potentially in other eviction cases) is necessarily incidental to the vindication of constitutional rights, an interpretation which allowed joinder was to be preferred.⁵⁵

Sailing Queen is a prime example of the potential for constitutional provisions, constitutional legislation and the common law to be harmonized in a way that provides regular and enduring protection to constitutional rights. It is now a procedural requirement (at least in the Johannesburg High Court) for the local municipality to be joined in eviction proceedings which may lead to homelessness. Rather than simply being an added-on consideration at hearing of an eviction, the constitutional obligations of the state are now 'hardwired' into eviction proceedings. The early notice provided by joinder of the municipality also allows the state to engage with potential homelessness at an early stage and be in a better position to provide meaningful information to the court which hears the application.

Most importantly, however, joinder of the state creates the conditions necessary for the state to hold the balance between common law ownership rights and the housing and shelter rights given effect to by the unlawful occupation. It ensures that, where an owner establishes his common law right to exclusive possession of his property, and the occupiers establish that

⁵⁴ *Sailing Queen* para 6.

⁵⁵ *Sailing Queen* paras 16–17. A court, in any event, has the power to join an interested party *mero motu*. One way of avoiding excessive delay, which would obviously be prejudicial to the owner, would be for owner, or the courts, to join municipalities in the absence of an application for joinder.

their eviction would lead to homelessness, the court can then turn to the state to move beyond the stalemate, consider the nature of its constitutional obligations in that case and, if necessary, order it to give effect to them. Without joinder, none of this is possible.

(c) *The duty to report*

Of course, joinder in and of itself is a necessary but not a sufficient condition to ensure that the state participates meaningfully in an eviction application. The courts have recently developed two aspects of the state's obligations in an eviction application. The first of these is the duty to report. Although the duty to report on the availability of land or alternative accommodation has been affirmed in the jurisprudence many times⁵⁶ there has been little guidance on what form that report must come in and what standards it must meet.⁵⁷ Guidance in this regard finally came in the recent decision in *Blue Moonlight*.

In *Blue Moonlight*, the owner, a property development company, sought the eviction of approximately 80 desperately poor people from a warehouse and a series of light industrial and commercial properties which had long since fallen into disuse. The company had recently purchased the property (knowing it to be occupied) and sought the occupiers' eviction in order to develop it. The occupiers raised the defence that their eviction would lead to homelessness and the Johannesburg municipality was joined in the proceedings by consent between the owner and the occupiers. The Johannesburg municipality did not respond to the application for joinder.

The occupiers thereafter brought an interlocutory application for the municipality to be ordered to produce a report, under oath, setting out what steps would be taken to re-house the occupiers in the event of their eviction, and when such steps would be taken. Before the interlocutory application was set down for a hearing, the municipality filed a report which dealt in general terms with the programmes it had adopted to provide housing opportunities in the Johannesburg area. However, the report did not engage with the particular needs of the occupiers in the *Blue Moonlight* case. Indeed, although the report set out in some detail the efforts the municipality was making in order to provide emergency shelter to displaced persons, it stated

⁵⁶ See, generally, *ABSA Bank Bpk v Murray* 2004 (2) SA 15, *Port Elizabeth Municipality v People's Dialogue on Land and Shelter* 2000 (2) SA 1074 (SECLD) and *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960.

⁵⁷ In *Ritama Investments* (note 56 above), Bertlesmann J subpoenaed several senior officials from the Johannesburg municipality and the Gauteng Provincial Department of Housing to give oral evidence on what could be done to re-accommodate approximately 1000 occupiers facing eviction from a disused factory in Alexandra. However, while the peculiarities of that case may well have justified the Judge's course of action, it is hardly practical to suggest that senior officials ought to be summoned to court to give oral evidence every time an eviction application is heard, even if an eviction would lead to homelessness.

that it would only make these facilities available to persons it evicted from buildings as part of its urban development plans. The report stated that:

‘Because of the scale of the task facing the City, the City cannot for the time being make any of its emergency shelters available for any persons evicted from private property by way of PIE’⁵⁸

