UNLAWFULLY OCCUPYING THE BRIDGE TO TRANSFORMATION: A CASE FOR JUDICIAL EXPROPRIATION WHEN EVICTIONS ARE UNJUST AND INEQUITABLE

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Dedication

To the kind and dignified people who have seen their homes demolished, to whom the law was neither friend nor saviour – I hope you are never subjected to such again.

A luta continua.

Acknowledgment

I am extremely grateful to my supervisor, Salona Lutchman, for being an incredible mentor. For untiringly encouraging me and inspiring me to leave my fear behind, and for reminding me that doing my best is enough. Every kind word of hers has shaped my own growth. I am thankful to not only have met, but also been mentored, by someone like her.

To my parents, Rashid and Ayesha, my grandmother, Aminah, and my sister, Kawthar, for always being by my side through every up and down. Pu Badji, mo koner ou p fer boucou duahs pu moi depi lao, merci.

Signed by candidate

To all my friends for always knowing just what to say. To SBN for listening to my endless, "unconventional" ideas about the law and always reminding me to answer the question. Thank you all for your unwavering support.

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"We are trapped in a vicious cycle of economic, intellectual, social, and political death. Inferior jobs, inferior housing, inferior education which in turn again leads to inferior jobs."

- Malcolm X

I. INTRODUCTION

Housing is not simply brick and mortar. When an unlawful occupier states that they will simply move to occupy other land if they are evicted, it is clear that they do so out of need.[1] Access to shelter is linked to numerous human needs and rights, and often predetermines one's ability to climb up the social ladder. Housing is related to job opportunities, hence the rapid increase in the rate of urbanisation in South Africa. Housing is also related to one's right to human dignity. Consequently, the Constitutional Court has spoken of the need to treat unlawful occupiers with grace and dignity.[2] The slow pace of the State's provision of housing, coupled with the private housing market's inability to cater for poor and vulnerable sections of society, has meant that informal settlements have become a common feature in South Africa. With the increasing polarisation in class and wealth, informal settlements have become the most viable way for poor people to get shelter.

A study of the different urban housing policies shows that large numbers of people are falling through the cracks and are not being catered for. As long as people have no resort but to occupy

[1] Centre on Housing Rights and Evictions, Any room for the Poor? Forced Evictions in Johannesburg, South Africa, (8 March 2005) *Centre on Housing and Evictions* available at https://issuu.com/cohre/docs/cohre_anyroomforthepoor_forcedevict, accessed on 22 November 2020. When a resident of Joel Street, Berea was interviewed by the Centre of Housing Rights and Evictions, they simply said:

> 'If they evict us, we'll sleep on the streets for a while, until we find somewhere else to go. I can't leave the city. If I do, my family will starve.'

[2] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*) para 37.

land to get shelter, informal settlements are here to stay. However, unlawful occupation happens on an indiscriminate basis, meaning that often, privately owned land falls prey to unlawful occupied. In cases of unlawful occupation of private land, there are two core rights which are at play: the right of unlawful occupiers not to be arbitrarily evicted,[3] and the right of property owners not to be deprived of their property, except through the operation of a law of general application.[4] These rights often operate at odds with each other. Although eviction cases have been thoroughly adjudicated by South African courts, this balancing act between the two rights has not always been at play.[5] While all cases of unlawful occupation of private

[3] Section 26 of the Constitution:

"(1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

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

[4] Section 25 of the Constitution:

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

(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

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

(9) Parliament must enact the legislation referred to in subsection (6)."

[5] This ascertainment is made by reading the housing cases which have come to the forefront in the Constitutional Court. See namely *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005

land involve a limitation of the owner's right to property, this limitation was rarely dealt with as it was seldom the case that this limitation would be permanent. Thus, when the final Constitution was promulgated,[6] eviction cases were often dealt with through a narrow prism: only under section 26 of the Constitution.

However, when the *Modderklip CC* case was brought to court, South African courts had no choice but to carefully weigh and consider the interaction between sections 25 and 26 of the Constitution.[7] While the Supreme Court of Appeal discussed the interactions of these two rights at length,[8] the Constitutional Court declined to consider expropriation of the occupied land as a plausible remedy for the ongoing unlawful occupation. A few years later, the High Court of South Africa, Western Cape Division (High Court) in *Fischer*,[9] a case with similar facts as *Modderklip CC*, ordered the State to negotiate a buy-out with the owner of the occupied property. The High Court in that matter opted to go through this route as it would allow it to review the State's decision should it decide to not expropriate the occupied properties.

