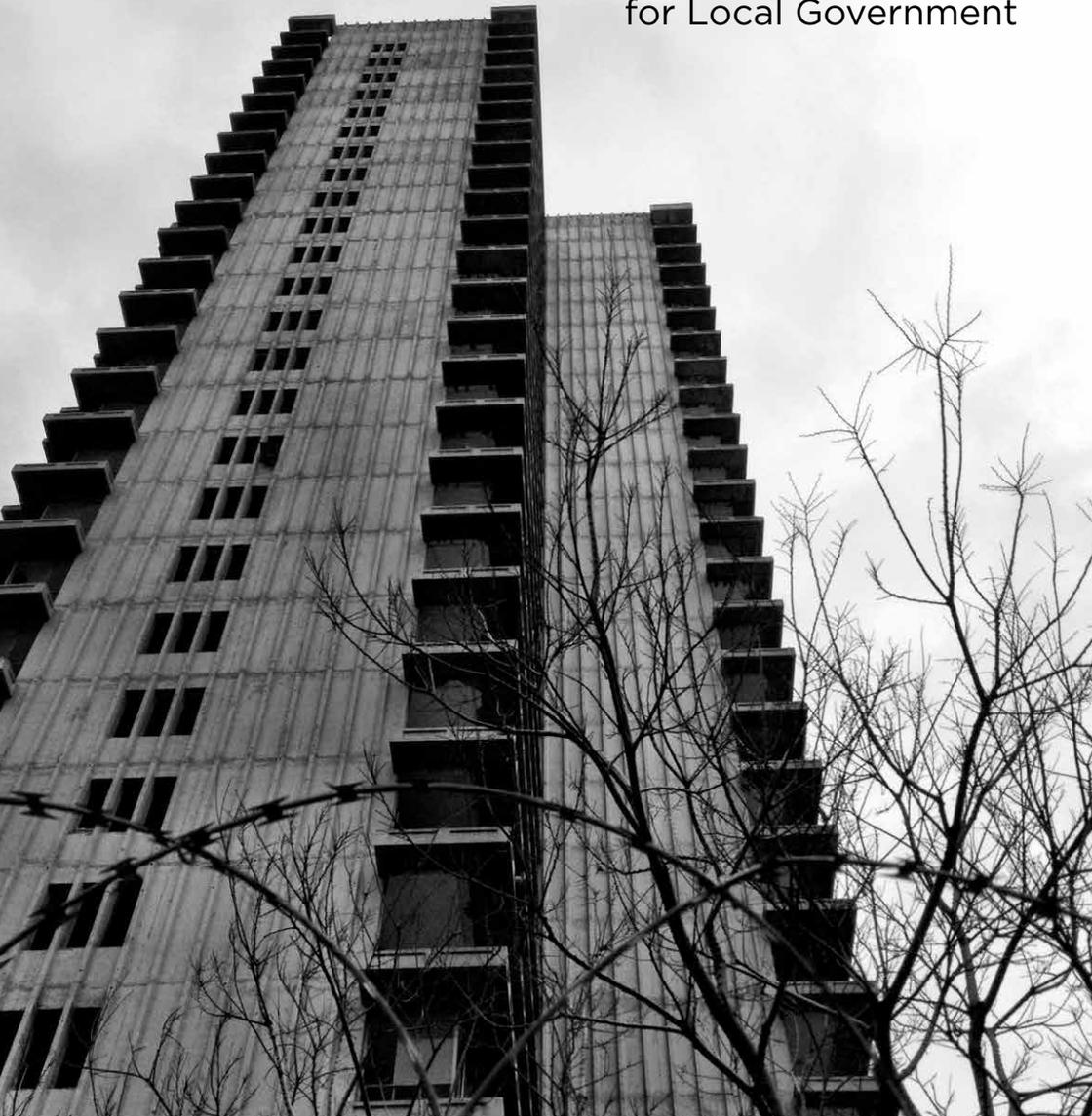


# SERI

socio-economic rights institute  
of south africa

## Evictions and Alternative Accommodation in South Africa:

An Analysis of the Jurisprudence and Implications  
for Local Government



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Cover photo of Schubart Park flats by Thomas Coggin.

# Evictions and Alternative Accommodation in South Africa:

## An Analysis of the Jurisprudence and Implications for Local Government

November 2013

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# Introduction

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The right of access to adequate housing enshrined in section 26 of the Constitution is undoubtedly the most fiercely contested and frequently litigated socio-economic right in the South African context.<sup>1</sup> This is unsurprising given South Africa's grossly unequal society in which the (overwhelmingly black) poor majority population is disproportionately denied adequate housing opportunities and basic amenities. Despite the state's commitment to progressively realising this right through its range of state-subsidised housing programmes, many poor households remain unable to access some form of adequate housing, often having to live in difficult conditions in informal settlements and inner city "slum buildings" and subject to the constant risk of eviction.

The Constitutional provision promising everyone access to adequate housing stands in stark contrast to pervasive realities of housing backlogs, evictions and removals. This is one of the main reasons that the right has been so regularly invoked in court.<sup>2</sup> The sheer volume of litigation has meant that the law in relation to the right to housing, evictions and alternative accommodation is continuously changing and adapting as the South African courts have incrementally and progressively developed the right.<sup>3</sup> It is amid this complexity that this report seeks to track the development of the right of access to adequate housing in South African jurisprudence, as well as to analyse the concomitant obligations on local government in the light of this jurisprudence.

In respect of the latter point, this report highlights how the constantly developing legal framework has given rise to a new cluster of relationships in relation to housing and eviction law. These relationships, in turn, are characterised by a series of rights and obligations pertaining to various parties.

Yet, despite years of litigation and a host of progressive judgments, municipalities have been hesitant, unable or unwilling to act on the obligations laid down in case law. This is

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<sup>1</sup> The majority of socio-economic rights cases that have come before the Constitutional Court have related to the right of access to adequate housing.

<sup>2</sup> Another possible reason for the frequency of litigation on the right to housing is that as a negative infringement of the right to housing, impending eviction, does not require the same degree of proactive legal mobilisation that, for example the crisis around inadequate education, does.

<sup>3</sup> Jeannie van Wyk points out that the law relating to evictions and alternative accommodation is "not what it was 10 years ago, or even 5 years ago". J van Wyk "The Role of Local Government in Evictions" (2011) 14(3) *Potchefstroom Electronic Law Journal* 50.

evident, for example, in the City of Johannesburg's failure to provide adequate alternative accommodation to poor households evicted by private landlords in the wake of the *Blue Moonlight*<sup>4</sup> Constitutional Court decision and, despite numerous cases against the City for execution of court orders, to provide alternative accommodation to those rendered homeless due to an eviction.

More generally, across the country municipalities have failed to devise and implement proactive, programmatic and coherent responses to evictions and the provision of alternative accommodation in instances of eviction within their jurisdictions. Instead, municipalities have often responded in a largely uncoordinated *ad hoc* manner by providing alternative accommodation only after being ordered (sometimes several times) by courts to do so. In cases where the municipalities have sought to implement a more coordinated response, the strategies have often failed to adequately internalise the substantial protections encapsulated in jurisprudence and human rights law. As such, municipalities are currently failing to fulfil their constitutional duties and are substantially undermining the housing-related rights of evictees who cannot afford housing on the open market.

Set against this backdrop, this report has been developed to assist non-governmental organisations (NGOs) and public interest law practitioners to navigate the highly complex legal terrain of the jurisprudence on housing rights and evictions, as well as to understand the various roles, responsibilities and duties of parties involved in eviction disputes, specifically focusing on the role of municipalities in respect of the provision of alternative accommodation where homelessness would otherwise result.

This report aims to provide a comprehensive analysis of the jurisprudence on evictions and alternative accommodation, and the contingent obligations on municipalities in respect of the provision of alternative accommodation.<sup>5</sup> It is hoped that the report might act as a guide to activists, communities and lawyers caught up in eviction-related struggles, as well as to local government officials who are tasked with developing and implementing housing policy.

This report is structured in four sections.<sup>6</sup>

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<sup>4</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

<sup>5</sup> This report does not deal with the jurisprudence and legal regime developed under the Extension of Security of Tenure Act 62 of 1997 (ESTA) or the Interim Protection of Informal Land Rights Act 31 of 1996 (IPLRA).

<sup>6</sup> This report sets out to provide a comprehensive analysis of housing and eviction jurisprudence in various ways. Section two of this report is structured chronologically, section three is structured thematically, section four sets out the arguments regularly invoked by municipalities in relation to their inability or unwillingness to provide alternative accommodation to those rendered homeless by an eviction, and section five sets out the obligations of the various parties involved in eviction proceedings. Due to this ordering, there is some duplication across the various sections. Attempts have been made to minimise such duplication. To the extent that there is duplication, this serves to aid readers who might only want to read specific sections of the report for detailed information.

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Section two of this report sets out the chronological development of the key South African housing and eviction court cases.<sup>7</sup> This section tracks the development of the law in relation to housing rights and evictions and aims to highlight what each of the cases has contributed towards housing and eviction jurisprudence in the sequence in which they were decided.

Subsequently, section three of this report provides a comprehensive analysis of the key legal principles that have been developed through the jurisprudence. Each principle is unpacked and examined through the lens of the case law through which the principles were established. Section three of this report highlights how the development of these principles has resulted in a progressive legal framework governing housing and evictions in South Africa. As discussed, this evolving framework is markedly different to the position at the common law in that it sets out a new cluster of relationships in housing and eviction cases in which the rights and interests of the parties involved are meticulously balanced by various intersecting rights, duties and responsibilities.

Section four of this report dissects the common arguments raised by local government to justify their inability, incapacity or delay in providing alternative accommodation to unlawful occupiers who could be rendered homeless by eviction proceedings. It critically evaluates these arguments in light of the pronouncements of the South African courts, which, in responding to the often legitimate concerns of municipalities, have set out carefully considered rules that aim to navigate and take account of these arguments while simultaneously giving expression to the right of access to adequate housing of impoverished occupiers.

The report concludes with section five, which succinctly sets out the obligations of the various parties involved in eviction proceedings.

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<sup>7</sup> Although there is a variety of progressive High Court decisions that have contributed to the development of housing and eviction jurisprudence, this report focuses primarily on the decisions of the Constitutional Court and the Supreme Court of Appeal (SCA).

# The development of housing and eviction jurisprudence: 2000-2013<sup>8</sup>

<sup>8</sup> This section relies heavily on an unpublished paper of Stuart Wilson. S Wilson *The Constitutional Right of Access to Adequate Housing* (2012) (unpublished).

As mentioned above, the right of access to adequate housing has been the most-often litigated socio-economic right in the South African context. This has led to the development of a wealth of jurisprudence in respect of housing and eviction law. This section sets out the chronological development of the key South African housing and eviction court cases. In doing so, this section tracks the progressive and incremental development of the law in relation to housing rights and evictions and highlights what each of the cases has contributed towards housing and eviction jurisprudence in the sequence in which they were decided. In section three of this report a detailed analysis of the essential legal principles that have developed from this jurisprudence is critically evaluated.

In terms of South African common law,<sup>9</sup> a landowner was entitled to evict an occupier through the *rei vindicatio*, by simply proving ownership and the absence of consent or some other right in law to occupy.<sup>10</sup> Thus an owner was entitled to an eviction order notwithstanding the hardship an ejection might cause, and irrespective of how many people were in occupation of land subject to the order, and for what purpose they occupied it. The apparently race-neutral language of the apartheid common law masked the fact that the ease with which eviction orders could be obtained assisted the apartheid state in corralling the majority black population into various small reserves of rural land, which then became the only places they could legally reside without permits.<sup>11</sup> Simply by restricting black landownership by statute, it was possible to allow the *rei vindicatio* to do a great deal of the work of racial segregation. The eviction of black people could be painted as the enforcement of race-neutral common law. Whatever the common law missed could be dealt with in terms of the Prevention of Illegal Squatting Act 52 of 1951

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<sup>9</sup> Common law is a system of law characterised by case law, which is law developed by judges through decisions of courts over time. South African common law includes elements of Roman-Dutch law as well as the legal rules and practices developed by our own courts over the years. Prior to the coming into force of the Constitution of the Republic of South Africa, 1996 (the Constitution), property relations in South Africa were predominantly regulated by the common law.

<sup>10</sup> The *rei vindicatio* is a common law remedy available to an owner to reclaim his or her property wherever it is found and from whomever is unlawfully holding it. See *Graham v Ridley* 1931 TPD 476. See also AJ van der Walt *Constitutional Property Law* (2005) 412ff; S Wilson “Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality” (2009) 126(2) *South African Law Journal* 270-271.

<sup>11</sup> A van der Walt “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land Reform Legislation” (2002) *Tydskrif van die Suid-Afrikaanse Reg* 258. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*) para 10.

(PISA), which gave (white) landowners and authorities wide-ranging powers to evict and destroy the homes of unlawful occupiers.<sup>12</sup>

The Constitution of the Republic of South Africa, 1996 (the Constitution) brought about a number of far-reaching changes in relation to the legal protections afforded to unlawful occupiers in respect especially of evictions by entrenching the right of access to adequate housing in section 26. Section 26 of the Constitution comprises three sub-sections: section 26(1) provides that “everyone” has a right of access to adequate housing, section 26(2) obliges the state to take reasonable steps to progressively provide access to adequate housing,<sup>13</sup> and section 26(3) prohibits arbitrary evictions by requiring that evictions be authorised by a court order made after having regard to “all the relevant circumstances”.<sup>14</sup>

The exact interaction between these subsections has not been entirely clarified. This is due to the fact that the courts have upheld an interpretation of the section 26(1) right of everyone to have access to adequate housing that is qualified by the section 26(2) restriction of the state’s obligation to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.<sup>15</sup> This approach effectively means that neither the section 26(1) right nor the section 26(2) right exists as a self-standing or stand-alone entitlement but rather that, “in a somewhat inverted analysis”, the content of each right is determined by the reasonableness of the state’s response to progressively realising that right.<sup>16</sup>

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<sup>12</sup> PISA authorised the forced removal and destruction of homes of land occupiers by owners, local authorities and government officials. See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 268-269.

<sup>13</sup> Section 26(2) of the Constitution reads: “The state must take reasonable measures, within available resources, to achieve the progressive realisation of this right”.

<sup>14</sup> Section 26(3) of the Constitution reads: “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.”

<sup>15</sup> Legal academics have suggested that this is textually unsound. David Bilchitz suggests that the textual separation of the right into two subsections could be used as authority to suggest that the right to housing (as contained in section 26(1)) should have certain minimum content. This would include certain entitlements which would be immediately claimable. This approach would be in accordance with international human rights law and the United Nations Committee on Economic, Social and Cultural Rights’ (CESR) “General Comment No 3: Nature of States’ Parties Obligations” UN Doc E/1991/23 (1991), which sets out the obligations of states parties to fulfil these rights. To Bilchitz, section 26(2) speaks to the further development of the right to housing over and above this minimum core. See D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19(1) *South African Journal of Human Rights* 1-26. While this interpretation makes contextual sense, the Constitutional Court has for the moment rejected a minimum core approach to the realisation of socio-economic rights. Instead, it has opted for a reasonableness approach (which will be discussed more fully later in this report). In this regard, it is important to note that although South Africa has not yet ratified the International Covenant of Economic, Social and Cultural Rights (1966) (in full), it has signed the Covenant and signalled in October 2012 that it would ratify it. Once ratified, South Africa would be bound by the minimum core approach as outlined above.

<sup>16</sup> M Langford, R Stacey and D Chirwa “Water” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2<sup>nd</sup> (2013 Revision Service 5) 56B-i, 56B-24, 56B-25. Although Langford et al write in the context of the right to water, the Constitutional Court has adopted the same approach in relation to all socio-economic rights. The principles are thus equally relevant in relation to the right to housing. In the context of housing, see for example, Liebenberg *Socio-Economic Rights* 131-227; K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 172-180.