In her judgment, Masipa J affirmed once more that municipalities had a duty to report to courts in circumstances where an eviction might lead to homelessness. The Judge furthermore found the municipality’s report defective in two respects. First, she found that the exclusion from its emergency shelter programme of people under threat of eviction from private land — or at least its refusal to say when its emergency shelter programme would be able to accommodate them — violated s 26(2) of the Constitution.⁵⁹ Second, the Judge found that the municipality’s report had failed to engage with the particular situation of the occupiers concerned and that such a failure to do so rendered it defective.⁶⁰ Masipa J provided the following further guidance on the process likely to lead to the filing of an acceptable report:

‘. . . in eviction cases a municipality is obliged and expected to give the court a full picture of, inter alia, whether land has been made available or can reasonably be made available, for the relocation of a specific group of unlawful occupiers and not unlawful occupiers in general. Implicit in the above is that the municipality concerned, in order to submit a proper report, must, inter alia, investigate the circumstances of a case as well as consult with the stakeholders, where necessary.’⁶¹

In order to give effect to these requirements, the Judge ordered that the state produce a further report within four weeks to set out ‘what steps it has taken and in future can take to provide emergency shelter or other housing for the [occupiers] in the event of their eviction as prayed.’ Within two weeks of the production of that report, the occupiers would have a chance to file an affidavit dealing with the report.⁶²

The decision in *Blue Moonlight* goes some way towards putting into practice the state’s duty to provide alternative accommodation in eviction cases. Indeed much of the *Blue Moonlight* judgment simply takes the state’s obligations in this regard for granted. Importantly, the *Blue Moonlight* judgment requires the state to say what priority it has assigned the occupiers in a particular eviction application in terms of its overall housing programme and when the occupiers can conceivably benefit from its implementation. This means that, even though the state may not be able to provide alternative shelter straight away, it can be held accountable to do so in future. As is clear

⁵⁸ *Blue Moonlight* para 51.

⁵⁹ *Blue Moonlight* para 69.

⁶⁰ *Blue Moonlight* paras 66 and 69.

⁶¹ *Blue Moonlight* para 66.

⁶² *Blue Moonlight* para 78.

from the judgment, it will not normally be acceptable for the state to say that it cannot or will not help at all.⁶³

(d) *Mediation*

Section 7 of the PIE Act empowers a municipality having jurisdiction over the property at issue in an eviction application to appoint a mediator to mediate any dispute arising under the Act. While it is unlikely that mediation can provide a long term solution to the conflict of fundamental rights and interests, mediation is important if the nature of the dispute does not go to the heart of the relationship between the parties or if the owner can vindicate his rights or interests in the property by means short of an eviction. Even if the clash of rights and interests in the property is more fundamental, mediation can be an important tool in procuring an interim resolution to an eviction case until, for example, a municipality is able to provide alternative accommodation to occupiers threatened with eviction.

There is scant case law on the procedural consequences of the mediation requirement in PIE disputes.⁶⁴ In *Cashbuild (South Africa) (Pty) Ltd v Scott and Others*⁶⁵ Poswa J found that the municipal officials have a duty to apply their minds to the possibility of appointing a mediator as soon as they receive a notice of eviction proceedings in terms of s 4(2) of the PIE Act. On the facts of that case the Judge ordered the joinder of the municipality having jurisdiction in order for it consider the facts of the case and the possibility of mediation.