This approach has led numerous scholars and even some courts,[10] to believe that judicial expropriation was not allowed under the Constitution. Thus, there seems to be a lack of analysis of these rights and their interaction in the judicial landscape. However, a court tasked with interpreting a transformative constitution ought to do so in an effort to "recognise the injustices of our past"[11] and address them. The bridge to a constitutional democracy, to transformation, cannot be traversed if it is unlawfully occupied. One cannot simply turn a blind eye to this

(5) SA 3 (CC) (*Modderklip CC*) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

[6] Constitution of the Republic of South Africa, 1996.

[7] *Modderklip CC* supra note 5; This case was not the first one to deal with sections 25 and 26 but it was the first one where the courts had to consider the impact of the defence created under section 26(3) against the private land owner's right to not be deprived of property save through the operation of a law of general application.

[8] *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*).

[9] *Fischer v Persons Listed on Annexure X to the Notice of Motion and those Persons whose Identity are Unknown to the Applicant and who are Unlawfully Occupying or Attempting to Occupy Erf 150 (Remaining Extent) Phillipi, Cape Division, Province of the Western Cape; Stock v Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Phillipi & Portion 0 Farm 597, Cape Rd; Copper Moon Trading 203 (Pty) Ltd v Persons whose Identities are to the Applicant Unknown and who are Unlawfully Occupying Remainder Erf 149, Phillipi, Cape Town* 2018 2 SA 228 (WCC).

[10] As will be seen later AJ van der Walt was one of the scholars who was skeptical about the courts' power to order land expropriation. As for the courts, the Supreme Court of Appeal in *Ekurhuleni Metropolitan Municipality v Dada NO and Others* (4) SA 463 (SCA) at para 13 was unequivocal about the fact that judicial deference should be preferred instead of overzealous judicial activism to "get things moving".

[11] Preamble of the Constitution.

phenomenon as if it were only a minute obstacle on the road. The import of the current housing crisis and the ever-increasing risk of grand-scale unlawful land occupation should be understood in a larger context. Informal settlements did not spring like mushrooms, overnight and out of thin air, in 1994. Unlawful occupation, informal settlements and rapid urbanization are direct consequences of apartheid laws and policies.

(a) History of land tenure security and Black land ownership in South Africa

It is astounding that courts have avoided this exercise up to 26 years after democracy, considering that this crisis arose due to colonisation and apartheid and persists to this day. It is no novel conclusion that the subjugation of Black South Africans (Africans) was achieved through a long-lasting, multi-layered oppressive regime, which always had its focus on the dispossession of the land of Africans.[12] During the 18th century, settlers were still at war with Africans and it took nine bloody wars 'before the position of European paramountcy was achieved'.[13] Settlers sought to limit and control how Africans were able to access and hold rights to land, and thus, a system of individual tenure modelled on European and Western conceptions of individual ownership was introduced. The State prevented Africans from participating in this tenure system regulated through title deeds and the Deeds Registry. Instead, a secondary inferior system of tenure was introduced for Africans – the nature and content of the rights held by Africans were completely controlled by officials of the colonial State.

Settlers were convinced that 'the system of individual tenure was the ultimate solution to the native question'.[14] This approach was especially endorsed because communal tenure, as was held by Africans, was flexible and responsive, allowing African groups to move freely, not containing them to specific areas which individual tenure would have achieved. This, coupled with the serious shortage of labour in 1890s, gave rise more laws to contain African groups and frustrate communal land ownership. Thus, in 1894, the Glen Grey Act was enacted.[15] The Glen Grey Act was the first to establish a particular pattern of landholding in South which

[12] R T Ally *The development of the system of individual tenure for Africans with special reference to the Glen Grey Act, c 1894 – 1922* (M.A. Thesis, Rhodes University, 1985) 78.
[13] S Lekhela *A Historical Survey of Native Land Settlement in South Africa from 1902 to the Passing of the Natives' Trust and Land Act of 1936* (MA Thesis, University of South Africa, 1955) 19.
[14] Ibid at p 100.
[15] Act 25 of 1894.

aimed at replacing communal tenure with individual tenure and was consequently seen as 'a key moment in the disenfranchising of Africans and restricting civil and land rights'.[16] Per Cecil Rhodes' speech, it is clear that the Glen Grey Act was enacted to control the increase in the African population and the colony's labour shortage.[17] Yet, as the Glen Grey Act was not as successful at containing Africans to a specific area, the Native Lands Act was promulgated a few years later to make uniform, across South Africa, the segregation of races through the restriction and regulation of land acquisition. 'The Native Lands Act was actually ratifying and setting in law a dispossession that started much earlier, centuries earlier.'[18]