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The content of the right of access to adequate housing has therefore largely been shaped by section 26(2) of the Constitution, which requires the state to take “reasonable” steps to realise the right to housing. This sets a seemingly objective standard by which state action to widen access to adequate housing is to be assessed. However, consistent with its attitude to other socio-economic rights, the Constitutional Court has done little to say what “housing” a rights-bearer is entitled to, and how we will know when, constitutionally speaking, the housing provided is “adequate”.<sup>17</sup> Although the Constitutional Court has stated that access to housing requires land, services and financing – more than mere “bricks and mortar”<sup>18</sup> – these attributes of the right or good are perceived as largely aspirational within the Constitutional Court’s approach of requiring a reasonable programme to progressively realise the right to housing over time and within available resources. The Constitutional Court has thus far been hesitant to prescribe the exact content of the right to housing, or what individuals would be able to claim from the state in terms of this right. Instead, the courts have opted to evaluate the reasonableness of the measures adopted by the state in order to realise the right to housing.<sup>19</sup>

## 2.1 Grootboom

In its second ever socio-economic rights case, *Government of the Republic of South Africa v Grootboom (Grootboom)*,<sup>20</sup> a case concerning 900 individuals that had set up a rudimentary camp on private land following their eviction in mid-winter Cape Town, the Constitutional Court set out the parameters of a “reasonable policy”. A reasonable housing policy must be:

- comprehensive, coherent, flexible and effective;
- have sufficient regard for the social, historic and economic context of poverty and deprivation;
- take into account the availability of resources;
- take a phased approach, including short, medium and long-term plans;
- allocate responsibilities clearly to all three spheres of government;

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<sup>17</sup> For commentary considering what would constitute “adequate” housing, see K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* SERI Research Report (February 2011) 25-29.

<sup>18</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 para 35.

<sup>19</sup> On the Constitutional Court’s embrace of the reasonableness standard, see D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19(1) *South African Journal of Human Rights* 1-26.

<sup>20</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

- respond with care and concern to the needs of the most desperate; and
- be free of bureaucratic inefficiency or overly onerous regulations.<sup>21</sup>

When determining reasonableness, courts should “not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent”.<sup>22</sup> Rather, reasonableness requires courts to adopt a flexible approach, in terms of which a “wide range of possible measures” could be adopted by the state in order to comply with its constitutional obligations.<sup>23</sup> The state thus has a relatively broad discretion in relation to the policy it adopts, provided that the policy “falls within the bounds of reasonableness”.<sup>24</sup>

Ultimately, *Grootboom* was decided on the basis that, in failing to have any plan for vulnerable people evicted without the ability to find alternative shelter, state policy lacked both comprehensiveness and sufficient concern for the shelter needs of the most desperate.<sup>25</sup> In essence, the state had simply failed to take steps to assist those “with literally no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations” and the Court made a declaratory order that it was in breach of section 26(2) of the Constitution.<sup>26</sup>

The *Grootboom* principles have been supplemented in later cases with more concrete requirements developed largely out of administrative law. These are discussed in greater detail in the subsections of this report that follow. In particular, there is a high degree of cross-pollination between the principles of reasonableness as conceived in administrative law and in a socio-economic rights context. Indeed, some authors have criticised the Constitutional Court for pursuing an administrative paradigm for the realisation of socio-economic rights.<sup>27</sup> In the administrative law inspired mode, the courts have found state action in the area of housing wanting when such action has been procedurally unfair for want of adequate engagement; where it failed to give effect to, or frustrated, legitimate expectations; was inconsistent with the state’s own adopted policies; or irrationally excluded large categories of people in need. The courts’ overarching aim has been to control the exercise of power, rather than to prescribe or criticise the ends to which the power has been exercised. Its limitations notwithstanding, this approach has tended to reign in the state’s more repressive instincts and, at the very least, directed its attention

<sup>21</sup> *Grootboom* paras 39, 42, 43, 44, 45, and 99. See also Wilson (2009) *South African Law Journal* 270-290.

<sup>22</sup> *Grootboom* para 41.

<sup>23</sup> *Grootboom* para 41.

<sup>24</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 9.

<sup>25</sup> The Court also stated that if state measures to realise the right to housing were “statistically successful” but failed to “respond to the needs of those most desperate, they may not pass the [reasonableness] test”. *Grootboom* para 44.

<sup>26</sup> *Grootboom* para 99.

<sup>27</sup> See generally, G Quinot and S Liebenberg “Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa” (2011) 22(3) *Stellenbosch Law Review* 639-663; and S Wilson and J Dugard “Constitutional Jurisprudence: The First and Second Waves” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 35-62.

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toward actually providing housing, rather than attempting to displace, stigmatise or ignore the poor and informally housed – at least in urban areas.

Although arguably self-consciously limited in scope and ambition, *Grootboom* laid a stable foundation for a new order in eviction cases by requiring that “at the very least” evictions had to be conducted “humanely”,<sup>28</sup> and by establishing that the state had an obligation to plan for those who would otherwise be rendered homeless by an eviction. This dictate of the Court found traction in the adoption of the Emergency Housing Programme (EHP) contained in Chapter 12 of the National Housing Code.<sup>29</sup> This Programme makes provision for municipalities to apply for grants from provincial governments to provide emergency housing to persons who find themselves in an “emergency housing situation”.<sup>30</sup> An eviction or the threat of imminent eviction is specifically classed in the policy as an emergency housing situation.<sup>31</sup> The EHP makes provision for a broad range of possible emergency housing options, including various types of temporary and permanent accommodation options.<sup>32</sup> The EHP is therefore a potentially important policy instrument through which municipalities could provide emergency accommodation for those in dire need.

## 2.2 Modderklip

Soon after the adoption of the EHP, the Supreme Court of Appeal (SCA) considered the interaction between the right of access to adequate housing in section 26 of the Constitution and owners’ property rights in section 25 of the Constitution in the far-reaching case of *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Modderklip)*.<sup>33</sup> This judgment was later confirmed by the Constitutional Court.<sup>34</sup>

The *Modderklip* case dealt with the plight of 400 people who were evicted in May 2000 from the Chris Hani informal settlement that was situated on municipal-owned land. Having nowhere else to go, they moved onto a portion of the farm known as Modderklip

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<sup>28</sup> *Grootboom* para 88.

<sup>29</sup> The Programme was adopted in Chapter 12 of the 2004 National Housing Code but has since been revised in the 2009 National Housing Code. See Department of Housing “Chapter 12: Housing Assistance in Emergency Housing Situations” Part 3 of the National Housing Code (2004) and Department of Human Settlements (DHS) “Emergency Housing Programme” Part 3 Vol 4 of the National Housing Code (2009).

<sup>30</sup> DHS “Emergency Housing Programme” 9 and 15-16.

<sup>31</sup> DHS “Emergency Housing Programme” 9 and 15.

<sup>32</sup> DHS “Emergency Housing Programme” 31-37.

<sup>33</sup> *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) (*Modderklip* (SCA)).

<sup>34</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (*Modderklip* (CC)).

Boerdery. By October 2000 the settlement had swelled to include over 4 000 informal shelters inhabited by approximately 18 000 people. At this point, the owner approached the High Court seeking an eviction order against the occupiers. The eviction order was granted.<sup>35</sup> However, by the time the order became executable, the informal settlement had grown significantly to roughly 40 000 occupiers. The massive size of the settlement meant that the cost of executing the eviction order would have been around R1,8 million, substantially more than the land itself was worth. The owner therefore brought a further application in the High Court to compel the state to execute the eviction order on its behalf. The High Court granted this enforcement order, finding that the state was in breach of its constitutional obligation to protect property rights by failing to effectively execute the order.<sup>36</sup> The High Court thus found that the continued unlawful occupation on the owner's land despite an eviction order was a serious deprivation of the private property owner's rights.

Both the eviction order and the enforcement order were appealed to the SCA. In that Court, Harms JA held that the continued occupation by the unlawful occupiers in the face of an eviction order amounted to an infringement of the owner's property rights.<sup>37</sup> Moreover, the Court considered the eviction of the unlawful occupiers in circumstances where they would effectively be rendered homeless to constitute a breach of what "limited" right of access to adequate housing they had realised for themselves.<sup>38</sup> Interestingly, the Court stated that the real issue in the case was the failure on the part of the state to take any steps to provide alternative accommodation to the unlawful occupiers who the Court considered to be "in desperate need".<sup>39</sup> Referring to *Grootboom*, the Court stated that there was an unassailable obligation on the state to ensure that, at the very least, evictions are "executed humanely".<sup>40</sup> In the circumstances, it seemed painfully evident that the eviction could not be executed humanely without the state providing some form of alternative accommodation or land.<sup>41</sup> In fact, if the occupiers were evicted, they would have had nowhere else to go which would simply have resulted in them reoccupying the Modderklip land or occupying other vacant land, once again rendering them at risk of eviction. As a result, the SCA held that the failure on the part of the state to fulfil its constitutional obligation to take pro-active steps to realise the right to housing of the occupiers "leads ... to the conclusion that the State simultaneously breached its section 25(1) obligations towards Modderklip".<sup>42</sup>

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<sup>35</sup> *Modderklip Boerdery (Pty) Ltd v Modderklip East Squatters and Another* 2011 (4) SA 385 (W) 396 (the eviction proceedings).

<sup>36</sup> See *Modderklip Boerdery (Pty) Ltd v President van die Republiek van Suid-Afrika en Andere* 2003 (1) All SA 465 (T) (the enforcement proceedings).

<sup>37</sup> *Modderklip* (SCA) para 21.

<sup>38</sup> *Modderklip* (SCA) para 22.

<sup>39</sup> *Modderklip* (SCA) para 22, referencing *Grootboom* para 63.

<sup>40</sup> *Modderklip* (SCA) para 26.

<sup>41</sup> *Modderklip* (SCA) para 26.

<sup>42</sup> *Modderklip* (SCA) para 28.

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According to Harms JA, the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available by the state,<sup>43</sup> and to require the state to pay constitutional damages to the property owner for the violation of its property rights.<sup>44</sup>

The *Modderklip* judgment was crucial in a number of respects. Firstly, *Modderklip* emphasised the interconnected nature of the state's constitutional obligations, by emphatically recognising that the state's failure to provide adequate housing to the unlawful occupiers (a positive obligation on the state) also amounted to an infringement of the property owner's rights (a negative obligation on the state). And secondly, the case 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.

The decisions in *Grootboom* and *Modderklip* catalysed the development of the law relating to evictions from residential property. *Grootboom* and *Modderklip* thus set in motion the incremental development of the right to adequate housing by requiring the state to take steps to provide at least temporary shelter to people in situations of acute housing crisis. It was thus only a matter of time before the extent to which a municipality had taken steps to make emergency housing available became a key consideration for a court deciding whether an eviction order was just and equitable.

## 2.3 PE Municipality

In 1998, the first democratic Parliament passed the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). The Act gave effect to section 26(3) of the Constitution's requirement that a court consider all the relevant circumstances before making an eviction order. It required the eviction of an unlawful occupier to be "just and equitable", having regard to a range of factors, including whether alternative accommodation could be made available by the state. The PIE Act was intended to protect the millions of South Africans in urban areas who had no common law entitlement to the land that they lived on, at least until housing could be rolled out at scale. In this sense, the PIE Act sought to invert the legal order in relation to evictions: from a legal framework that targeted unlawful occupation and "land invasion", to one

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<sup>43</sup> *Modderklip* (SCA) para 41.

<sup>44</sup> *Modderklip* (SCA) paras 43 and 44. The Court left open the question of the monetary value of such constitutional damages, but did state that damages would be based on either the value of the land and/or the length of occupation.

that sought to prevent illegal evictions. The PIE Act thus had the potential to alter the legal system from one that disproportionately favoured property owners by providing for speedy and effortless evictions in instances where they alleged that residents were in unlawful occupation, to one that provided substantial protections for unlawful occupiers by requiring that no eviction order could be granted unless the eviction would be “just and equitable”. However, for the first few years of its application, the PIE Act seemed to have limited impact on the courts, and particularly the lower courts. Common law-trained judges simply equated “justice and equity” with the enforcement of an owner’s rights and routinely granted eviction orders.<sup>45</sup>

The Constitutional Court’s first real engagement with eviction law came in *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*.<sup>46</sup> In this matter, the High Court granted an eviction order for a group of 68 people, including 29 children, from privately-owned land in Port Elizabeth municipality. The municipality had sought the eviction after receiving a petition from 1 600 residents of a neighbouring formal township, including the owner of the land. It had offered the occupiers alternative land in the nearby Walmer Township, however, the occupiers refused to move because there was no guarantee that they would be given some measure of tenure security on the alternative land. The SCA set aside the eviction order on this basis, finding that the occupiers, many of whom had been evicted before, were entitled to expect that they would not be evicted again after their move to Walmer.<sup>47</sup> The municipality then applied for leave to appeal to the Constitutional Court, seeking a ruling that it was not required to provide alternative accommodation as a matter of course when evicting unlawful occupiers. The basis of the application was somewhat curious, since, on the municipality’s version, it had offered alternative accommodation, at least in this case.

In the Constitutional Court, in a wide-ranging and sensitive judgment, Sachs J reviewed the way in which the apartheid legal order – particularly through the PISA – deliberately sought to make evictions as easy as possible. He then characterised section 26(3) of the Constitution and the PIE Act as an inversion of apartheid law, requiring unlawful occupiers to be treated with “dignity and respect”,<sup>48</sup> not as “obnoxious social nuisances”.<sup>49</sup> The Constitution has thus substantially altered the law relating to evictions by recognising that the “normal ownership rights of possession, use and occupation” are now offset by “a new and equally relevant right not arbitrarily to be deprived of a home”.<sup>50</sup> Section 26(3) of the Constitution, Sachs J held “evinces special constitutional regard for a person’s place of abode” acknowledging that “a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security.”<sup>51</sup> While

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<sup>45</sup> See, for example, *Betta Eiendomme (Pty) Ltd v Ekple – Epoh* 2000 (4) SA 468 (W) and *Groengrass Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T).

<sup>46</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC).

<sup>47</sup> See *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) (*Baartman*). See also *PE Municipality* para 5.

<sup>48</sup> *PE Municipality* para 12.

<sup>49</sup> *PE Municipality* para 41.

<sup>50</sup> *PE Municipality* para 23. See also Liebenberg *Socio-Economic Rights* 274.

<sup>51</sup> *PE Municipality* para 17.

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the Constitution and the PIE Act do not provide that under no circumstances should a home be destroyed, a court should be reluctant to conclude that an eviction would be just and equitable unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending access to permanent housing.<sup>52</sup> Echoing *Grootboom*, Sachs J held that it was not enough to show that a municipality has in place a programme designed to house the largest number of people over the shortest period of time in the most cost-effective way.<sup>53</sup> In addition to being statistically successful, a municipality must show that its housing programme is sufficiently flexible to respond to immediate housing need. If that cannot be demonstrated through the ability to make land available to relatively settled occupiers facing eviction, then an eviction order can be refused.<sup>54</sup> The municipality's application was accordingly dismissed.<sup>55</sup>

The power of *PE Municipality* lay in its fusion of the conception of justice and equity under the PIE Act, and the constitutional requirement of reasonableness set out in *Grootboom*. According to *PE Municipality*, whether it is just and equitable to order an eviction under the PIE Act will normally depend on whether an occupier can find alternative accommodation and, if not, whether the state has taken reasonable measures to make accommodation available to occupiers who are unable to provide it for themselves. Although the consequences of the *PE Municipality* decision were yet to work themselves out, the state and private property owners were, or should have been, on notice that the days of quick and easy eviction orders were over.

## 2.4 Olivia Road

Despite the legal protections developed in *PE Municipality*, the pressure to displace the poor from valuable urban land in a (modestly) expanding economy did not abate. For example in the inner city of South Africa's biggest metropolitan municipality, Johannesburg, the state embarked upon an ambitious regeneration programme, premised entirely on encouraging commercial property developers to take control of urban slum properties, evict the occupiers and refurbish them for occupation at much higher rents.<sup>56</sup> The City of Johannesburg's (the City) 2003 Inner City Regeneration Strategy made no provision for the re-accommodation of poor and vulnerable people currently living in slum properties, who would be unable to afford the rents demanded by the owners of the refurbished

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<sup>52</sup> *PE Municipality* para 28.

<sup>53</sup> *PE Municipality* para 29, referring to *Grootboom* para 44.

<sup>54</sup> *PE Municipality* para 29.

<sup>55</sup> *PE Municipality* para 61.