In *Lingwood and another v Occupiers of R/E ERF 9 Highlands*⁶⁶ Mogagabe AJ

⁶³ Just before this article went to print, the SCA handed down judgment in *The Occupiers of Shorts Retreat v Daisy Dear Investments* [2009] ZASCA 80 (3 July 2009). There, Jafta JA, for a unanimous court, set aside an eviction order granted against approximately 2000 people by Jappie J in the Natal Provincial Division. The court found that the eviction order had been premature because the court had failed to explore all reasonable avenues, including mediation, to facilitate the identification of alternative accommodation for the occupiers. Jappie J had erred in accepting the municipality's flat refusal to take steps to provide alternative accommodation for the occupiers. The court held that 'the affected community lives within the municipality's area of jurisdiction and cannot be wished away' and its eviction would undoubtedly, in any event, impact on the municipality's legal interests, rendering the municipality an interested party. Accordingly, the local municipality was joined to the proceedings and ordered to produce a report on 'what steps it has taken and what steps it intends or is able to take in order to provide land and/or emergency accommodation for the occupiers'. Although the *Shorts Retreat* decision did not cite the *Sailing Queen* and *Blue Moonlight* judgments, the reasoning of the decision and the order granted bear a very close resemblance to those judgments, which were placed before the court in written argument. Whether by coincidence or (more likely) design, the *Shorts Retreat* decision is confirmation by the SCA of many of the procedural elements of the new normality set out in this article.

⁶⁴ In *PE Municipality*, Sachs J stressed the importance and potential benefits of mediation, but ultimately declined to order it.

⁶⁵ 2007 (1) SA 332 (T).

⁶⁶ 2008 (3) BCLR 325 (W).

declined to issue an eviction order on the grounds that the owner had made no effort to procure a negotiated solution with the desperately poor occupiers of a house he had bought to develop for up-market residential purposes. The Judge postponed the matter *sine die*, ordered the joinder of the municipality and directed the parties, including the municipality ‘to engage in mediation in an endeavour to exploring [sic] all reasonable possibilities of securing suitable alternative accommodation or land and/or of achieving solutions mutually acceptable to the parties’.⁶⁷

It does not appear to be a substantive rule of law that an eviction order will not be granted unless mediation has been ordered.⁶⁸ However, it seems from the case law that the absence of a genuine attempt at negotiating an alternative to an eviction which would lead to homelessness would weigh heavily against the granting of an eviction order.

IV CONCLUSION: THE NEW NORMALITY STATED

It is now possible to set out what a new normality in property relations might look like. It is one in which evictions from immovable property which might lead to homelessness are treated separately from all other classes of actions for the repossession of property. Unaffected by the principles set out above are ejections from commercial property, or from homes occupied by affluent tenants. While both of these kinds of property relationships may be affected by legal reform, they are not subject to the constitutional and statutory impact set out in this paper.

Fundamental to the new normality is an understanding of land as a resource, possession of which, irrespective of ownership, gives effect to the fundamental rights associated with access to a home. The new normality applies when the deprivation of possession would lead to a breach of those rights.

The first principle of the new normality is that, absent an unforced ‘land invasion’⁶⁹ or the possibility that ownership of the land is a means to the protection of some other constitutional right, the right to a home will limit the rights associated with ownership. In other words, ownership will not

⁶⁷ *Lingwood* para 38.

⁶⁸ *PE Municipality* para 47.

⁶⁹ The language of ‘land invasion’ — deployed here as an easy short-hand despite its pejorative overtones — is unsatisfactory. Not all ‘land invasions’ would automatically justify an eviction order. The Modderklip occupation, for example, was what many would refer to as a ‘land invasion’, but it was caused by the prior conduct of the municipality, which evicted the original occupiers living in the Chris Hani settlement adjacent to the farm and, as a consequence, left them with no alternative but to ‘invade’ land. But the occupation was hardly motivated by greed. Nor did it happen by stealth. As Harms JA readily accepted, the Modderklip occupiers had to go somewhere. On the other hand, a ‘land invasion’ which might attract an eviction order without alternative accommodation may be an orchestrated attempt to occupy a low-cost housing development *en masse*, depriving the intended beneficiaries of the project access to their new homes.

automatically entitle the owner to exclusive possession of his property in the absence of a counter-veiling common law right in it. On the other hand, the mere fact of occupation does not give the occupier any pecuniary or alienable rights in the land. However, the fact that possession of the land gives an unlawful occupier his only access to a home will, without more, be a defence to an eviction application.