Section 1(2) of the Native Lands Act made the aim behind its promulgation clear, 'scheduled native areas' were cordoned for the exclusive use and purchase of Africans.[19] Section 1(4) of the Native Lands Act also stated that any agreement concluded outside the scope of section 1(2) was null and void *ab initio*. The contravention of said sections was punishable by law. It was the first Act under the Union Government of South Africa to bind the movement of Africans only to specifically scheduled reserve areas.[20] It also limited the ability of Africans to hold any rights – as determined by colonial officials – to these same areas. Only seven per cent of South African land was put aside for Africans.[21] The land allocated to Africans in terms of the Native Land Act was not held by Black people in their own right but by various State-controlled entities.

The Native Trust and Land Act created the South African Development Trust (the Trust), a consolidated entity to hold the land that hand been set aside for Africans, and increased the reserved land from 7 per cent to 13 per cent of South Africa.[22] The Trust was in charge of

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[16] R Hall *The Politics of Land Reform in Post-Apartheid South Africa, 1990 to 2004: A Shifting Terrain of Power, Actors and Discourses* (PhD Thesis, University of Oxford, 2010) 75.

[17] C J Rhodes 'Glen Grey Act (The Native Issue)' South African History Online, available at https://www.sahistory.org.za/archive/glen-grey-act-native-issue-cecil-john-rhodes-july-30-1894-cape-house-parliament, accessed on 17 November 2020.

[18] C Osorio '100 years since the Native Land Act: an interview with Ben Cousins' GroundUp 26 June 2013, available at https://www.groundup.org.za/article/100-years-nativeland-act-interview-ben-cousins1048/, accessed on 17 November 2020.

[19] Black Land Act 27 of 1914 at section 1(2).

[20] Alan Paton Centre and Struggle Archives 'Land issues: Blackspots, Forced Removals and Resettlement' available at http://paton.ukzn.ac.za/Collections/blackspotsandforcedremovals.aspx, accessed on 17 November 2020.

[21] Ibid.

[22] Act 18 of 1936.

buying land in each of the provinces for African settlements.[23] Tenure could by only be held by Africans through the Trust and the Trust determined the nature of the rights held and access to the land. Africans did not have rights of ownership like the white population; tenure was conditional and depended on whether one was a man, along with other conditions.[24] Additionally, tenure did not include the right to alienate the property. The Trust's land would be administered for 'settlement, support, benefit, and material welfare of the natives of the Union'.[25] This land, reserved exclusively for Black people, came with extremely restricted forms of rights. Rights came in the form of either 'Permissions to Occupy' (PTOs) or 99-year leaseholds – which were capable of being cancelled administratively.[26] Under the 1913 and 1936 Land Acts, approximately 614 000 people were removed from 'black spots'.[27] If one were to count informal settlement removals, infrastructural removals and political removals, around 185 500 more people were removed.[28]

Statistics by the Association for Rural Advancement (AFRA) show that between the period of 1948-1984, 300 000 people of colour were evicted from farms. Another 115 000 people were moved from black spots and reserves respectively.[29] The motivation behind these mass evictions was to 'prevent the possibility of guerrillas moving easily amongst the farm population'.[30] The evictions were done from non-scheduled, non-released land and freehold areas – the former consisting of dispersed land owned by a particular racial group. These forced removals were rooted in section 26 of the Native Trust and Land Act. The Native Administration Act[31] was enacted and further limited land ownership by giving the white regime the executive power to remove Africans from land declared as white areas, and relocate them. This further accelerated the limitation of African land ownership and overcrowding, as well as environmental degradation on land Africans were permitted to occupy.[32]

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[23] C Fourie '*Land and the cadastre in South Africa: Its history and present government policy*' (2000), paper presented as a Guest Lecture at the International Institute of Aerospace Survey and Earth Sciences (ITC), Enschede, The Netherlands.
[24] Ibid.
[25] Section 4(1) of the Natives Trust and Land Act.
[26] Supra note 12.
[27] A 'black spot' was an area of land where Black people lived despite the area being situated in an area that had been allocated for the white population. J Van Wyk, M Oranje 'The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?' (2014) 13(4) *Planning Theory* 349.
[28] Ibid.
[29] Supra note 13 at 5; The official published figures of forced removals are not representative of those being forcibly removed as they only indicate the people who brought their cases to court.
[30] Ibid.
[31] Act 38 of 1927.
[32] Supra note 20.