<sup>56</sup> See S Wilson "Litigating Housing Rights in Johannesburg's Inner City: 2004-2008" (2010) 27 *South African Journal of Human Rights* 127 and 134; and K Tissington *Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Accommodation in Inner City Johannesburg* SERI Research Report (November 2013).

properties. In the early stages of the Programme, part of the attraction of the scheme for private property developers was that the City would itself evict the current occupiers of slum properties, delivering the bulk of a building, vacant and ready for refurbishment to the developer. The vision was one of the gradual displacement of the poor from the urban core, through a process of accelerated, state-assisted gentrification.<sup>57</sup>

Rather than rely on the PIE Act, with its injunction to consider the equity of evictions from homes, the City elected instead to rely on the National Building Standards and Building Regulations Act 103 of 1977 (the NBRA).<sup>58</sup> This enabled the City to circumvent a number of the supposedly onerous provisions set out in the PIE Act. Section 12(4)(b) of the NBRA permitted a municipal official, if she was of the opinion that it was necessary “for the safety of any person” to order the “vacation” of a property, merely by issuing a notice. The use of the NBRA in this way assisted the City to characterise the slum properties in the inner city as health and safety nuisances rather than sites of dire housing need urgently requiring attention. The strategy employed exactly the same approach to the urban poor so stringently disapproved of by Sachs J in *PE Municipality*. Between 2002 and 2006, approximately 10 000 people were evicted by the City under the auspices of the strategy.<sup>59</sup>

The implementation of Johannesburg’s inner city regeneration strategy and its consequences has generated a range of key cases before the courts. The case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg (Olivia Road)*<sup>60</sup> was of particular importance to the development of eviction jurisprudence. The applicants in this matter were several hundred occupiers of two buildings in the inner city of Johannesburg. One of the buildings was a sixteen storey residential block, which had already been earmarked for refurbishment by a property developer. The City issued a notice in terms of section 12(4)(b) of the NBRA and then applied to the High Court for an eviction order in order to give effect to the notice.

In the High Court, Jajbhay J dismissed the application on the basis that the City had failed to adopt a policy through which the occupiers could access affordable alternative accommodation.<sup>61</sup> The High Court declared the absence of such a policy to be in breach of the City’s constitutional obligations, and interdicted the City from evicting the occupiers until alternative accommodation was made available to them.<sup>62</sup> On appeal to the SCA, Harms JA set aside most of the High Court’s order, holding that the City’s right to seek the “evacuation” of buildings it considered unsafe was not conditional on it being able to

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<sup>57</sup> Wilson (2010) *South African Journal of Human Rights* 134. See also Centre on Housing Rights and Evictions (COHRE) *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (2005) 70-72.

<sup>58</sup> There have also been instances where municipalities have failed to effect removals or evictions in accordance with any piece of legislation. See, for example, *Schubart Park Residents’ Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).

<sup>59</sup> Wilson (2010) *South African Journal of Human Rights* 137; COHRE *Any Room for the Poor?* 41-74.

<sup>60</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) 208 (CC).

<sup>61</sup> *City of Johannesburg v Rand Properties* 2007 (1) SA 78 (W) (*Rand Properties* (W)) para 1 of the Court’s order.

<sup>62</sup> *Rand Properties* (W) para 1 of the Court’s order.

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provide alternative accommodation.<sup>63</sup> The eviction order was reinstated.<sup>64</sup> Nonetheless, Harms JA held, the City did have a constitutional obligation based on *Grootboom* to provide emergency shelter to all those who requested it on eviction. He accordingly directed the City to open a register upon which the occupiers could register themselves for the provision of emergency accommodation once they were evicted.<sup>65</sup>

Fearing that they would be left homeless while the City compiled its register and identified emergency accommodation, the occupiers applied for leave to appeal to the Constitutional Court. In this Court, the application turned on quite different considerations. Reluctant to delve into the deeper questions of whether the City had an obligation to adopt a policy in terms of which the occupiers should be afforded alternative accommodation, the Constitutional Court instead focussed on the absence of “meaningful engagement” with the occupiers prior to eviction. The Court directed the City to meaningfully engage with the occupiers and report back at a later date regarding these deliberations. After two months of intensive negotiations which were effectively overseen by the Constitutional Court, the matter was finally resolved with the occupiers being offered and accepting accommodation in a building yet to be refurbished nearby in the inner city where the residents remain today.

When the case returned to the Constitutional Court, Yacoob J held that the aspects of the dispute relating to the constitutionality of the City’s housing policy and eviction practices had become moot because of the agreement reached between the occupiers and the City.<sup>66</sup> Nonetheless, the Court took the opportunity to develop and expand upon the concept of “meaningful engagement” as constituent of reasonable state action required by section 26(2) of the Constitution. Most significant steps in the implementation of housing policy, Yacoob J held, must be taken after meaningful engagement with the people affected by it.<sup>67</sup> Where the state intends to remove or displace people from their existing housing, engagement is normally a prerequisite to the institution of eviction proceedings.<sup>68</sup> Engagement must be individual and collective,<sup>69</sup> presumably meaning that affected communities must be engaged as a group in relation to the impending removal, as well as at an individual and household level, in order to ensure that all relevant personal circumstances are taken into account in the process. Engagement must be

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<sup>63</sup> *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA) (*Rand Properties* (SCA)) paras 68-69.

<sup>64</sup> *Rand Properties* (SCA) para 78.

<sup>65</sup> *Rand Properties* (SCA) para 78.

<sup>66</sup> *Olivia Road* para 34.

<sup>67</sup> *Olivia Road* para 9ff.

<sup>68</sup> *Olivia Road* para 30.

<sup>69</sup> *Olivia Road* para 13.

undertaken without secrecy, and should focus on meeting the reasonable needs of an affected community, and providing alternative accommodation where it is needed.<sup>70</sup> Because no such engagement had been undertaken by the City in relation to the *Olivia Road* occupiers, Yacoob J held that the eviction order issued by the SCA should be set aside.

The apparently onerous requirements relating to engagement set out in the *Olivia Road* judgment, together with the strong implication that alternative accommodation would have to be provided to those who needed it, effectively put a halt to the City's programme of forced removals from slum buildings. The City had neither the accommodation nor the political will to start providing shelter to the inner city poor at a large scale. As a result the burden of removing the poor from the inner city passed from the City itself to individual private owners.<sup>71</sup> It was not long, however, before essentially private law disputes between owners and occupiers of inner city properties drew the City in. As the Constitutional Court made clear in *PE Municipality*, whether an eviction that would otherwise lead to homelessness could be carried into effect depended crucially on whether a municipality had taken reasonable steps to meet emergency housing needs within its area of jurisdiction.

## 2.5 Blue Moonlight

As yet unclear, however, was the nature of the obligation in respect of evictions from private property. In *City of Johannesburg v Blue Moonlight Properties (Blue Moonlight)*,<sup>72</sup> the Constitutional Court had to address more closely the concrete duties of a municipality where an eviction by a private landlord would result in homelessness. In this matter, 86 people faced eviction from a disused set of factory buildings and warehouses in Saratoga Avenue, Berea, Johannesburg. The owner, a company that had purchased the building in full knowledge that it was occupied by poor residents but hoping to evict them to develop the property for a higher-income market, brought an eviction application relying on the bare *rei vindicatio*. The occupiers alleged and proved that an eviction would leave them homeless, and brought an application to join the City to the proceedings, as a prelude to seeking an order that it provide them with alternative accommodation in the event of their eviction. The City, for its part, stated that it had, since the decision of the Court in *Olivia Road*, devised a policy to provide accommodation to people it removed from unsafe buildings from within its own resources, but denied any obligation to provide accommodation to occupiers facing eviction by a private landowner.<sup>73</sup> The City stated that the obligation lay with provincial government, to which it had applied for funding in terms of the EHP, and been refused.

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<sup>70</sup> *Olivia Road* paras 14, 18 and 21.

<sup>71</sup> In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) (*Changing Tides*) para 54, the SCA specifically comments on this development.

<sup>72</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

<sup>73</sup> *Blue Moonlight* paras 48-49.

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Taking their cue from *Grootboom* and *PE Municipality*, the High Court<sup>74</sup> and the SCA<sup>75</sup> judgments declared unconstitutional the City's differentiation between people it evicted from allegedly unsafe properties, and those evicted by private landowners. Both *Grootboom* and *PE Municipality* made it clear that the state had an obligation to respond to the needs of people facing housing emergencies. *PE Municipality* made clear that the primary duty to do so lay with a municipality, even where occupiers were sought to be evicted from privately-owned land.

The City then applied for leave to appeal to the Constitutional Court, which was granted. In the judgment, Van der Westhuizen J confirmed the SCA's findings in all material respects.<sup>76</sup> He found in particular that the PIE Act limited the rights of owners to undisturbed use and enjoyment of their property.<sup>77</sup> If homelessness would otherwise result, section 26 of the Constitution and the PIE Act require that an owner patiently wait to vindicate her property until the state has been given a reasonable opportunity to discharge its obligations, grounded in *Grootboom*, to provide alternative accommodation.<sup>78</sup>

The Court further found that a municipality is not entitled to deflect its obligations onto national and provincial government. It has the obligation to plan and procure resources to meet emergency housing needs within its area of jurisdiction. It cannot rely on an absence of resources to do so if it has not at least acknowledged its obligations and attempted to find resources to allocate to emergency housing projects.<sup>79</sup> This obligation becomes particularly apparent when one considers that municipalities are ideally suited to react, engage and plan to fulfil the needs of local communities.<sup>80</sup> Moreover, a municipality cannot pick and choose which housing crises it responds to. Instead, it must prioritise its response to emergency housing situations in a reasonable manner. To differentiate between emergency housing situations caused by eviction by reference to the identity and purposes of the evictor is unreasonable, since it matters little to a homeless person what the cause of her homelessness is. Her need is the same.<sup>81</sup>

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<sup>74</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2010 ZAGPJHC 3 (4 February 2010).

<sup>75</sup> *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA).

<sup>76</sup> *Blue Moonlight* para 102.

<sup>77</sup> *Blue Moonlight* paras 37 and 40.

<sup>78</sup> *Blue Moonlight* para 40.

<sup>79</sup> *Blue Moonlight* para 74.

<sup>80</sup> *Blue Moonlight* paras 47 and 57.

<sup>81</sup> *Blue Moonlight* para 95.

## 2.6 Skurweplaas and Mooiplaats

The principles laid down in the *Blue Moonlight* judgment were fleshed out in two decisions handed down subsequently. In *Occupiers of Skurweplaas v PPC Aggregate Quarries (Skurweplaas)*<sup>82</sup> and *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread (Mooiplaats)*<sup>83</sup> the Constitutional Court dealt with two groups of people who had moved onto open land just outside Pretoria because they had been evicted or otherwise displaced from neighbouring informal settlements. Both groups had been resident on the land for very short periods of time (in contrast to the occupiers in *Blue Moonlight*, who had resided at Saratoga Avenue for periods of up to 30 years).

In these cases, the Court affirmed its decision in *Blue Moonlight* in all material respects, but added four important observations. First, the Court deplored the reference to the occupiers in both matters as “invaders”. This description, the Court held was “emotive and judgmental” and undermined the occupiers’ humanity.<sup>84</sup> Second, the Court took into account that, even though the occupation had only begun a relatively short period before eviction proceedings were instituted, the probability that an eviction would lead to homelessness meant that the provision of alternative accommodation or land was still required.<sup>85</sup> To ensure that the occupiers were not rendered homeless prior to the provision of alternative accommodation, the Court also required a linkage between the date of eviction and the date upon which the municipality should provide alternative accommodation.<sup>86</sup> Third, the Court took into account the owners’ failure to demonstrate that they had any urgent or compelling use for the land unlawfully occupied.<sup>87</sup> This militated against ordering a speedy eviction without the provision of alternatives. Finally, the Court emphasised that courts have the power and the duty to order municipalities to take steps to investigate and furnish information relating to their ability to provide alternative accommodation, in the event that it is found that a municipality’s approach is unsatisfactory.<sup>88</sup>

The judgment in *Blue Moonlight*, as supplemented by *Mooiplaats* and *Skurweplaas*, finally spelt out the substantive framework of relationships between owners, unlawful occupiers and the state in relation to access to land. The cases developed the *Grootboom* principle to its logical conclusion. Property owners are no longer entitled to insist on the immediate enforcement of common law rights if this means homelessness for poor and vulnerable people with nowhere else to go. Unlawful occupiers, though they are without common law rights, do acquire a temporary, limited and circumscribed entitlement to remain on land without an owner’s consent until the state can reasonably be expected to make good, at least rudimentarily, on the Constitution’s promise of housing for all who

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<sup>82</sup> *Occupiers of Skurweplaas v PPC Aggregate Quarries and Others* 2012 (4) BCLR 382 (CC).

<sup>83</sup> *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread and Others* 2012 (2) SA 337 (CC).

<sup>84</sup> *Mooiplaats* para 4; *Skurweplaas* para 3.

<sup>85</sup> *Mooiplaats* para 16; *Skurweplaas* para 14.

<sup>86</sup> *Skurweplaas* para 13.

<sup>87</sup> *Mooiplaats* para 18; *Skurweplaas* para 12.

<sup>88</sup> *Mooiplaats* para 13.

need it. As recognised through the jurisprudence, in South Africa's historical and social context, it is simply wrong to ignore the acute hardship caused by the enforcement of statutory or common law rights which so easily lend themselves to social exclusion and the reproduction of structural inequality. In limiting property rights in favour of housing rights, the South African courts have granted the poor a secure legal foothold in urban areas.

## 2.7 Mchunu and Hlophe

However, despite the legally secure position of the urban poor as spelled out in the case law, the state - especially local government - has remained reluctant to implement the progressive legal framework developed by the Constitutional Court. In some instances municipalities repeatedly request postponements in order to comply with court orders and eventually fail to meet deadlines set by the courts.<sup>89</sup>

Thus the key current fault line is how to ensure the enforcement of court orders. Two cases have established important precedent in this regard. In *Mchunu v Executive Mayor of eThekweni (Mchunu)*,<sup>90</sup> 37 poor families were living in a transit camp in KwaMashu, Durban. This was subsequent to the Durban High Court authorising their eviction and relocation from the Siyanda informal settlement to a transit camp to allow for the construction of a road. The relocation was permitted on condition that the families be provided with permanent housing within a year of the court order. The deadline passed without the order being complied with. Fearing that they would be compelled to remain in temporary emergency accommodation for the foreseeable future, the occupiers instituted proceedings to hold municipal office bearers personally liable for non-compliance with the court order. This was done by bringing contempt proceedings against the Executive Mayor, the Municipal Manager and the Director of Housing. The Durban High Court declared that the relevant municipal office bearers (specifically the Executive Mayor, City Manager and Director of Housing) were "constitutionally and statutorily obliged to take all necessary steps" to ensure that permanent housing was provided to the occupiers within three months from the court order.<sup>91</sup> If this was not done the municipal officers would be held in contempt of court and may be fined

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<sup>89</sup> Per illustration, one could refer to the postponements and delays sought by the City of Johannesburg and the eThekweni Municipality as succinctly articulated in *Mchunu and Others v Executive Mayor of eThekweni and Others* 2013 (1) SA 555 (KZD) and *Hlophe and Others v Johannesburg Metropolitan Municipality and Others* 2013 (4) SA 121 (GSJ).

<sup>90</sup> *Mchunu and Others v Executive Mayor of eThekweni and Others* 2013 (1) SA 555 (KZD).

<sup>91</sup> *Mchunu* para 21.

or imprisoned. The order successfully spurred the municipality into action as it soon tendered permanent housing to the occupiers.<sup>92</sup>

The relief granted in *Mchunu* was later also granted against the City of Johannesburg in *Hlophe v City of Johannesburg (Hlophe)*.<sup>93</sup> This case involved a similar set of facts, in the context of inner city Johannesburg. The City of Johannesburg failed to indicate that it had taken adequate measures to comply with the *Blue Moonlight* judgment in respect of occupiers facing eviction from a building called Chung Hua Mansions. As a result, the order of eviction had been suspended pending the provision of temporary alternative accommodation by the City.