It might immediately be objected that this is legally and conceptually incoherent. It leaves the parties to an eviction application in a legal vacuum. The occupiers can occupy the land, but have no rights to it; while the owner has rights to the land, but cannot occupy it. Yet this statement of the new normality's consequences misapprehends the basis on which the occupiers may stay on the land or in buildings pending the provision of a suitable alternative. In most cases where homelessness would otherwise result, unlawful occupiers do acquire a limited, temporary and circumscribed right of occupation which persists for so long as the state does not perform its constitutional obligations to provide temporary shelter. The effect of the PIE Act jurisprudence is that the constitutional right to housing limits the common law right of ownership. It does not, however, extinguish it, as, for example, an expropriation would. The limitation is temporary. In appropriate cases (such as those where the state unreasonably fails or refuses to perform its obligations to provide temporary shelter), that limitation is subject to compensation from the state.

The second principle is that this stalemate can only be broken by the state. As implied by the *Sailing Queen* case, a private owner who proceeds for eviction against an occupier who would be rendered homeless thereby should ordinarily expect to lose the application if the state is not a party to it. Where the state is a party, a court must be prepared to scrutinize the measures it has taken, or that it will take, to house the unlawful occupiers. A court should not readily accept refusals to assist or excuses for inaction. It should demand of the state the sort of flexible and enabling administrative statecraft Sachs J correctly pointed out was so important in finding solutions for unlawful occupiers.

The third principle of the new normality is that the state is under a duty to act positively to give effect to the right of access to adequate housing and to provide temporary shelter in the event that an eviction order would otherwise lead to homelessness. No eviction application should succeed unless a court is sure that a reasonable alternative is or can be made available to the occupier. In order to explore this question, a court can require the state to produce the kind of report envisaged in *Blue Moonlight* which responds to the particular situation at issue in an eviction case and can use the report as a basis to order the state to provide an alternative.

The fourth principle relates to what happens when the state does not, or is unable to, provide an alternative. There the question becomes whether, taking into account the standards set in *Grootboom* and *PE Municipality*, the state's failure to do so is unreasonable. If the failure to do so is unreasonable, the owner may have an action for damages against the state for compensation

for loss of the use and enjoyment of his property which could have been prevented by reasonable state action. What reasonable state action is, and the quantum of compensation payable, depends on the facts of a particular case. An owner's cause of action would arise as soon as the state's unreasonable failure to provide an alternative becomes the sole reason why an owner cannot take full occupation of his property. This point would be reached once the state has been joined to the proceedings and after its report is made.

The fifth principle relates to mediation or negotiation. Owners should be required to engage in negotiation to ascertain whether a proposed eviction might lead to homelessness, whether an interim measure (for example, a lease at a sub-market rental)⁷⁰ is possible while the state is pursued for alternative accommodation, whether the owner's interests in his property can be vindicated without an eviction order being obtained or whether the owner is himself able to make a contribution (financial or otherwise) to the state's efforts to provide an alternative. Where none of these avenues of mediation or negotiation have been explored, a court should not normally grant an eviction order.

The principles set out above are far more complicated and demanding than those applying the *rei vindicatio* with which this paper began. Yet they are far more certain and transparent than a vague appeal to patience, sympathy, justice and equity. They are also already implicit in South African law, but have yet to be stated as a coherent whole.

It might be asked why we should depart from centuries-old common law principles in order to embrace the new network of relationships set out in this paper. The answer is simple. The common law, in the context of the violent dispossession which accompanied colonialism and apartheid, acted to frustrate the basic human needs of the vast majority of South Africans who did not and were not permitted to own land. The damage wrought by the violence and injustice which accompanied the imposition of colonial and apartheid property relations in South Africa may never be undone. Our efforts to do so, however, should be predictable, principled and transparent. They should make clear where the benefits and burdens of the post-apartheid project fall and why they are so distributed. A clearly structured legal regime relating to the ownership and possession of immovable property is essential to this endeavour.

⁷⁰ This is the basis on which the matter of *Lingwood and another v Unlawful Occupiers of R/E ERF 9 Highlands* 2008 (3) BCLR 325 (W) was eventually settled, on an interim basis.