As the land which was allocated to Africans was not in urban areas, Africans were 'temporary residents' in cities and towns. The 1937 Slums Act actively prevented Africans from acquiring land in urban areas.[33] The Native (Urban Areas) Consolidation Act, which was put into place in 1945, outlined four different categories of urban residents and tenure rights which Africans were entitled to in urban areas.[34] They all linked an African's right to be in the city to their employment. The Group Areas Act followed the Black (Urban Areas) Act and made a distinction between areas subjected to different extent of control through use, occupation and ownership based on race.[35] This Act distinguished between Africans, Coloureds, Asians and white people. Consequently, individuals from certain race groups were prohibited from using, occupying and owning land in areas selected for other race groups. The relevant sections of both Acts were copied verbatim in the proclamation of the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters.[36]

The Group Areas Act was promulgated after the National Party came into power in 1948 and was tasked almost exclusively with 'cleaning' black spots. Those areas were usually fertile land prime for cultivation, as opposed to land set aside for Africans, which was generally overcrowded and overgrazed.[37] The Group Areas Act was the main tool under which forced removal and dispossession of Indian and Coloured communities took place. Dr. Malan, the Prime Minister of South Africa when apartheid was implemented, called the Group Areas Act the 'heart of apartheid'.[38] Under the infamous Group Areas Act, and between 1960 and 1983, approximately 7.5 million people were forcibly removed.[39]

The Group Areas Act was responsible for the creation of areas such as Lenasia, Eldorado Park, Chatsworth and Mitchell's Plain; and destroyed areas such as Cator Manor (Durban), South End (Port Elizabeth), District Six (Cape Town), Fordsburg, Vrededorp, Pageview and Sophiatown (Johannesburg).[40] The former areas are now townships while the destroyed areas are well known for having been subject to violent mass evictions during apartheid. Many of

[33] Supra note 16 at 78.
[34] Ibid.
[35] Act 36 of 1966 and Act 21 of 1923.
[36] Proc R1036 in *GG Extraordinary* 2096 of 14 June 1968.
[37] S Rugege 'Land reform in South Africa: An overview' (2004) *32 Int'l J. Legal Info* 285.
[38] Ibid.
[39] Ibid.
[40] Ibid at 286.

the victims have up to this day not been accommodated back on what used to be their land. Although many other laws and policies came after the Group Areas Act, it is this Act that did the most damage and set out the main laws under which forced removals were imposed on non-white communities, and ownership rights of Africans were undermined. All these legislations were so effective at stripping Africans of their land rights that, four years before democracy, in 1990, only one per cent of homeland residents had freehold access to land.[41]

(b) Problem Statement

This in-depth description of certain legislations' impact on Black people's rights and relations to their land shows that during apartheid, there was a deliberate move to dispossess people of colour of land. The effects of such a deliberate, prolonged and painful process can only be addressed and undone through a more robust, and equally as deliberate move underpinned by a constitutional and legislative framework. Consequently, these wrongs have given rise to rights which are now engraved in the Bill of Rights and which have in turn caused several Acts, to be implemented. Two of these rights, on which this dissertation pivots, are the rights to not be deprived of property under section 25 of the Constitution and the right to access to housing under section 26 thereof. Out of the socio-economic rights cases that have been heard in the Constitutional Court, the preponderance of those concerning the right to access to housing is flagrant.[42] This is hardly surprising as the number of housing cases coming to South African courts is reflective of the disparity between the original aims of the State for the provision of housing, and the State's disappointing delivery.[43] While this criticism is not devoid of appreciation of the constraints which the State faces, it is nonetheless an acknowledgment that the State ought to look into changing its approach to housing delivery. Yet, until the State causes this shift to happen, the existing problems will remain. With the slow access to housing currently at play, it is not controversial to reach the conclusion that these problems have reached unprecedented proportions. Thus, not unlike in the litigation of many other rights, the judiciary and civil society find themselves doing more of the heavy lifting. Unfortunately, while the expansive jurisprudence which the Constitutional Court has developed and the accompanying legislation enacted, such as the Prevention of Illegal Eviction from and

[41] G Muller 'The Legal-Historical Context of Urban Forced Evictions in South Africa' (2013) *Unisa Press* 368.
[42] K Tissington, Evictions and Alternative Accommodation in South Africa 2000-2016: An analysis of the jurisprudence and implications for local government' (2016) *SERI Report, Second Edition* 3.
[43] Ibid.