After numerous postponements and various reports that failed to satisfactorily account for the measures undertaken by the City to comply with its obligations, the 201 occupiers launched an enforcement application against City officials to ensure compliance with an order to provide alternative accommodation. The City argued that it could not comply with the order and would be unable to provide alternative accommodation for the foreseeable future, this in spite of the City's previously agreement to be bound by the order.<sup>94</sup> The judgment of Satchwell J in the South Gauteng High Court directed the Executive Mayor, City Manager and Director of Housing for the City to personally explain why the City had not acted to provide shelter to those rendered homeless by eviction over 18 months after the *Blue Moonlight* decision requiring it to do so. The Court ordered that the responsible municipal office bearers should take all necessary steps to provide shelter to the occupiers within two months. If they failed to do so, the Mayor, City Manager and the Director of Housing could be held in contempt, and fined or imprisoned as a result.<sup>95</sup>

These two cases have strengthened the legal enforcement mechanisms available to vulnerable occupiers to hold municipal office bearers to account, by enabling occupiers to hold officials personally liable for non-compliance with court orders. Municipal office bearers may now risk fines or imprisonment if they fail to implement court orders timeously. These judgments have therefore cemented the constitutionally secure position of unlawful occupiers that are faced with the threat of homelessness.

As impressive as the jurisprudence outlined above has been, to date the South African courts have been largely silent on the meaning of adequacy in relation to alternative

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<sup>92</sup> Litigation to ensure that housing is tendered in accordance with this order is ongoing. For more on the case and the ongoing litigation visit the Socio-Economic Rights Institute of South Africa (SERI)'s website: <http://www.seri-sa.org/>.

<sup>93</sup> *Hlophe and Others v Johannesburg Metropolitan Municipality and Others* 2013 (4) SA 121 (GSJ). See also J Dugard "Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in relation to the Provision of Alternative Housing" (2012) 5 *Constitutional Court Review* (forthcoming).

<sup>94</sup> *Hlophe* para 9.

<sup>95</sup> Subsequently, the City of Johannesburg has lodged a notice of appeal against the *Hlophe* order of Satchwell J.

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accommodation.<sup>96</sup> As a result, municipalities have mostly been left to their own devices in developing models for the provision of adequate alternative accommodation for evictees, with some alarming results such as the shelters used by the City of Johannesburg to provide emergency shelter to evictees. This may be set to change, as the adequacy of the draconian shelters provided by the City of Johannesburg are currently subject to constitutional review in ongoing litigation.<sup>97</sup> Guidance from the courts on what constitutes adequate alternative accommodation would go a long way towards guiding municipalities in developing adequate and successful models for the provision of alternative accommodation, as well as in aiding litigation aimed at ensuring adequate standards are met.

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<sup>96</sup> In fact, courts have seemingly been reticent to clearly articulate what is meant by alternative accommodation. In various cases, it seems that the courts have referred to “alternative accommodation”, “emergency housing” and “temporary shelter” virtually interchangeably without indicating whether it distinguishes between these concepts. This may require further research as it remains unclear what the concept of alternative accommodation specifically entails.

<sup>97</sup> For more on this litigation see section 3.5 of this report and, in particular, *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another*, South Gauteng High Court, Case No 39502/2012.

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# What the law says on the key principles

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**T**he case law discussed above has incrementally developed the law on housing rights and evictions in South Africa, culminating in a progressive legal framework that is markedly different from the position at common law. This framework is characterised by a new cluster of relationships in housing and eviction cases – one in which the rights and interests of the parties involved are meticulously balanced by various intersecting rights, duties and responsibilities.

This paradigm shift in housing and eviction relations has resulted in a “new normality in property relations”.<sup>98</sup> The new normality is one in which evictions from immovable property which might lead to homelessness are treated differently from all other actions for the repossession of property.<sup>99</sup> The new normality provides a legal framework infused with a number of essential substantive and procedural protections afforded to occupiers, regardless of the lawfulness of their occupation. At the core of this new paradigm is the notion that land should be viewed as a resource, which may be possessed or occupied without being owned.<sup>100</sup> Such possession or occupation gives expression to the right of access to adequate housing as contained in the Constitution and deprivation of such possession consequently also constitutes a breach of this right.<sup>101</sup> The new normality thus provides a framework that seeks to reconcile the opposing legal entitlements of property owners and unlawful occupiers that face the threat of homelessness, and articulates clear obligations in respect of these parties as well as the state.

The new normality has also resulted in a shift away from a legal framework that revered immovable property ownership rights and considered them largely sacrosanct. In terms of the new normality, immovable property ownership rights are considered in a balancing act alongside the rights to shelter of occupiers, including unlawful occupiers, and ensures that they may only be evicted where it is just and equitable to do so. As developed through the case law, it is usually only just and equitable to evict occupiers if alternative accommodation is provided where an eviction would otherwise result in homelessness.

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<sup>98</sup> This term has been borrowed from Wilson (2009) *South African Law Journal* 270-290. See also Liebenberg *Socio-Economic Rights* 268-316, who describes this new cluster of relationships as a “new paradigm” in housing and property relations.

<sup>99</sup> Wilson (2009) *South African Law Journal* 288.

<sup>100</sup> Wilson (2009) *South African Law Journal* 288.

<sup>101</sup> Wilson (2009) *South African Law Journal* 288. Wilson points out that these principles do not apply to ejections from commercial property, or from homes occupied by affluent tenants.

The key principles, as well as the new legal relationships that have been created through the case law are discussed below in more detail.

### 3.1 Procedural requirements for an eviction

Section 26(3) of the Constitution, along with the PIE Act, provides a number of essential procedural protections to unlawful occupiers who face evictions. First, and most importantly, section 26(3) provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to “all the relevant circumstances”.<sup>102</sup> The PIE Act expands on this requirement by stating that a court may not grant an eviction order unless the eviction sought would be “just and equitable” in the circumstances.<sup>103</sup> This requires a court to have regard for various factors, including whether the occupiers include vulnerable categories of persons (the elderly, children and female-headed households), the duration of occupation and the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers are unable to obtain alternatives on their own. The legal framework thus establishes that an eviction order may not be granted if an eviction would not be just and equitable.

These procedural protections have been supplemented by case law. In a range of cases the South African courts held that a court cannot decide what is just and equitable without being provided all the necessary information to enable it to make such decision.<sup>104</sup> As the Constitutional Court stated in *PE Municipality*:

*The obligation on the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal.*<sup>105</sup>

This means that courts should be satisfied that they are “fully informed” of all the relevant circumstances before embarking of a determination of whether an eviction would be just and equitable.<sup>106</sup> In ensuring that it is sufficiently informed, a court may insist on being provided with more information. In fact, if the evidence presented before a court fails to address crucial issues, courts may have to “go beyond” the evidence and find innovative

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<sup>102</sup> This principle was affirmed in *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (*Pheko*) para 35, where the Constitutional Court stated that section 26(3) of the Constitution does not permit legislation authorising eviction without a court order.

<sup>103</sup> Section 4(6) and 4(7) of the PIE Act lay out a number of these circumstances. However, the factors listed in section 4(6) and 4(7) do not constitute an exhaustive list of circumstances that may be considered. This means that courts could consider any factor they deem relevant in the circumstances. *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) (*Shulana Court*) para 13.

<sup>104</sup> *Sailing Queen Investments v Occupants La Colleen Court* 2008 (6) BCLR 666 (W) (*Sailing Queen*) paras 11, 14, 18 and 19; *Changing Tides* paras 26 and 27; *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2010 (4) BCLR 354 (SCA) (*Shorts Retreat*) para 11; *Shulana Court* para 10.

<sup>105</sup> *PE Municipality* para 32.

<sup>106</sup> *PE Municipality* para 32.

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ways of obtaining the information necessary “to enable it the ‘have regard’ to relevant circumstances”.<sup>107</sup>

Courts are therefore empowered to compel joinder of municipalities to litigation in order for them to provide certain information in relation to alternative accommodation and their ability to provide it to occupiers who need it.<sup>108</sup> This is due to the fact that municipalities have a direct, substantial and material interest in these matters as they have a constitutional obligation to provide alternative accommodation to those who cannot provide such accommodation for themselves and play an essential engagement or mediator’s role.<sup>109</sup> Courts have affirmed that in cases where occupiers may be rendered homeless due to an eviction, municipalities must always be joined as a party to the eviction proceedings.<sup>110</sup> As Wallis JA states in *Changing Tides*:

*Whenever the circumstances alleged by an applicant for an eviction order raise the possibility that the grant of that order may trigger constitutional obligations on the part of a local authority to provide emergency accommodation, the local authority will be a necessary party to the litigation and must be joined.*<sup>111</sup>

In fact, in instances where eviction could result in homelessness, courts should be reluctant to order an eviction in cases where a municipality is not joined to the proceedings.<sup>112</sup>

In order to fulfil their need for information, courts have also obliged municipalities to file a report to the court on various issues in relation to occupiers’ personal circumstances, availability of alternative accommodation, the municipality’s current housing policy and progress reports on the implementation of the local government’s housing policy, and provision of alternative accommodation.<sup>113</sup> This report should be more than mere general statements of the municipality’s current housing policy and its unwillingness or inability to provide alternative accommodation. Instead, the report should engage with the specific circumstances of the case at hand.<sup>114</sup> The municipal report should “directly” deal with:

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<sup>107</sup> *PE Municipality* para 32. See also *Schulana Court* para 12 and *Shorts Retreat* para 14.

<sup>108</sup> For more on joinder of municipalities to eviction proceedings, see G Muller and S Liebenberg “Developing the Law of Joinder in the Context of Evictions of People From Their Homes” (2013) 29 *South African Journal of Human Rights* 554-570.

<sup>109</sup> *Sailing Queen* para 14; *Changing Tides* para 38. See also Muller and Liebenberg (2014) *South African Journal of Human Rights* 558-570.

<sup>110</sup> *Changing Tides* para 38; *Shorts Retreat* para 11.

<sup>111</sup> *Changing Tides* para 38.

<sup>112</sup> *Sailing Queen* para 14.

<sup>113</sup> *Changing Tides* para 40; *Sailing Queen* para 18.

<sup>114</sup> *Changing Tides* para 40.

- the information available to the municipality in relation to the building or property, including whether the building is considered a slum building that may pose health and safety concerns;
- the information the municipality has in relation to the demographic composition and personal circumstances of the occupiers of the property;
- whether an eviction would likely result in the occupiers becoming homeless;
- if the possibility of homelessness is a threat, what steps the municipality proposes to put in place to prevent such homelessness by providing alternative land or accommodation;
- the implications for the property owner;
- details of all engagement with the occupiers and whether there is any scope for a mediated solution between the parties.<sup>115</sup>
- information on the municipality's housing policies and programmes;<sup>116</sup> and
- the specific housing needs in the municipality.<sup>117</sup>

The onus of proof in eviction proceedings has also been substantially altered by jurisprudence. The “onus” of proof refers to the duty to provide evidence to demonstrate the truth of a particular set of facts. Ordinarily, one party to a case must show that a particular fact or facts are true in order to get the court to make the order they want. This is the “onus” on them. Under the common law, a property owner had to show that he was the owner of a particular piece of land, and that the occupants were living on it without his consent or without any other legal right to do so. That was his onus. However, this position has been substantially altered under the constitutional dispensation and the PIE Act.

Firstly, the PIE Act requires that a property owner satisfy a court that an eviction would be just and equitable by setting out facts that will convince a court that it would be fair in all the circumstances to evict an occupier. Depending on the circumstances, this means that the property owner may well have to show more than his ownership of the land and the occupier's lack of permission or a right to occupy it. In *Changing Tides*, Wallis JA found that a property owner is required to put such information as she is able to before a court to demonstrate that an eviction would be just and equitable in the circumstances.<sup>118</sup> The information required depends on the circumstances. This is because the constitutional and legislative scheme relating to eviction rather requires that courts “make [a] value judgment ... on the material before it”.<sup>119</sup> A property owner applying for an eviction order is required to satisfy the court that an eviction would be just and equitable

<sup>115</sup> *Changing Tides* para 40.

<sup>116</sup> Muller and Liebenberg (2014) *South African Journal on Human Rights* 568-569.

<sup>117</sup> Muller and Liebenberg (2014) *South African Journal on Human Rights* 568-569.

<sup>118</sup> *Changing Tides* para 30. In *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA), Harms JA held that the onus was on the occupiers to adduce the kind of evidence necessary to demonstrate that an eviction would not be just and equitable. This position was altered in *Changing Tides*, which overruled the *Ndlovu* case.

<sup>119</sup> *Changing Tides* para 34.

by placing evidence before the court that would enable a court to make such finding, having regard to the court's duty to consider all relevant factors.<sup>120</sup>

Another crucial procedural development brought about by the case law is that the South African courts have effectively done away with the distinction made in section 4(6) and 4(7) of the PIE Act. These sections essentially drew a distinction between unlawful occupiers based on the duration of occupation. Significantly, section 4(7) of the PIE Act, which provides for the eviction of unlawful occupiers who had occupied property for a period longer than six months, expressly requires a court to, in considering all the relevant circumstances, consider "whether land has been made available or can reasonably be made available by a municipality or other organ of state ... for the relocation of the unlawful occupier[s]".<sup>121</sup> The same caveat is not repeated in section 4(6) of the PIE Act, which governs the eviction of unlawful occupiers who have occupied property for a period shorter than six months.<sup>122</sup> The structure of these provisions thus suggested that courts did not have to consider the availability of alternative accommodation or land in instances where occupiers had occupied a property for less than six months.

This interpretation was rejected by the SCA in *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele (Shulana Court)*. In this case, the SCA acknowledged the textual dissimilarities between section 4(6) and 4(7) of the PIE Act.<sup>123</sup> The Court, however, determined that there was nothing in section 4(6) which suggested that a court would be restricted to a consideration of only the circumstances expressly listed in the subsection.<sup>124</sup> This meant that that a "court may, in appropriate cases, have regard to the availability of the alternative land [or alternative accommodation]" in instances where unlawful occupiers occupied a property for a period less than six months.<sup>125</sup> In fact, the

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<sup>120</sup> *Changing Tides* para 34.

<sup>121</sup> Section 4(7) of the PIE Act states:

"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." (Emphasis added).

<sup>122</sup> Section 4(6) of the PIE Act reads:

"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 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." (Emphasis added).

<sup>123</sup> *Shulana Court* para 13.

<sup>124</sup> *Shulana Court* para 13.

<sup>125</sup> *Shulana Court* para 13.

Court deemed this consideration crucial to a comprehensive inquiry into “all the relevant circumstances”.<sup>126</sup>

This decision was confirmed in the Constitutional Court in *Skurweplaas* and *Mooiplaats*. Both of these cases related to groups of occupiers who had resided on the properties in question for relatively short periods. This brought the proposed eviction of both sets of occupiers under the purview of section 4(6) of the PIE Act.<sup>127</sup> Despite this, in both cases the Court ruled that the state was obliged to provide alternative accommodation to the occupiers as the evictions would likely render them homeless.<sup>128</sup> These cases have therefore effectively obliterated the distinction between unlawful occupiers who have occupied a property for more or less than six months, and have established that, where occupiers are evicted from a home, the issue of whether alternative accommodation or land is available or likely to be provided will always be a relevant factor to be considered by a court in eviction proceedings.

## 3.2 Meaningful engagement

A particularly interesting development in the housing and eviction jurisprudence is the requirement of “meaningful engagement”, as first flagged by the Constitutional Court in *PE Municipality*.<sup>129</sup> In this case, the Constitutional Court focussed on the importance of engagement and mediation as vital legal mechanisms in eviction proceedings, and housing policy more broadly.<sup>130</sup> In underscoring the usefulness of engagement and mediation, the Court stated that “the procedural and substantive aspects of justice cannot always be separated”<sup>131</sup> and that in exercising their managerial functions to ensure just and equitable evictions courts may have to be more “innovative” in sculpting their remedies.<sup>132</sup>

The Court commented that an effective method of obtaining reconciliation between parties in a dispute would be to “encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions”.<sup>133</sup> Mediation and engagement encourage the humanisation of the other parties to a dispute, furthering an awareness of each as an individual bearer of rights and dignity.<sup>134</sup> Moreover, the special nature of the interests involved in eviction proceedings mean that it would

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<sup>126</sup> *Shulana Court* para 13.

<sup>127</sup> See *Skurweplaas* para 1.