Unlawful Occupation of Land Act (PIE),[44] provide a detailed and progressive legal framework tackling evictions, there are still aspects of evictions which remain unexplored.

These unexplored aspects not only highlight the need for a new approach in the provision of housing but also beg the question of whether more can be done under the existing conditions. One of these aspects concerns whether South African courts can order the State to expropriate land in cases where the eviction of the unlawful occupiers would be unjust and inequitable. Although scholars have written on this matter, courts have steered clear from this remedy and, more distressingly, the Constitutional Court has opted to not discuss the matter when it had the opportunity to do so.

This paper is based on the hypothesis that the executive is empowered to expropriate land for the provision of housing and that South African courts have the power to compel the State to expropriate land in situations that would otherwise give rise to a permanent limitation of rights, the right to property and to access to housing respectively. Based on this theory, this paper considers whether South African courts can order land expropriation in cases of occupation of land by a large number of occupiers when the State has not done so.[45]

(c) Research Questions

This paper requires the in-depth consideration of the following questions:

a. What is the relationship between the right to property of the owner of the unlawfully occupied land and the right to access to housing of the unlawful occupiers?
b. What has the courts' approach been in relation to the expropriation of land for the provision of housing?
c. Can courts order the State to expropriate land?

(d) Literature Review

Although this issue is one which has been avoided by the courts, some academics have considered it through various lenses. In fact, the relationship between sections 25 and 26 has been so thoroughly researched that, after the advent of the Constitution, a new branch of law

[44] Act 19 of 1998.
[45] The number of occupiers is one of the factors which will be considered in Chapter IV of this thesis.

was developed: constitutional property law.[46] The leading thinker of constitutional property law is late AJ van der Walt, whose work will be extensively referred to in this dissertation. Van der Walt has written a book about constitutional property law, of which various editions have been published. He also wrote about housing rights in numerous articles; discussing expropriation and housing rights at length.[47] This dissertation would be amiss in its reflections on the relationship between sections 25 and 26, if it were to not engage with van der Walt's writing.

More specifically, Dugard looks into the question of whether courts can compel the State to expropriate property in cases where evictions would be unjust and inequitable by revisiting *Modderklip*.[48] In her article, she focuses on van der Walt's approach to expropriation which in turn primarily considers administrative expropriation and remains cautious of judicial expropriation.[49] Dugard reflects that the Court in *Fischer* provides a novel remedy, thereby creating a 'new, grey area between administrative and judicial expropriation'[50] by ordering the State to consult with the private landowners concerned and negotiate in an effort to purchase the properties, and if that should not possible, the State ought to report back to the Court on the negotiations. While Dugard does not provide a definitive answer to whether courts can compel the State to expropriate land for housing under certain conditions, she critiques the literature and avoidant approach that South African courts have so far adopted.

The other writings surrounding *Modderklip* has come in the form of scholars discussing about the conditions of the Gabon township which is where the *Modderklip* farm is located.[51] This writing has mostly focused on the current state of Gabon despite the Constitutional Court's remedy of constitutional damages which were to be paid by the State to the land owner until the unlawful occupiers to move to other land.

(e) Structure

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[46] AJ Van der Walt *Constitutional Property Law* 3 ed (2011) Juta and Company Ltd.
[47] AJ Van der Walt "The State's duty to protect owners v the State's duty to provide housing: Thoughts on the *Modderklip* Case" (2005) *South African Journal on Human Rights*, vol. 21, no. 1, 144-62.
[48] J Dugard "*Modderklip* revisited: Can courts compel the State to expropriate property where the eviction of unlawful occupiers is not just and equitable?" (2018) *PER / PELJ* 21.
[49] Ibid at 16.
[50] Ibid at 17.
[51] See further K Tissington 'Demolishing Development at Gabon Informal Settlement: Public Interest Litigation beyond Modderklip' (2011) *South African Journal on Human Rights*, vol. 27, no. 1 192.

This chapter has delineated the parameters of this dissertation, by discussing the history of land dispossession in South Africa, and the need for this topic to be researched. It also aims to offer a road map of how this will be achieved. The next chapter will consider sections 25 and 26 of the Constitution respectively by looking into how these constitutional provisions came into being and how they have so far been interpreted by the Constitutional Court. After these individual analyses, the relationship between the two rights will be discussed at length.

The third chapter will look into how courts have approached land expropriation for the provision of housing. Building on the interpretation of sections 25 and 26 put forward in the second chapter, this chapter will deal with the Constitutional Court's finding in *Modderklip CC, PE Municipality* as well as the Supreme Court of Appeal's decision in *Modderklip SCA*.[52] Finally, this chapter will contrast these approaches to the High Court's approach in *Fischer*.

The fourth chapter will consider whether South African courts are empowered to order the State to expropriate land under section 172(1)(b) of the Constitution. This chapter will critically engage other scholars' and courts' arguments against judicial expropriation. The fourth chapter will make a strong case that the courts are empowered to do so and, in some cases, even mandated to do so. This will be done firstly by considering the tenets of judicial land expropriation, and secondly by contemplating the arguments as to why courts ought not to be able to order the State to expropriate land when consequential evictions would be unjust and inequitable.

Finally, in the fifth and concluding chapter, the findings of this paper will be discussed and accompanied by recommendations as to when the courts ought to order the State to expropriate land as a primary remedy.

(f) Limitations and Methodology

While there are numerous instances where townships have expanded over privately-owned land, thus creating occurrences of unlawful land occupation, these occupations do not often become the subject of litigation. Even if they do, the subject matter does not always concern the balancing exercise of sections 25 and 26 because there are very few of these cases where parties brought up the remedy of expropriation and an even fewer number where this remedy

[52] Supra note 8.

was a viable alternative. Hence, this paper has narrowed its focus to two particular cases, *Modderklip* and *Fischer*. These were cases where the immediate eviction of the unlawful occupiers would have been *prima facie* unjust and inequitable, and thus, unlawful. While the number of occupiers which had been served with eviction notices in both cases had been more than a hundred, the number of unlawful occupiers was in the thousands. This made the possibility of a just and equitable eviction almost nil, due to various factors, including the lack of suitable alternative land, and the inability to have meaningful engagement. Thus, the arguments made in this dissertation will only apply to circumstances similar to those in *Modderklip* and *Fischer*.

II. THE CONCEPTUAL RELATIONSHIP BETWEEN SECTIONS 25 AND 26 OF THE CONSTITUTION

As a starting point, this dissertation concedes that expropriation is a drastic remedy. However, an argument is made that certain circumstances call for such a drastic remedy. This argument in part involves the fact that, by suspending an eviction order in cases where the eviction is clearly unjust and equitable, the right of the property owner is being limited. Depending on how long this limitation endures, an argument could be made that the limitation becomes unjustifiable. The property owner's right in property is protected under section 25 of the Constitution, more specifically section 25(1), while the unlawful occupier's right to not be arbitrarily evicted of their home is found under section 26 of the Constitution, in particular section 26(3). On a superficial reading of the two sections, one could believe that the two are at odds with each other. To remedy this potential erroneous understanding, this Chapter will consider the rights to property and access to housing under the Constitution in an effort to make the argument that there is no tension between the two, only a peculiar relationship.

(a) International Law on the Rights to Adequate Housing and Land

According to section 39(1)(b) of the Constitution, a court should take into consideration international law when interpreting the Bill of Rights. In terms of international law, two rights are of importance to this paper, article 25 of the Universal Declaration of Human Rights (UDHR) and article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[53] Both rights pertain to one's entitlement to a 'standard of living adequate for the health and well-being' of oneself and that includes adequate housing. Elaborating on these rights are General Comments 3, 4 and 7 on Covenant obligations.[54]

General Comment 7 focuses on forced evictions. While it recognises that forced evictions may be justifiable in certain circumstances, it also discusses the requirement of adequate compensation or alternative accommodation. For instances of urban renewal or large-scale

[53] *Universal Declaration of Human Right*s, 10 December 1948 and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.
[54] Committee on Economic, Social and Cultural Rights, G*eneral Comment 3 on the Nature of State Parties Obligations: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1990.

developments, large numbers of people may only be evicted as a last resort.[55] The requirements of evictions are further set out in paragraph 15 of the Comment and encompasses the need for genuine consultation between the affected parties, reasonable notice of eviction, information on said eviction, the presence of government officials or representatives during the eviction, identification of people carrying out the eviction, to not evict people during bad weather or at night, and lastly, legal aid for people in need of it to seek redress.[56] South Africa has adopted a progressive approach to the right to access to adequate housing, it encourages almost all the qualifications of the international laws as laid down by the UDHR and the ICESCR.