<sup>128</sup> *Skurweplaas* para 14; *Mooiplaats* para 16.

<sup>129</sup> See *PE Municipality* paras 39-47. See also Tissington *A Resource Guide to Housing in South Africa* 46.

<sup>130</sup> Some have argued that meaningful engagement should be distinguished from mediation, which is a more formal process, where a third party is appointed to help settle a dispute. See Van Wyk (2011) *Potchefstroom Electronic Law Journal* 65. However, at the core of these divergent processes lies the need to negotiate and engage. As a result, these processes may be grouped together here.

<sup>131</sup> *PE Municipality* para 39.

<sup>132</sup> *PE Municipality* para 39.

<sup>133</sup> *PE Municipality* para 39.

<sup>134</sup> *PE Municipality* para 41.

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generally not be just and equitable to order an eviction if “proper discussions and, where fitting, mediation were not attempted”.<sup>135</sup>

In the *Olivia Road* case, the Constitutional Court expressly developed and provided content to the concept of meaningful engagement. In this case, the Court gave an interim ruling in terms of which it ordered the parties to engage meaningfully with one another in an attempt to reach mutually acceptable solutions to the issues raised before the Court and ways to improve the safety of the building in the interim. On the parties’ return, the Court gave reasons for its decision to order meaningful engagement and elaborated on what this form of engagement would entail. Stating that the obligation to engage meaningfully flowed from section 26(2) of the Constitution,<sup>136</sup> the Court clarified that meaningful engagement is an essential component of a reasonable state response to the housing programme.<sup>137</sup> Thus when a municipality seeks to evict occupiers and homelessness could ensue, the municipality must meaningfully engage with the occupiers regarding the eviction and/or alternative accommodation options.<sup>138</sup> Courts are then empowered to endorse the agreements reached between the parties in instances where those agreements are reasonable, thereby exercising due vigilance.<sup>139</sup>

In theory, meaningful engagement means that the occupiers, owner and relevant municipality have to meaningfully engage on all aspects related to the eviction and the provision of temporary shelter to those who require it.<sup>140</sup> All the parties must be sincere during the engagement process by acting reasonably and approaching the engagement in good faith.<sup>141</sup> Parties should engage about the consequences of a possible eviction, whether the municipality can alleviate some of the potentially dire consequences that result from eviction, the obligations of the municipality in relation to any possible eviction, and how and when the municipality should fulfil its obligations.<sup>142</sup> Of particular importance in meaningful engagement is the need to address questions of homelessness that may ensue, potential temporary measures that may starve off homelessness (including sub-market leasing of the property by the occupiers) while the state provides alternative accommodation, whether the owner’s interests could be vindicated without an eviction order being granted, or whether the owner could contribute to the efforts of the state

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<sup>135</sup> *PE Municipality* para 43. The Court provided that this principle may only be departed from in “special circumstances” (para 43).

<sup>136</sup> *Olivia Road* paras 17-18.

<sup>137</sup> *Olivia Road* para 17.

<sup>138</sup> *Olivia Road* para 18.

<sup>139</sup> *Olivia Road* paras 24-30.

<sup>140</sup> *Olivia Road* para 14.

<sup>141</sup> *Olivia Road* para 20.

<sup>142</sup> *Olivia Road* para 14.

to provide an alternative.<sup>143</sup> Engagement should aim at arriving at mutually acceptable solutions. This has not always been the case in practice as detailed below.

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Joe Slovo)*,<sup>144</sup> a divided Constitutional Court laid down five separate concurring judgments. Each of these various judgments underscored the importance of meaningful engagement to a determination of the reasonableness of any housing project, especially when relocation or eviction is pursued to facilitate such project as was the case before the Court. The majority of the judges criticised the insufficient state engagement with the community.<sup>145</sup>

In particular, Sachs J denounced the “top-down” approach to engagement adopted by the state, in terms of which state officials would unilaterally make decisions without consultation or inclusion of the community.<sup>146</sup> Sachs J’s criticism of the government’s top-down approach stood in stark conflict with Yacoob J’s more deferential attitude towards engagement. According to Yacoob J, the state was only obliged to ensure that it reasonably engaged with the occupiers.<sup>147</sup> This means that although individual and careful engagement with each person or household might be desirable, the engagement between the parties in eviction proceedings should not be devoid of “realism and practicality”.<sup>148</sup> O’Regan J also acknowledged that the limited state consultation with the occupiers did not constitute full and meaningful engagement.<sup>149</sup>

O’Regan J, however, insisted that the appropriate inquiry in the circumstances was whether the “failure to have a coherent and meaningful strategy of engagement render[ed] the implementation of the plan unreasonable to the extent that the [state] failed to establish a right to evict the occupiers”.<sup>150</sup> According to O’Regan J, it did not. In support of this assertion, O’Regan J determined that as this was the first large-scale attempt at a housing development in terms of the new housing policy this failure should be condoned. Moreover, she recognised that there was “some consultation” with the occupiers, however lacking, and that the limitations of this consultation could be remedied by an order requiring the parties to meaningfully engage about the timeframes and consequences of the eviction.<sup>151</sup> Arguably, the watered-down version of meaningful engagement contrasts starkly with the Court’s earlier pronouncements in *Olivia Road*.

Despite the Court’s recognition that state engagement was insufficient, the Court allowed the eviction. However, it ordered the state and the occupiers to engage meaningfully about a range of issues related to the time and consequences of the relocation.<sup>152</sup> This, the Court held, should include consultations relating to the individual relocations of households having due regard to their details and personal circumstances; the time,

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<sup>143</sup> Wilson (2009) *South African Law Journal* 290.

<sup>144</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 545 (CC) (*Joe Slovo*).

<sup>145</sup> *Joe Slovo* paras 302-303 and 378.

<sup>146</sup> *Joe Slovo* para 378.

<sup>147</sup> *Joe Slovo* para 117.

<sup>148</sup> *Joe Slovo* para 117.

<sup>149</sup> *Joe Slovo* para 301.

<sup>150</sup> *Joe Slovo* para 302.

<sup>151</sup> *Joe Slovo* paras 302-303.

<sup>152</sup> *Joe Slovo* para 7.

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manner and conditions of the relocation; the provision of transport; and information about the current position of individual residents on the housing waiting list.<sup>153</sup>

The judgment in *Joe Slovo* has given rise to considerable uncertainty about whether meaningful engagement should occur *before* an eviction is sought. In this regard, *Joe Slovo* sits uneasily alongside the Constitutional Court's assertion in *Olivia Road* that meaningful engagement is a constituent component of a reasonable state response to the realisation of the right to housing<sup>154</sup> and would therefore be essential to the assessment of the reasonableness of the state's actions. Overall, the Constitutional Court has emphasised that meaningful engagement should ordinarily take place before eviction proceedings have been instituted and matters have reached the courts.<sup>155</sup> In practice, this would mean that eviction proceedings should not be embarked on unless and until municipalities and property owners have engaged with anyone involved in eviction proceedings or otherwise affected by such proceedings.<sup>156</sup> *Joe Slovo* does, however, indicate that meaningful engagement should also take place during the relocation process in instances where an eviction order has been granted. This principle is in keeping with the assertion in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality (Schubart Park)*<sup>157</sup> that engagement should take place at *every stage* of the eviction and housing process.<sup>158</sup>

The obligation to meaningfully engage provides potentially significant protections for unlawful occupiers facing evictions and has far-reaching consequences for state decision-making in eviction proceedings. Despite the potential benefits of this concept, there is a very real risk that meaningful engagement could become "a purely procedural 'box to tick'" thereby circumventing the quality and purpose of engagement.<sup>159</sup> This approach to engagement has been considered by the Constitutional Court on two occasions.

In *Abahlali base Mjondolo Movement SA v Premier of the Province of KwaZulu-Natal (Abahlali)* the Constitutional Court determined that, if engagement took place *after* a decision to evict had already been taken, the engagement would not be genuine or

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<sup>153</sup> *Joe Slovo* para 7.

<sup>154</sup> *Olivia Road* paras 17-18.

<sup>155</sup> *Olivia Road* para 30; *Abahlali base Mjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) (*Abahlali*) paras 69 and 119-120. See also L Chenwi and K Tissington *Engaging Meaningfully with Government in the Realisation of Socio-Economic Rights in South Africa: A Focus on the Right to Housing* SERI and Community Law Centre (CLC) Research Report (2010) 21.

<sup>156</sup> Chenwi and Tissington *Engaging Meaningfully with Government* 21.

<sup>157</sup> *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).

<sup>158</sup> *Schubart Park* para 51.

<sup>159</sup> Tissington *A Resource Guide to Housing* 46 n 179.

meaningful.<sup>160</sup> Moreover, proper engagement would include a comprehensive assessment of the needs of the affected community or group of occupiers.<sup>161</sup> In *Schubart Park* the conditional tender made by the City of Tshwane, in terms of which residents who met certain criteria and agreed to certain terms, were offered temporary accommodation, was held to form an inadequate basis for proper engagement.<sup>162</sup> Specifically, the Constitutional Court criticised the “top-down” premise from which the City proceeded, in terms of which the City had unilaterally pre-determined all the conditions.<sup>163</sup>

Subsequently, in the *Blue Moonlight* case, the Constitutional Court exhibited a more cavalier attitude towards the City of Johannesburg’s manifest failure to meaningfully engage with the property owner or unlawful occupiers at all. This may signal a possible retreat from an approach to evictions that stresses meaningful engagement.<sup>164</sup>

### 3.3 Rights of private property owners

The new normality in South African property relations has also brought about substantial changes to the position of private land owners. The right of access to adequate housing now has the potential to limit the right to property.<sup>165</sup> The balancing of these rights mean that in instances where homelessness would otherwise result, unlawful occupiers would acquire a temporary, limited right of occupation “which persists for as long as the state does not perform its obligations to provide temporary shelter”.<sup>166</sup> While ownership does “not automatically entitle [an] owner to exclusive possession of this property”,<sup>167</sup> the right of access to adequate housing does not provide inalienable land rights for occupiers either.

In *PE Municipality*, the Constitutional Court alluded to the fact that an owner’s right to property could be limited in instances where evictions may lead to homelessness, by emphasising the fact that the constitutional rights require a balancing of the property rights in section 25 of the Constitution and the right of access to adequate housing in section 26 of the Constitution.<sup>168</sup> This reinforced the notion that section 26 now affords unlawful occupiers considerable protection against the property rights of owners.

This position was expressly confirmed in *Blue Moonlight*. Here, the Court dealt with the rights of a private owner of property that was unlawfully occupied and the obligations of a municipality to provide alternative accommodation to occupiers if they were evicted. The court affirmed that a private owners’ property rights (protected in terms of section 25 of the Constitution) could, in circumstances where an eviction leads to homelessness,

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<sup>160</sup> *Abahlali* paras 69 and 120. See also Chenwi and Tissington *Engaging Meaningfully with Government* 21.

<sup>161</sup> *Abahlali* paras 114 and 126.

<sup>162</sup> *Schubart Park* para 50.

<sup>163</sup> *Schubart Park* para 50.

<sup>164</sup> For criticism of the principle of meaningful engagement, and particularly the *Joe Slovo* judgment, see K McLean “Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo” (2010) 3 *Constitutional Court Review* 223-242.

<sup>165</sup> Wilson (2009) *South African Law Journal* 288-289.

<sup>166</sup> Wilson (2009) *South African Law Journal* 289.

<sup>167</sup> Wilson (2009) *South African Law Journal* 288-289.

<sup>168</sup> *PE Municipality* para 23. See also Liebenberg *Socio-Economic Rights* 273-279.

conflict with the occupiers' right of access to adequate housing (as protected by section 26 of the Constitution).<sup>169</sup> In such situations, the protection against arbitrary deprivation of property in section 25 should be balanced by the protection against arbitrary eviction in section 26(3).<sup>170</sup> The right of access to adequate housing may thus temporarily limit the right to private property in certain instances.<sup>171</sup>

Undoubtedly, unlawful occupation results in the deprivation of property. But such deprivation may pass constitutional scrutiny if it is mandated by legislation and is not arbitrary.<sup>172</sup> In *Blue Moonlight*, the Constitutional Court also addressed the question whether the eviction was just and equitable in terms of the PIE Act. This suggests that if a court refused to authorise an eviction on the grounds that such eviction was not "just and equitable" in the circumstances, such refusal would amount to a legitimate limitation of the right to property in terms of section 25 of the Constitution.<sup>173</sup>

The Court in *Blue Moonlight* considered an open list of factors to determine whether an eviction would be just and equitable given the circumstances. These factors include:

- the length and duration of occupation by the occupiers (some of the occupiers had been in occupation for considerable periods of time);
- whether their occupation was once lawful;
- whether the owner was aware of the occupiers when purchasing the property;
- whether the eviction would lead to homelessness; and
- whether there is a competing risk of homelessness on the part of the private owner of the property.<sup>174</sup>

Consideration of these factors led the Court to conclude that owners may have to be patient while their ownership rights are temporarily restricted by unlawful occupation in situations where evictions may lead to homelessness.<sup>175</sup>

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<sup>169</sup> *Blue Moonlight* paras 16-18.

<sup>170</sup> *Blue Moonlight* para 34.

<sup>171</sup> See Wilson (2009) *South African Law Journal* 289.

<sup>172</sup> *Blue Moonlight* para 37.

<sup>173</sup> *Blue Moonlight* para 40.

<sup>174</sup> *Blue Moonlight* para 39.

<sup>175</sup> *Blue Moonlight* para 40. The Constitutional Court's decision in *Blue Moonlight* appeared to turn, to some extent, on two considerations linked to the owners' intention in relation to the property. The Court specifically emphasised the fact that the owner of the property was aware of the occupation of the property when it purchased it (*Blue Moonlight* para 40). In fact, the owner had bought the property with the intention of evicting the occupiers and redeveloping the property for higher-income residents. The Court also considered it relevant that the owner intended to use the property for commercial purposes and not as a home (*Blue Moonlight* para 40). By highlighting these factors, the Court left open the question whether an eviction would be just and equitable in instances where an owner was either unaware of the occupation when she purchased the property or intended to use the property as a home.

This nuanced position was further etched out in *Skurweplaas*. In this case, the Constitutional Court specified that it would not be just and equitable for a court to authorise an eviction without ensuring that such eviction would not lead to homelessness prior to the provision of alternative accommodation.<sup>176</sup> The Court thus reinforced the need for a linkage between the date of the eviction and the date upon which the municipality must provide alternative accommodation to ensure that vulnerable occupiers are not rendered homeless in the interim.<sup>177</sup>

In *Skurweplaas* and *Mooiplaats* the Constitutional Court further confirmed the approach taken in *Blue Moonlight* that the right to ownership cannot be regarded as wholly unqualified.<sup>178</sup> In these cases the Court reiterated that owners may have to be patient while their ownership rights are temporarily restricted until alternative accommodation could be provided.<sup>179</sup> Finally, the Court also considered the fact that the owner of the property was not going to use the property “gainfully in the foreseeable future”,<sup>180</sup> which the Court held to be a factor militating against a speedy eviction.<sup>181</sup>

These pronouncements have effectively resulted in a new regime in housing and property relations in terms of which the right to temporary emergency shelter may, on occasion, trump property owners’ unlimited rights to enjoy their property.<sup>182</sup> Although the limitation of ownership rights is usually temporary, in *Modderklip* the SCA (and the Constitutional Court) alluded to the fact that the limitation of property rights may have a potentially permanent effect in instances where the state unreasonably fails or refuses to provide alternative shelter or permanent housing. This is evident from the Court’s references to the deprivation of property and even expropriation.<sup>183</sup> The Court, however balanced these effects carefully by stating that such limitation may, in cases where the state unreasonably fails or refuses to provide alternative shelter, entitle the owner to compensation from the state.<sup>184</sup>

### 3.4 Municipal provision of alternative accommodation

The Constitutional Court in *PE Municipality* enunciated various important aspects that a court would have to consider prior to authorising an eviction order. These include: the degree of emergency or desperation that drove people to find accommodation,<sup>185</sup> whether the community is settled and would be uprooted by an eviction order,<sup>186</sup> and

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<sup>176</sup> *Skurweplaas* para 13.

<sup>177</sup> *Skurweplaas* para 13.