Despite the recognition of the right to own property under Article 17 of the Universal Declaration of Human rights,[57] it is widely recognized that the right to property arises only under the domestic law of respective nations. While many international human rights conventions discuss a right to property, main international human rights treaties do not adopt a discussion of the right.[58] However, there have been scholarly debates as to whether the right to land has received international customary law status, due to it being recognized under numerous States' domestic laws. For the purposes of this dissertation, the nonexistence of a stand-alone right to land in international law[59] means that the interpretation of section 25 of the Constitution has not been informed by international law and as will be seen later, the reference grew obsolete in this context.

(b) The interpretation and application of section 25

While section 25 has been thoroughly debated in numerous texts, this paper is limited to a broad overview and preliminary analysis of the section. Also known as the property clause, section 25 is the lengthiest and arguably most complex right in the Bill of Rights.[60] It is considered to be one of the most intricate property clauses around the world as it consists of superficially contradictory composite parts and has a heavy emphasis on land reform, making

[55] Committee on Economic, Social and Cultural Rights, *General Comment No. 7 on Right to Adequate Housing: Forced Evictions*, 1997.
[56] Ibid para 15.
[57] *Universal Declaration of Human Rights* supra note 51.
[58] J Gilbert 'Land Rights as Human Rights' (2013) *SUR* 18, available at https://sur.conectas.org/en/land-rights-human-rights/, accessed 1 November 2020.
[59] United Nations Office of the High Commissioner, 'Land and Human Rights: Standards and Applications' available at *https://www.ohchr.org/Documents/Publications/Land_HR-StandardsApplications.pdf*, accessed on 17 November 2020.
[60] Supra note 46 at 2.

it considerably unique.[61] Section 25(1) to (3) can be seen as the more conventional provisions, providing for the protection of existing property interests against State interference. Sections 25(4) to (9) are a cluster of provisions that empower the State to promote land and other related reforms through various mechanisms.

The first judicial interpretation of the property clause was done by the Constitutional Court, in the *First Certification Case*.[62] It had to deal with two major objections. The first was that the section did not 'expressly protect the right to acquire, hold and dispose of property as did section 28(1) of the Interim Constitution'[63] and secondly, that the provisions guiding expropriation and relevant payable compensation were not adequate. The Constitutional Court dealt with these objections concisely, by comparing the formulated version of section 25 to the test of "universally accepted fundamental rights" under Constitutional Principle II of the Interim Constitution.[64] This involved a brief survey of international and foreign law, to have a better grasp of the formulation of property clauses around the world. The Court found that despite the fact that article 17 of the Universal Declaration of Human Rights provides that 'everyone has the right to own property' and that 'no-one shall be arbitrarily deprived' of property, the International Covenant on Economic, Social and Cultural Rights,[65] and the International Covenant on Civil and Political Rights[66] did not contain any property protection. Since the Universal Declaration of Human Rights is only binding to the extent that it has been granted customary international law status, the Court would only be guided by guarantees afforded by the covenants.

As for comparative law, the Court held that not all recognized democracies contained property clauses in their bill of rights or constitutions and the democracies which did, did not always formulate the property protection in a uniform manner.[67] While some countries expressed the right in a negative way to restrain State interferences, some democracies formulated the right

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[61] Ibid.

[62] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*First Certification Case*).

[63] Ibid at para 70; Section 28 of the Interim Constitution read as follows:

> "(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights."

[64] Ibid.

[65] *International Covenant on Economic, Social and Cultural Right*s supra note 53.

[66] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999

[67] Supra note 62 para 72.

in a positive way, establishing a right to acquire and dispose of property.[68] Due to the absence of a uniform formulation of a property clause, the property clause met the test under Constitutional Principle II. The way in which the Court tackled the second objection was somewhat similar. It looked at the criteria for determining the amount for compensation in other countries and concluded that there was a broad range of factors for expropriation and the payment of compensation thereof. Due to the lack of consistency as to the criteria listed for expropriation and the payment of compensation, and the fact that the formulation adopted in section 25 was similar to certain other constitutions, the Court found that the section 'cannot be said to flout any universally accepted approach'.[69] Thus, the current wording of section 25 was so adopted.