<sup>178</sup> *Skurweplaas* para 11; *Mooiplaats* para 17.

<sup>179</sup> *Skurweplaas* para 11; *Mooiplaats* para 17.

<sup>180</sup> *Skurweplaas* para 12; *Mooiplaats* para 18.

<sup>181</sup> *Skurweplaas* para 12; *Mooiplaats* para 18.

<sup>182</sup> Wilson (2009) *South African Law Journal* 270-290.

<sup>183</sup> *Modderklip* (SCA) paras 43-44.

<sup>184</sup> *Modderklip* (SCA) paras 43-44; Wilson (2009) *South African Law Journal* 289.

<sup>185</sup> *PE Municipality* para 26.

<sup>186</sup> *PE Municipality* para 27.

the availability of alternative accommodation, even if it is temporary accommodation (especially if it is a settled community).<sup>187</sup> The Court also asserted that there may be other relevant factors that a court would have to have due regard to depending on the particular circumstances of the case,<sup>188</sup> indicating that the list of considerations is not closed.<sup>189</sup>

In *Blue Moonlight*, the Constitutional Court considered the municipality's obligations in relation to providing alternative accommodation. The Court emphasised that all three branches of government are mandated to realise the right of access to adequate housing in cooperation with each other.<sup>190</sup> This however, did not mean that local government escaped responsibility for funding emergency accommodation to give effect to Chapter 12 of the National Housing Code. The Court found that absolute, inflexible divisions in governmental responsibilities are not appropriate. There is thus no basis in law to suggest that local government is not entitled to self-fund, especially in relation to emergencies where it is ideally suited to "react, engage and plan around the needs of local communities".<sup>191</sup>

The Court specifically stated that the very unpredictable nature of emergency situations would mean that local government cannot always rely on an application to the provincial sphere of government to fund the provision of alternative accommodation. That would go against the very nature of an emergency policy.<sup>192</sup> Thus, municipalities must make provision for flexible plans in order to realise their obligations in terms of section 26 of the Constitution.<sup>193</sup>

The issue at the core of *Blue Moonlight* was the constitutionality of the municipality's housing policy, which differentiated between those relocated by the municipality itself (usually from "bad buildings" in inner city Johannesburg) and those evicted by private landowners. The policy provided that those evicted at the hand of the City would be entitled to temporary accommodation if such eviction would lead to homelessness, while those evicted by private owners were not entitled to commensurate benefits. The question before the Court was whether the differentiation in the policy could be considered reasonable in the light of the *Grootboom* judgment.<sup>194</sup> The Court stated that

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<sup>187</sup> *PE Municipality* para 28.

<sup>188</sup> *PE Municipality* para 30. See also *Shulana Court* para 13.

<sup>189</sup> *PE Municipality* para 30. See also *Shulana Court* para 13.

<sup>190</sup> *Blue Moonlight* para 42.

<sup>191</sup> *Blue Moonlight* para 57 read with para 47.

<sup>192</sup> *Blue Moonlight* para 63.

<sup>193</sup> *Blue Moonlight* para 66.

<sup>194</sup> *Blue Moonlight* para 89.

the differentiation fails to acknowledge the dire need for housing that is particularly great for those who are rendered homeless. Moreover the Court asserted that this policy fails to provide for the needs of those affected by evictions, stating that it matters little to an evicted occupier who the evictee is.<sup>195</sup> The Court thus found that this differentiation was unreasonable and consequently unconstitutional,<sup>196</sup> thereby confirming the obligation on the City to provide alternative accommodation in cases where private owners seek evictions.

In *Skurweplaas* and *Mooiplaats*, the Constitutional Court expanded the principles laid down in *Blue Moonlight*, to clarify that, even where occupiers had not been in occupation of the land for a long period of time, alternative accommodation should be provided to the occupiers.<sup>197</sup> In *Mooiplaats* the Court stated that although the short period of occupation might be a relevant consideration, a court would still be obliged to consider all the relevant circumstances, including whether an eviction would lead to homelessness.<sup>198</sup>

From these dictates, it is clear that the state is burdened with a duty to take positive steps in order to give effect to the right of access to adequate housing by providing temporary alternative accommodation in the event that an eviction would lead to homelessness.<sup>199</sup> The case law developed in relation to alternative accommodation also makes clear that municipalities are obliged to take positive action to provide alternative accommodation to evictees and will no longer be allowed to rely on the escape hatch of provincial or national responsibility.

### 3.5 “Adequate” alternative accommodation

Although the jurisprudence in relation to housing and eviction law has affirmed that the state (and particularly municipalities) is obliged to provide alternative accommodation in instances where homelessness may ensue from an eviction, the jurisprudence has largely failed to address what constitutes “adequate” alternative accommodation. In particular, the courts have not clearly set out what adequate accommodation would mean in high and medium density urban and peri-urban contexts.

The Emergency Housing Programme (EHP) provides a policy framework for the provision of alternative accommodation in a variety of instances. Although the requirements laid out in the EHP are not necessarily determinative of what would constitute adequate alternative accommodation, these requirements have been relied on as guidelines to

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<sup>195</sup> *Blue Moonlight* para 92.

<sup>196</sup> *Blue Moonlight* para 95.

<sup>197</sup> *Skurweplaas* para 14; *Mooiplaats* para 16.

<sup>198</sup> *Mooiplaats* para 16.

<sup>199</sup> Wilson (2009) *South African Law Journal* 289.

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determine the “absolute bare minimum” content in relation to housing.<sup>200</sup> The EHP sets out specific requirements in relation to what alternative accommodation should be provided. These requirements were supplemented in the Constitutional Court case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Joe Slovo)*.<sup>201</sup>

In *Joe Slovo* the Court authorised the eviction of a large group of occupiers subject to a set of strict requirements in relation to the state’s provision of alternative accommodation. In this case, the Court endorsed relocating the residents to Temporary Residential Units (TRUs) in terms of the EHP. However, in doing so, the Court set out in detail the nature and specifications of temporary accommodation to be provided in future, as well as a detailed timetable for the relocation.<sup>202</sup> In ordering that all existing and future TRUs had to comply with the certain minimum specifications or be of superior quality, the Court effectively gave minimum content to alternative accommodation provided by the state. The Court prescribed that TRUs had to:

- be at least 24m<sup>2</sup> in size;
- be accessible by tarred road;
- be individually numbered for identification;
- have walls constructed of Nutec;
- have galvanised corrugated iron roofs;
- be supplied with electricity by a prepaid electricity meter;
- be located within reasonable proximity of communal ablution facilities;
- make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and
- make reasonable provision for fresh water, which may be communal.<sup>203</sup>

Arguably, the standards laid out for TRUs could be extrapolated and used in an urban context. After all, the EHP states that the standards apply to both urban and rural areas. However, it is unclear how these standards would be applied in high-density urban and peri-urban settings where there may be considerable constraints on space.

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<sup>200</sup> See for example *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 (WCC) para 115. In this case, the City of Cape Town argued that the minimum requirements in terms of the EHP constituted the full obligations of the City to provide permanent sanitation in terms of the Upgrading of Informal Settlements Programme. The Western Cape High Court disagreed however, stating that the minimum requirements in terms of the EHP would constitute only the bare minimum and would be inappropriate for more permanent forms of housing.

<sup>201</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC).

<sup>202</sup> *Joe Slovo* paras 5 and 7.

<sup>203</sup> *Joe Slovo* para 7.

Apart from these detailed specifications, the South African courts have laid down certain broad legal requirements that the provision of alternative accommodation must comply with. In the *Blue Moonlight* case, the Constitutional Court underscored the importance of the element of the location of alternative accommodation provided. This was clear from the Court's insistence that alternative accommodation should be provided as close as reasonably possible to the property from which the occupiers were evicted.<sup>204</sup> The courts have also indicated that when providing alternative accommodation, municipalities would have to have regard to the proximity of the alternative accommodation to schools, public amenities and the evictees' places of employment or access to employment opportunities.<sup>205</sup> Moreover, in *Baartman v Port Elizabeth Municipality (Baartman)*<sup>206</sup> the SCA held that alternative accommodation should entail a measure of tenure security. In this case the SCA set aside an eviction order, stating that it would be contrary to the public interest to evict the occupiers only for them to be rendered subject to eviction once again.<sup>207</sup> Alternative accommodation should thus include a guarantee against eviction, albeit limited.<sup>208</sup>

These principles, however, do little more than frame some essential legal requirements of alternative accommodation, leaving a wide margin to municipalities regarding the provision of alternative accommodation. Possibly due to a lack of clarity in relation to the broader legal requirements for alternative accommodation, some municipalities have devised and implemented alternative accommodation models that violate key human rights. For example, the City of Johannesburg has adopted a shelter-based "managed care" model that has various problematic house rules. In terms of this model, occupiers who are evicted from their homes are housed in gender-differentiated dorms with virtually no privacy, effectively resulting in the separation of families. This model further subjects occupiers to a day-time lock-out, and the City has also limited the time period in terms of which persons are able to remain in such shelters to 6 months or a maximum of 12 months, after which it reserves the right to unilaterally evict an occupier without a court order. Although the courts have not yet clarified the full range of parameters that would constitute adequate alternative accommodation, the model proposed by the City clearly flouts a number of human rights as entrenched in the Constitution. A current court case, *Dladla v City of Johannesburg (Dladla)*,<sup>209</sup> is seeking to challenge the City's

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<sup>204</sup> *Blue Moonlight* para 104(c)(iv). See also S Wilson "Curing the Poor: State Housing policy in Johannesburg after *Blue Moonlight*" (2012) 5 *Constitutional Court Review* (forthcoming).

<sup>205</sup> See *Joe Slovo* paras 249, 254 and 256; and *Rand Properties* (SCA) para 44. Although Ngcobo J's judgment in *Joe Slovo* acknowledges the importance of locality in the provision of alternative accommodation and the significant disruptive effects of alternative accommodation that is located far away from where occupiers originally resided, the issue of locality was largely glossed over by the remainder of the Court. For Ngcobo J's statements on locality of alternative accommodation, see *Joe Slovo* paras 241, 249 and 254-258.

<sup>206</sup> *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA). See also Wilson (2012) *Constitutional Court Review* (forthcoming).

<sup>207</sup> *Baartman* para 18.

<sup>208</sup> Wilson (2012) *Constitutional Court Review* (forthcoming).

<sup>209</sup> *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another*, South Gauteng High Court, Case No 39502/2012. For more details on the case and to access all the court papers, visit the SERI website: <http://www.seri-sa.org/index.php/litigation-9/cases>.

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shelter model and may shed some light on the concept of “adequacy” in relation to alternative accommodation.

## 3.6 Accountability of municipal office bearers to enforce court orders

Responding to apparent municipal indifference to court orders to provide alternative accommodation, there have been a number of recent cases that have resulted in illuminating judgments regarding the accountability of municipal office bearers. In *Mchunu*, it was established that individual office bearers within a municipality can be held personally responsible for the state’s failure to perform on specific obligations. In the Durban High Court, Hollis AJ determined that the Mayor of eThekweni, the City Manager and the Director of Housing of eThekweni are “constitutionally and statutorily obliged to take all the necessary steps” to ensure that court orders are complied with. If they do not, they may be held in contempt and fined or imprisoned.

The *Hlophe* case reiterated these principles. In this case Satchwell J directed the Executive Mayor, City Manager and Director of Housing for the City of Johannesburg to personally explain why the City had not acted to provide shelter to the homeless, over 18 months after the *Blue Moonlight* decision requiring it to do so. The Court further compelled these office bearers to take all the steps necessary to provide shelter to the occupiers within two months. If they fail to do so, the Mayor, City Manager and the Director of Housing could be held in contempt, and be fined or imprisoned as a result. The Court was critical of the City’s lackadaisical attitude, stating that the City could not simply “throw its hands up in horror” every time it had to house people about to be evicted.<sup>210</sup>

These cases reinforced the substantive and procedural legal protections afforded to both unlawful occupiers and private property owners by providing for a means to hold municipal officials personally liable for their failure to adhere to court orders.

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<sup>210</sup> *Hlophe* para 26.

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# **Unpacking arguments raised by municipalities**

Local authorities have frequently raised a number of arguments to justify their inability, incapacity or delay in providing alternative accommodation to unlawful occupiers who would be rendered homeless by eviction proceedings. These arguments include: deference/separation of powers, resource constraints, 'jumping the queue', inter-governmental competences, procurement policies as reason for delay, and qualifying criteria for alternative accommodation.

The courts have considered these arguments in detail and assessed their validity in the light of the constitutional and legislative housing obligations on the state. In responding to the often legitimate concerns of municipalities, the South African courts have navigated the complexities inherent in these arguments and set out carefully considered guidelines and rules to take account of these arguments while simultaneously giving expression to the right of access to adequate housing of impoverished occupiers.

## 4.1 Deference / separation of powers

One of the most prevalent arguments raised by the state in relation to its failure to provide alternative accommodation to those facing evictions is the argument that courts are not institutionally appropriate forums to review or determine the appropriateness of the housing programmes and policies. According to this line of reasoning, the courts should adopt a deferential approach to the other branches of government, providing them the freedom to structure and implement housing policies and programmes as they deem fit. This is based in part on the argument that judges do not have the necessary technical expertise to make the types of wide-ranging, polycentric decisions that arise in the context of housing programmes and policy.<sup>211</sup>

<sup>211</sup> In this regard, see K McLean "Towards a Framework for Understanding Constitutional Deference" (2010) 25(2) *South African Public Law* 451-457; McLean *Constitutional Deference* 72-78. The deference argument is also partially based on a specific and narrow interpretation of democratic legitimacy in terms of which courts (a non-democratically elected branch of government) should not make determinations in relation to the structure, implementation or programmatic design of housing policy, which should be left to the executive and legislature as the democratically elected arms of government. According to this argument, courts are democratically ill-suited to make such determinations as they cannot be held directly accountable by the electorate. For an explanation of this conception of deference, see McLean (2010) *South African Public Law* 446-451; McLean *Constitutional Deference* 64-72. However, this notion ignores the fact that South Africa is a constitutional democracy in which the state at all levels and across all branches is obliged to uphold the legal principles enshrined in the Constitution, and that courts are obliged to interpret and adjudicate these principles. In other words, to the extent that the Constitution is a democratic instrument, courts are obliged to interpret it as part of the democratic order. In a similar vein, see D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22(3) *Stellenbosch Law Review* 614-138; McLean *Constitutional Deference* 108. See also the comments made in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) paras 96-106.

This argument was perhaps most unambiguously raised in *Minister of Health v Treatment Action Campaign (No 2) (TAC)*.<sup>212</sup> In this case, the national government raised separation of powers concerns in relation to how the court should approach the adjudication of socio-economic rights cases.<sup>213</sup> The state's argument was twofold. First, the state argued that the Constitutional Court should show deference to the decisions of the executive branch of government in relation to the formulation and implementation of its policies and should consequently refrain from interfering with such policies.<sup>214</sup> Second, the state argued that, if the Court found that it had failed to comply with its constitutional obligations, the Court should show deference to the executive in relation to the remedy it granted.<sup>215</sup> Both arguments were based on the notion that it would be institutionally and constitutionally inappropriate for the courts to review or adjudicate on matters that would impact on the formulation and implementation of government policy.<sup>216</sup>

In response to these arguments, the Constitutional Court recognised that courts may in certain instances be restrained by the separation of powers. In particular, the Court stated:

*Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may ... have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.*<sup>217</sup>

In relation to the question of what an appropriate remedy would be in socio-economic rights cases, the Court further highlighted the need for sensitivity in relation to its powers. The Court indicated that courts have to remain vigilant of the often vague lines that delimitate the terrain of the various arms of government.<sup>218</sup> Nonetheless, the Court stated that this sensitivity did not mean that courts could not or should not make orders that have an impact on government policy.<sup>219</sup> According to the Court,

*[t]he primary duty of courts is to the Constitution and the law, which they must apply 'impartially and without fear, favour or prejudice'. The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'.*

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<sup>212</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC). Although the TAC case did not expressly relate to the right to housing, it did relate to the socio-economic right of access to healthcare services as contained in section 27(1)(a) of the Constitution. As the Constitutional Court has indicated that a similar approach to the realisation and adjudication of all socio-economic rights are to be followed, the case remains relevant for purposes of this report.

<sup>213</sup> McLean (2010) *South African Public Law* 465.

<sup>214</sup> TAC para 22.

<sup>215</sup> TAC para 22. Specifically the state argued that the Constitutional Court should award a declaration of rights rather than a declaration of constitutional invalidity or a mandatory interdict.

<sup>216</sup> TAC para 97.

<sup>217</sup> TAC para 38. See also McLean (2010) *South African Public Law* 465.

<sup>218</sup> TAC para 98.

<sup>219</sup> TAC para 98.

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*Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.<sup>220</sup>*

The Constitutional Court also responded to these arguments in the *Grootboom* judgment. *Grootboom* also specifically acknowledged the institutional complexity of separation of powers concerns and recognised that the argument holds merit in certain instances. The Constitution does, after all, mandate the state with the progressive realisation of the right to adequate housing, within available resources.<sup>221</sup> It is in this light that the Court stated that “the precise contours and content of the measures adopted [by the state] are primarily a matter for the legislature and executive”.<sup>222</sup> However, the measures adopted and policy implemented must be reasonable.<sup>223</sup> This means that although the executive branch has certain leeway in relation to the specific content of the right and the measures through which to realise the right, the courts would still be capable of reviewing the measures adopted by the state and to declare those measures unconstitutional if they are not reasonable.<sup>224</sup>

In *Grootboom* the Constitutional Court set out the general parameters for a reasonable policy. However, when considering reasonableness courts would not enquire whether “other more desirable or favourable measures could have been adopted”, or whether public money could have been better spent. Reasonableness requires the courts to adopt a flexible approach, in terms of which a wide range of possible measures could be adopted by the state in order to comply with its constitutional obligations. This position reflects a considerable degree of deference in which the state has a relatively broad discretion in relation to the policy it adopts, provided that the policy is reasonable.

However, as established in cases such as *Grootboom* and *TAC*, the people of South Africa have the right to challenge policies and programmes that fail to progressively realise their rights.

Another argument that is frequently raised by municipalities and policy-makers alike and that is closely linked to the deference argument, is the argument that litigation,

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<sup>220</sup> *TAC* para 99 (footnotes omitted).

<sup>221</sup> Section 26 of the Constitution.

<sup>222</sup> *Grootboom* para 41.

<sup>223</sup> *Grootboom* para 41.

<sup>224</sup> *Grootboom* para 41.

and specifically housing rights litigation, has the unintended effect of derailing government planning.<sup>225</sup> This occurs in two ways. First, litigation may have the effect of suspending the implementation of housing policy or programmes in instances where the reasonableness of such programmes is brought into questions. Secondly, litigation often results in the housing policy or programme being found unreasonable and consequently unconstitutional.

However, very often, litigation in relation to housing and eviction law is not about the state's plans as they stand, but rather the state's failure or omission to plan and budget at all. It is all very well to say that a court should not interfere with the state's existing priorities, but that is seldom what is at issue. What the eviction cases have highlighted is a failure to have any regard at all to emergency housing need.

## 4.2 Resource constraints

Another frequent assertion by the state - as raised in *Blue Moonlight*<sup>226</sup> and *Hlophe*<sup>227</sup> - is that it lacks the necessary resources to provide alternative accommodation to occupiers when they are evicted. According to this contention, not only is it not possible for the state to provide alternative accommodation, but the state is not obliged to do more in relation to housing than its existing budgeted line items allow for.<sup>228</sup>

The availability of resources is certainly an important factor, which is recognised in section 26(2)'s internal limitation on the state's obligation to realise the right of access to housing. Moreover, as clarified in *Grootboom*, the availability of resources at the state's disposal is also an important factor when it comes to determining whether the measures adopted by the state to fulfil its housing obligations are reasonable.<sup>229</sup>

Nonetheless, to the extent that the state argues - as the City of Johannesburg did in *Blue Moonlight* - that it can stand by existing housing budgets regardless of what factors and which groups of people the budgets cater for, this stance has been rejected by the courts. In *Blue Moonlight*, the Constitutional Court forcefully rejected the specific resource constraints argument of the City. It determined that the reasonableness of the City's housing policy cannot be limited by budgetary decisions that may be made under a misguided understanding of the housing obligations of the various branches of government.<sup>230</sup> Importantly, the Court stated that "it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations".<sup>231</sup> The Court also lambasted the practice of the City to withhold information about its financial position, while contending

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<sup>225</sup> See, for example, *Modderklip* para 24, where this argument is employed by the state.

<sup>226</sup> *Blue Moonlight* para 5.

<sup>227</sup> *Hlophe* paras 13 and 17, where the City of Johannesburg argued that "it would be impossible for the City to accommodate the [occupiers] as outlined in the order" due to "a lack of available buildings and financial and other resources".

<sup>228</sup> *Blue Moonlight* para 72.

<sup>229</sup> *Grootboom* para 46.

<sup>230</sup> *Blue Moonlight* para 74.

<sup>231</sup> *Blue Moonlight* para 74.

that it has no resources to comply with its constitutional and statutory responsibilities.<sup>232</sup> It is therefore clear that the state cannot evade its obligations through baldly denying having the budget to comply with its housing-related obligations. Any failure to realise the right of access to housing will have to be justified for it to be accepted by the courts.

### 4.3 ‘Jumping the queue’

Due to a severe housing supply shortage in South Africa, it is common for many households to wait extended periods of time before being allocated state-subsidised housing. This reality lays the basis for another argument frequently employed by the state, which is that, by ordering the state to provide alternative accommodation, the courts are allowing or encouraging “queue jumping”, which should not be tolerated. According to this view, unlawful occupiers who litigate against the risk of being rendered homeless in order to obtain temporary alternative accommodation are “opportunists” who attempt to gain preference over those who have followed the prescribed legal procedures and patiently await state-subsidised housing.<sup>233</sup> This argument was employed by the state in *Modderklip*,<sup>234</sup> *Blue Moonlight*,<sup>235</sup> and *PE Municipality*.<sup>236</sup>

This argument is flawed on a number of levels. As exposed in a recent research report by the Socio-Economic Rights Institute of South Africa (SERI) and the Community Law Centre (CLC), the existence of a waiting list that operates in a fair and rational manner to allocate state-subsidised housing on a “first come first served” basis is actually “a myth”.<sup>237</sup> Instead, according to the report,

*there are a range of highly differentiated, and sometimes contradictory, policies and systems in place to respond to housing need. These range from housing demand databases and the National Housing Needs Register (NHNR) which attempt to respond flexibly to the rapidly changing nature of housing need; lottery systems, which allocate housing to qualifying beneficiaries by chance, in a manner that has nothing to do with need or the length of time spent of the list; and other, highly localised, idiosyncratic and often community-based methods of allocating housing developed to adapt to local situations.*<sup>238</sup>

<sup>232</sup> *Blue Moonlight* para 73.

<sup>233</sup> See, per example, *Blue Moonlight* paras 93-94.

<sup>234</sup> See *Modderklip* para 25.

<sup>235</sup> See *Blue Moonlight* paras 93-94.

<sup>236</sup> See *PE Municipality* paras 54-55. See also *Shorts Retreat* para 8, where the SCA rebuts the High Court’s classification of unlawful occupiers as “queue jumpers”.

<sup>237</sup> See SERI and CLC *‘Jumping the Queue’, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa* (2013).

<sup>238</sup> SERI and CLC *‘Jumping the Queue’, Waiting Lists and Other Myths* 80.

As such, state-subsidised housing opportunities are allocated in varied and often random ways, and the accusation of “jumping the queue” does not hold up.

The courts have further rejected this “jumping the queue” argument in so far as it relates to desperate groups and communities that may be rendered homeless as result of an eviction. In relation to desperate communities, the SCA in *Modderklip* held that the unlawful occupiers of the portion of a farm could not be considered “queue jumpers”. In coming to this conclusion, the SCA considered that the occupiers did not intend to occupy land or property with the objective of obtaining precedence over other potential housing beneficiaries.<sup>239</sup> Rather, the occupiers in *Modderklip* had occupied the property out of desperation as they had “nowhere else to go”.<sup>240</sup>

Moreover, the courts have also rejected the “queue jumping” argument in instances where a community may be rendered homeless as result of an eviction. In these cases the unlawful occupiers do not claim permanent housing before anyone else who should benefit in terms of the usual processes for the allocation of state-subsidised housing.<sup>241</sup> Rather these occupiers simply seek temporary alternative accommodation to prevent homelessness.<sup>242</sup> Unlawful occupiers in this position do not purposely invade buildings or land with the intention of destabilising the housing programme.<sup>243</sup> They simply live in these buildings because they have nowhere else to go, and when threatened with eviction have no other recourse but to approach the courts.

## 4.4 Inter-governmental competences

A further argument employed by municipalities in order to justify their unwillingness to provide alternative accommodation is that they do not have a mandate or obligations in terms of housing legislation and policy to do so. According to this argument each sphere of government has specific responsibilities in relation to the provision of housing, and that the particular sphere present before the court has exhausted its obligations in terms of the housing policy. This argument was raised by the City of Johannesburg in various cases, including *Blue Moonlight* and *Hlophe*.<sup>244</sup> Although this argument is related to funding, and is therefore closely related to section 4.2 of this report, it is also based on competences and authority to act in terms of the legal framework.

*Grootboom* affirmed that the Constitution envisages that each sphere of government is endowed with distinct but complementary powers and functions in relation to housing.<sup>245</sup> As a result, the Constitution requires cooperation and consultation between the three spheres of government - local, provincial and national - when performing their housing

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<sup>239</sup> *Modderklip* (SCA) para 25.

<sup>240</sup> *Modderklip* (SCA) para 25.

<sup>241</sup> *Blue Moonlight* para 93; *PE Municipality* para 55.

<sup>242</sup> *Blue Moonlight* paras 93-94.

<sup>243</sup> *Blue Moonlight* paras 93-94; *PE Municipality* para 55; *Shorts Retreat* para 8.

<sup>244</sup> See specifically *Blue Moonlight* para 50 and *Hlophe* para 12.

<sup>245</sup> *Grootboom* para 39.

obligations.<sup>246</sup> According to the Constitutional Court, a reasonable policy would therefore require clearly allocated responsibilities to the different spheres of government, while ensuring that the necessary financial and human resources are available in order to enable the different spheres to realise the right to housing.<sup>247</sup>

This position was further developed in *Blue Moonlight*. In this case the City of Johannesburg argued that its obligations in relation to the provision of housing were secondary to the other spheres of government and limited in scope, especially in relation to the provision of temporary alternative accommodation. According to the City, its only obligation in the specific circumstances was to apply to provincial government for funding and assistance in terms of the Emergency Housing Programme (EHP). Once this application was refused, the City argued that it had exhausted its responsibilities in relation to the occupiers.<sup>248</sup> The City thus argued that it was not primarily responsible for the realisation of the right to housing, and was “entirely dependent” on the policy framework and funding from the provincial and national spheres of government.<sup>249</sup> The Constitutional Court held that the City has a fundamental role to play in the provision of housing.<sup>250</sup> It further asserted that the division of responsibilities between the different spheres of government should not be “absolute or inflexible”.<sup>251</sup> The legislative framework does not require funding for housing developments and emergency accommodation to originate solely from provincial or national government.<sup>252</sup> In particular, the Court emphasised that there may be a duty on local government to self-fund its housing development projects in certain instances.<sup>253</sup> This is especially so in relation to emergency housing situations, where the City is best suited to “react to, engage with and prospectively plan around the needs of local communities”.<sup>254</sup>

The City attempted to rebuff its responsibilities to plan for, develop and fund alternative emergency accommodation by arguing that it was incapable of budgeting for costs that were not justified by a current need.<sup>255</sup> However, this argument seems to hold little water in relation to the provision of temporary emergency accommodation, since the very

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<sup>246</sup> *Grootboom* paras 39-40. See also *Blue Moonlight* paras 23 and 42.

<sup>247</sup> *Grootboom* paras 39-41.

<sup>248</sup> *Blue Moonlight* paras 48-49.

<sup>249</sup> *Blue Moonlight* para 50. See also the City of Johannesburg’s assertion in *Hlopho* para 12 that it was unable to scale up the provision of alternative accommodation “without financial resources and assistance from other spheres of government”.

<sup>250</sup> *Blue Moonlight* para 46.

<sup>251</sup> *Blue Moonlight* para 54.

<sup>252</sup> *Blue Moonlight* para 63.

<sup>253</sup> *Blue Moonlight* para 57.

<sup>254</sup> *Blue Moonlight* para 57.

<sup>255</sup> *Blue Moonlight* para 62.

nature of emergencies is their unpredictability.<sup>256</sup> The Court stated that such an *ad hoc* approach to emergency housing needs was untenable since this approach would render the purpose of an emergency housing policy nugatory.<sup>257</sup> It is therefore clear that the City - and any municipality - is duty-bound to provide for and fund temporary alternative accommodation to those facing homelessness due to emergency situations or evictions.

## 4.5 Procurement policies as reason for delay

The state regularly blames its often slow and bureaucratic public procurement processes for the delay in being able to provide temporary alternative accommodation to unlawful occupiers who may be rendered homeless. The state has often argued that it is required to strictly follow the procurement processes set out in legislation, as well as its Supply Chain Management Policy, which may take considerable time, rendering it incapable of providing alternative accommodation speedily.

This argument was expressly raised in the *Hlophe* case. In this case, the City of Johannesburg argued that it was unable to provide temporary emergency accommodation to a number of evictees for the foreseeable future due to a lack of available buildings which could be utilised for such alternative accommodation. Among the various reasons raised by the City to justify this inability to acquire buildings for this purpose was that the “the time period for the completion of supply chain management and procurement policies”.<sup>258</sup>

The South Gauteng High Court, however, did not entertain this argument. Although Satchwell J did not expressly rebut this argument, she did state that the municipal reports filed by the City failed to detail the steps taken by the City to provide alternative accommodation and were preoccupied with the “difficulties” confronting the City. The reports thus failed to find “solutions”.<sup>259</sup> This statement seems to indicate that the court considered the City’s excuses, including burdensome public procurement processes, unfounded. The court recognised that the City had an obligation to provide alternative accommodation to evictees and was thus required to conduct the “necessary planning and preparations” to meet those obligations.<sup>260</sup>

The legal and policy framework related to public procurement also does not provide for absolute or inflexible processes. Public procurement processes are regulated by various pieces of legislation, including the Public Finance Management Act 1 of 1999, which applies to state entities at national and provincial level as well as state-owned enterprises, and the Municipal Finance Management Act 56 of 2003 (MFMA), which regulates procurement processes for municipalities. In terms of section 111 of the MFMA, each municipality must develop their own Supply Chain Management Policy, which should set out the policy for the procurement of goods and services by such municipality. This policy has to comply

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<sup>256</sup> *Blue Moonlight* para 62.

<sup>257</sup> *Blue Moonlight* para 63.

<sup>258</sup> *Hlophe* para 17.

<sup>259</sup> *Hlophe* para 21.

<sup>260</sup> *Hlophe* para 23.

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with the overall procurement framework.<sup>261</sup> Section 112 of the MFMA also provides that the Supply Chain Management Policy of a municipality must provide for:

- (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;*
- (b) when a municipality or municipal entity may or must use a particular type of process; [and]*
- (c) procedures and mechanisms for each type of process...*

This indicates that the MFMA envisages a relatively flexible public procurement regime that makes room for a number of different procurement mechanisms to serve a multitude of situations. It can also be argued that this flexible approach foresees the inclusion of procurement mechanisms that provide for the purchase of land in emergency situations.

Most municipalities have provisions in their Supply Chain Management policies which would enable expedited procurement processes in emergency situations. For example, section 21 of the City of Johannesburg's Supply Chain Management Policy provides for deviations from the normal procedures in certain exceptional circumstances. In terms of section 21(1)(a) of the City's Supply Chain Management Policy, the City may deviate from normal procurement procedures in "emergency or exceptional circumstances".

The City of Johannesburg, like many other municipalities, also has a Supply Chain Management Policy in relation to the purchase of land specifically. Although this policy does not provide expressly for deviations in the acquisition of land, it does provide for deviations related to the use, control or transfer of the property owned by the municipality or municipal entities in chapter 5 of the policy. Section 33(2) provides for such deviations if it would be in the public interest or "in consideration of the plight of the poor". In this regard, section 37 also specifically provides that the deviation policy may include deviations that seek to fulfil the housing policies of the City and the Johannesburg Social Housing Company (JOSHCO), a municipality-owned rental housing company. Municipalities are therefore often capable of utilising expedited procurement procedures such as these but have tended to refrain from employing these mechanisms.

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<sup>261</sup> Section 112 of the MFMA.

## 4.6 Qualifying criteria for alternative accommodation

The National Housing Code prescribes a set of generic qualifying criteria that persons or households must satisfy before they would be eligible for state-subsidised housing assistance in terms of the national housing programmes.<sup>262</sup> This means that households that are unable to meet the qualifying criteria would generally be unable to access state housing assistance. It is in this context that municipalities have argued that the obligation to provide alternative accommodation to all unlawful occupiers who may be rendered homeless due to an eviction effectively results in a number of occupiers who would not qualify as beneficiaries in terms of the National Housing Code circumventing the qualifying criteria. Municipalities have argued that this places undue financial and logistical burdens on them to provide housing to those that are not entitled to housing in terms of the Code. Consequently, municipalities have claimed that they are entitled to determine whether a person seeking temporary alternative accommodation is eligible for permanent state-subsidised housing before providing such alternative accommodation.<sup>263</sup>

This assertion contradicts the principle implied in *Grootboom* – by the pronouncement that a housing policy would be constitutionally unreasonable if it did not provide for those in desperate need and emergency conditions – that a municipality is obliged to provide alternative accommodation to any occupier that may be at risk of homelessness due to an eviction, regardless of whether such occupier qualifies for state-assisted housing in terms of the generic eligibility criteria.<sup>264</sup> This approach was further confirmed in the *Blue Moonlight* and *PE Municipality* judgments.<sup>265</sup>

The EHP also expressly provides that the normal qualifying criteria in relation to housing assistance does not apply in relation to occupiers who require emergency housing in terms of the Programme.<sup>266</sup> Instead, the EHP provides that the Programme may benefit “all affected persons”.<sup>267</sup> As the EHP provides that an eviction would qualify as an emergency situation, the EHP could be utilised to provide housing assistance to all persons who will be rendered homeless due to an eviction. This effectively means that people who fall outside the traditional eligibility requirements may qualify for emergency housing, including persons with a monthly income exceeding R3 500 a month, persons without dependants, persons who are not first-time home owners, persons who have previously received housing assistance or currently own a residential property, and, in certain instances, foreigners or illegal immigrants.<sup>268</sup>

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<sup>262</sup> See the DHS “Technical and General Guidelines” Part A of Part 3 Vol 2 of the National Housing Code (2009) 109-114 for the generic qualifying criteria. It should be mentioned that the various national housing subsidy programmes occasionally have specific eligibility criteria over and above the generic qualifying criteria.

<sup>263</sup> See specifically *Changing Tides* paras 49-53.

<sup>264</sup> *Grootboom* paras 44 and 99.

<sup>265</sup> See, generally, the Constitutional Court decisions in *Blue Moonlight* and *PE Municipality* para 29.

<sup>266</sup> DHS “Emergency Housing Programme” 16.

<sup>267</sup> DHS “Emergency Housing Programme” 16.

<sup>268</sup> DHS “Emergency Housing Programme” 16. See also Tissington *A Resource Guide to Housing* 95.

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Despite the case law and the provisions of the EHP referred to above, municipalities have tried to limit the persons it provides alternative accommodation to in a multitude of ways. In *Changing Tides* the City of Johannesburg attempted to make provision of alternative accommodation subject to registration on the City's Expanded Social Package (ESP), a municipal programme to assist indigent households to access basic services at reduced rates.<sup>269</sup>

In its judgment, the SCA stated that by requiring occupiers to register on the ESP prior to the provision of alternative accommodation, the City was attempting to “weed out” those who “in its view would not qualify for assistance on grounds of income, need, ability to find accommodation elsewhere and the like”.<sup>270</sup> The Court stated that this approach would “set in train a bureaucratic process that will inevitably involve delay”, while the occupiers were faced with the imminent threat of eviction.<sup>271</sup> The urgency of the occupiers' pending eviction thus required the state to provide alternative accommodation to all those who required it. If the municipality was intent on proving disqualification at a later stage, it was entitled to put processes in place to do so; however, it was not entitled to make alternative accommodation subject to these processes from the outset.<sup>272</sup> In *Schubart Park*, the municipality also sought to limit those it was required to provide alternative accommodation to by attempting to make the provision of alternative accommodation subject to the terms and conditions it unilaterally dictated to occupiers. The Constitutional Court rejected this “top-down” approach, criticising it as an “inadequate basis for ... proper engagement between the parties.”<sup>273</sup>

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<sup>269</sup> *Changing Tides* para 49.

<sup>270</sup> *Changing Tides* para 50.

<sup>271</sup> *Changing Tides* para 50.

<sup>272</sup> *Changing Tides* paras 49-53.

<sup>273</sup> *Schubart Park* para 50.

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# Conclusion

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**T**his report sets out how the jurisprudence of the South African courts (and in particular the Constitutional Court and SCA) has significantly contributed to the development of the right of access to housing. The jurisprudence has had a definitive role in expanding the substantive and procedural legal protections afforded to unlawful occupiers in relation to eviction law by supplementing the progressive legislative framework with a number of legal principles that should be upheld during eviction cases. These include the obligation to meaningfully engage and the state obligation to provide alternative accommodation in instances where those evicted may be rendered homeless as result of such eviction. The jurisprudence has also been fundamentally important to balancing the often contradictory legal claims and interests inherent in housing and eviction matters. This has been achieved by the development of a new cluster of relationships between the parties involved in eviction proceedings, which has been supplemented by various rights, duties and obligations on the parties involved in these proceedings.

Below is a summary of the obligations of the various parties to eviction proceedings, including private property owners, occupiers and municipalities, as developed through the jurisprudence.

### *The rights and obligations of private property owners*

- At the outset, it is important for private property owners to recognise that their rights to property and ownership are not necessarily paramount. The constitutional scheme has instilled a new paradigm in housing and eviction relations which effectively balances the right to immovable property with the equally relevant right of access to adequate housing.
- Although housing rights do not trump private property rights in all instances, there are cases where this right will supersede property rights. This will usually occur when the interests of the occupiers that are sought to be evicted outweigh the interests of the private property owner. For example, in cases where a property owner aims to use a property for commercial purposes, her commercial interests may be counter-posed by the need to starve off homelessness for occupiers that reside in the property.

- Any limitation of property rights is predominantly temporary in nature and limited in scope. This means that the infringement will continue until the state takes steps to remedy the limitation, usually by providing alternative accommodation to occupiers who could face homelessness if evicted. As the Constitutional Court stated in *Blue Moonlight*, private property owners cannot be “expected to be burdened with providing accommodation to [occupiers] indefinitely” but a “degree of patience should reasonable be expected”.<sup>274</sup>
- In instances where the state unreasonably fails to fulfil its obligations to provide alternative accommodation to those who are unable to provide for themselves, a property owner is entitled to claim constitutional damages for the infringement of her property rights.
- Property owners are obliged to meaningfully engage with the occupiers prior to instituting evictions proceedings.
- Property owners are also required to place sufficient information before a court for it to be able to make a just and equitable decision having regard to all the relevant circumstances.

### *The rights and obligations of unlawful occupiers*

- Unlawful occupiers are granted significant substantive and procedural protections. Most importantly, they may not be evicted without first obtaining a court order that deems such eviction “just and equitable” after having regard to all the relevant circumstances. The availability or likely provision of adequate alternative accommodation would be a crucial consideration in whether an eviction would be just and equitable in the circumstances.
- Occupiers facing eviction proceedings must raise a defence against eviction. Potentially being rendered homeless due to an eviction qualifies as a defence for the purposes of eviction proceedings.
- Occupiers are required to provide sufficient information before a court in respect of their personal circumstances, how they came to occupy the property and why they would be rendered homeless as a result of an eviction.

### *The obligations of municipalities*

- Municipalities must adopt a reasonable housing policy, which provides not only for permanent housing solutions, but also provides for the provision of adequate alternative accommodation for persons who face homelessness due to an eviction.
- Municipalities are required to meaningfully engage with the parties to eviction proceedings.
- Municipalities may be joined to eviction proceedings in instances where the occupiers that face eviction could be rendered homeless due to an eviction.

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<sup>274</sup> *Blue Moonlight* para 100.

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- Municipalities are required to place sufficient information before a court for it to be able to make a just and equitable decision having regard to all the relevant circumstances. A municipality is specifically obliged to provide information about its housing policy and how it would provide alternative accommodation to those who require it upon eviction.
  - Municipalities are constitutionally obliged to provide access to adequate alternative accommodation to occupiers who are evicted from their home and would otherwise be rendered homeless due to such eviction.
  - In light of the *Blue Moonlight* judgment, it is also clear that municipalities are obliged to budget for all categories of persons in desperate or emergency need of housing and, if necessary, municipalities must leverage provincial and/or national funding to do so.

# Bibliography

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## Books / chapters in books

- M Langford, R Stacey and D Chirwa “Water” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2<sup>ed</sup> (2013 Revision Service 5) 53B
- S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010)
- K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009)
- AJ van der Walt *Constitutional Property Law* (2005)
- S Wilson and J Dugard “Constitutional Jurisprudence: The First and Second Waves” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa* (2014) 35-62

## Journal articles

- D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19(1) *South African Journal of Human Rights* 1-26
- D Brand “Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa” (2011) 22(3) *Stellenbosch Law Review* 614-138
- J Dugard “Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in relation to the Provision of Alternative Housing” (2012) 5 *Constitutional Court Review* (forthcoming)
- K McLean “Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*” (2010) 3 *Constitutional Court Review* 223-242
- K McLean “Towards a Framework for Understanding Constitutional Deference” (2010) 25(2) *South African Public Law* 445-470

- G Muller and S Liebenberg “Developing the Law of Joinder in the Context of Evictions of People From Their Homes” (2013) 29 *South African Journal of Human Rights* 554-570
- G Quinot and S Liebenberg “Narrowing the Band: Reasonableness review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa” (2011) 22(3) *Stellenbosch Law Review* 639-663
- A van der Walt “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land Reform Legislation” (2002) *Tydskrif van die Suid-Afrikaanse Reg* 254
- J van Wyk “The Role of Local Government in Evictions” (2011) 14(3) *Potchefstroom Electronic Law Journal* 50-83: <http://www.saflii.org/za/journals/PER/2011/21.pdf> (accessed 30 November 2013)
- S Wilson “Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality” (2009) 126(2) *South African Law Journal* 270-290
- S Wilson “Curing the Poor: State Housing policy in Johannesburg after Blue Moonlight” (2012) 5 *Constitutional Court Review* (forthcoming)
- S Wilson “Litigation Housing Rights in Johannesburg’s Inner City: 2004-2008” (2010) 27 *South African Journal of Human Rights* 127-151

## Research reports / publications

- L Chenwi and K Tissington *Engaging Meaningfully with Government in the Realisation of Socio-Economic Rights in South Africa: A Focus of the Right to Housing* Socio-Economic Rights Institute of South Africa (SERI) & the Community Law Centre (CLC) Research Report (2010): <http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/SER%20Publications/> (accessed 30 November 2013)
- Socio-Economic Rights Institute (SERI) & Community Law Centre (CLC) ‘*Jumping the Queue, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa*’ Research Report (2013): <http://www.seri-sa.org/index.php/research-7/research-reports> (accessed 30 November 2013)
- K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* SERI Research Report (February 2011): <http://www.seri-sa.org/index.php/research-7/resource-guides> (accessed 30 November 2013)

- K Tissington *Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Accommodation in Inner City Johannesburg* SERI Research Report (November 2013): <http://www.seri-sa.org/index.php/research-7/research-reports> (accessed 30 November 2013)
- S Wilson *The Constitutional Right of Access to Adequate Housing* (2012) (unpublished)

## Court judgments

- *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC): <http://www.saflii.org/za/cases/ZACC/2009/31.html> (accessed 30 November 2013)
- *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA): <http://www.saflii.org/za/cases/ZASCA/2003/99.html> (accessed 30 November 2013)
- *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 (WCC): <http://www.saflii.org/za/cases/ZAWCHC/2011/97.html> (accessed 30 November 2013)
- *Betta Eiendomme (Pty) Ltd v Ekple – Epoch* 2000 (4) SA 468 (W)
- *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2010 ZAGPJHC 3 (4 February 2010): <http://www.saflii.org/za/cases/ZAGPJHC/2010/3.html> (accessed 30 November 2013)
- *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC): <http://www.saflii.org/za/cases/ZACC/2011/40.html> (accessed 30 November 2013)
- *City of Johannesburg v Blue Moonlight Properties* 2011 (4) SA 337 (SCA): <http://www.saflii.org/za/cases/ZASCA/2011/47.html> (accessed 30 November 2013)
- *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA): <http://www.saflii.org/za/cases/ZASCA/2012/116.html> (accessed 30 November 2013)
- *City of Johannesburg v Rand Properties* 2007 (1) SA 78 (W): <http://www.saflii.org/za/cases/ZAGPHC/2006/21.html> (accessed 30 November 2013)
- *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA): <http://www.saflii.org/za/cases/ZASCA/2007/25.html> (accessed 30 November 2013)
- *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another*, South Gauteng High Court, Case No 39502/2012

- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 CC: <http://www.saflii.org/za/cases/ZACC/2000/19.html> (accessed 30 November 2013)
- *Graham v Ridley* 1931 TPD 476
- *Groengrass Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T)
- *Hlophe and Others v Johannesburg Metropolitan Municipality and Others* 2013 (4) SA 121 (GSJ): <http://www.saflii.org/za/cases/ZAGPJHC/2013/98.html> (accessed 30 November 2013)
- *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC): <http://www.saflii.org/za/cases/ZACC/2009/28.html> (accessed 30 November 2013)
- *Mchunu and Others v Executive Mayor of eThekweni and Others* 2013 (1) SA 555 (KZD): <http://www.saflii.org/za/cases/ZAKZDHC/2012/78.html> (accessed 30 November 2013)
- *Minister of Health and Others v Treatment Action Campaign (TAC) and Others (No 2)* 2002 (5) SA 721 (CC): <http://www.saflii.org/za/cases/ZACC/2002/15.html> (accessed 30 November 2013)
- *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA): <http://www.saflii.org/za/cases/ZASCA/2004/47.html> (accessed 30 November 2013)
- *Ndlovu v Ncgobo; Bekker v Jika* 2003 (1) SA 113 (SCA)
- *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) 208 (CC): <http://www.saflii.org/za/cases/ZACC/2008/1.html> (accessed 30 November 2013)
- *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 (2) SA 337 (CC): <http://www.saflii.org/za/cases/ZACC/2011/35.html> (accessed 30 November 2013)
- *Occupiers of Skurweplaas v PPC Aggregate Quarries* 2012 (4) BCLR 382 (CC): <http://www.saflii.org/za/cases/ZACC/2011/36.html> (accessed 30 November 2013)
- *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC): <http://www.saflii.org/za/cases/ZACC/2011/34.html> (accessed 30 November 2013)
- *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC): <http://www.saflii.org/za/cases/ZACC/2004/7.html> (accessed 30 November 2013)

- *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC): <http://www.saflii.org/za/cases/ZACC/2005/5.html> (accessed 30 November 2013)
- *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 545 (CC): <http://www.saflii.org/za/cases/ZACC/2009/16.html> (accessed 30 November 2013)
- *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC): <http://www.saflii.org/za/cases/ZACC/2012/26.html> (accessed 30 November 2013)

## Legislation / Policy documents

- Constitution of the Republic of South Africa, 1996 (the Constitution)
- Extension of Security of Tenure Act 62 of 1997 (ESTA)
- Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA)
- Municipal Finance Management Act 56 of 2003 (MFMA)
- National Building Standards and Building Regulations Act 103 of 1977 (NBRA)
- National Housing Code (2009)
- Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE)
- Prevention of Illegal Squatting Act 52 of 1951 (PISA)
- Public Finance Management Act 1 of 1999 (PFMA)





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