Other than the original interpretation of the Constitutional Court, it is important, for purposes of interpretation, to analyze the structure of the property clause and its coherence. Earlier, the property clause was divided into two main clusters: one dealing with the protection of existing property interests (section 25(1) – (3)) and the other dealing with the State's duty to promote land reform (section 25(4) – (9)). These clusters can be further divided into four. The sub-sections can be divided as follows: section 25(1) covers deprivation, while section 25(2) and (3) regulate expropriation. Section 25(4) deals with the interpretation of the whole clause and section 25(5) to (9) guide land and other related reforms. This structure regulates the way in which the property clause ought to be interpreted and applied respectively. Van der Walt believed that this structure is also essential in explaining the 'tension between the provisions in section 25' and the tension between section 25 and other constitutional rights (such as the right of access to adequate housing under section 26).[70] In *PE Municipality*[71] which will be discussed in depth in the next chapter, Sachs J. mentions the two-pronged structure of the provision, its wider historical and constitutional circumstance and the 'broad constitutional matrix' which englobes the legislation giving effect to section 26(3) of the Constitution.[72] Van der Walt argued that this description by Sachs J. is the way in which section 25 should be interpreted as a whole.[73]

[68] Ibid.
[69] Supra note 62 para 73.
[70] Supra note 46 at 16.
[71] Supra note 2.
[72] In this context, as will be seen later, the legislation in question was PIE supra note 2.
[73] Supra note 69.

This paper's analysis of the property clause starts with section 25(1). The provision is negatively phrased and does not contain a positive guarantee of property, as did section 28(1) of the Interim Constitution. Although quite similar to section 28(2) of the Interim Constitution, section 25(1) dictates that deprivation of property should be done "in terms of a law of general application" while the former indicated that the deprivation ought to be 'in accordance with a law'. These two parts of section 25(1) aim to achieve two goals. Section 25(1) establishes that the right to property is not absolute. This changed the common law radically, as prior to the Constitution, ownership was considered sacrosanct and, in many ways, inviolate.[74] Hence, it is evident that the Constitution allows for State interferences, pertaining to regulatory deprivations, provided that they conform to the requirements in section 25(1). However, although there may be limitations to the use, enjoyment and exploitation of property, they may only be so if they are legitimate and indispensable regulatory limitations which may not be imposed in an arbitrary or unfair manner.[75]

Section 25(2) sets out the requirements for expropriation to be legitimate. The requirements are as follows: the expropriation can only be imposed by a law of general application; it has to serve a public purpose or be in the public interest;[76] and that compensation has to accompany expropriation and has to be just and equitable, as per section 25(3). Section 25(3) specifies that compensation ought to be determined per certain factors which are not a closed list, so as to demonstrate balance between the interests of those who were affected by the expropriation, and the public interest. As for section 25(4), it informs the interpretation of section 25 only. Section 25(4) specifies that property is not limited to land,[77] and that 'the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. The last proviso seems to ensure that land may be expropriated even in circumstances where the ultimate beneficiary of the land is a private person.[78] This provision is believed to have been included as a result of the fear that certain parties held, during the Interim Constitution negotiations, about the possible misinterpretation

[74] Supra note 46 at 17.
[75] Ibid.
[76] When the Interim Constitution's property clause was being discussed, there was disagreement as to which term out of "public purpose" and "public interest" was the broader one so to avoid any mishaps, they were both included.
[77] The Constitutional Assembly believed that there was a need to specify that property extends beyond land because the latter provisions of section 25 focused on land to a large extent. See supra note 46 at 17 for a more in-depth discussion of the inclusion of section 25(4).
[78] Supra note 46 at 18.

of the section in certain problematic instances.[79] The Constitutional Assembly feared that the legitimacy of land reform might be eroded by the constitutional guarantee of property.

Section 25(5) places a duty on the State to take 'reasonable legislative and other measures' to adopt conditions which empower citizens to gain access to land on an equitable basis. Section 25(6) entitles a person or community whose tenure of land is legally insecure as a result of previous discriminatory laws or practices by placing a duty on the State to enable such redress through legislation, as per section 25(9).[80] Section 25(7) warrants persons or communities, dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices, to restitution of that property or to equitable redress. Finally, section 25(8) guarantees that no provision of the property clause may obstruct the State from taking legislative and other measures to achieve, land, water and related reform in order to rectify the consequences of past racial discrimination, provided that the said measures are in accordance with the limitation clause as per section 36.

The duties emanating from section 25 were made clear by the Constitutional Court in the *First National Bank* case.[81] In its judgment, the Court stated that a holistic view of the property clause must be adopted when interpreting it.[82] This means that the property clause should not only be seen to be about protecting property rights, but also to be about restoring land rights.

> 'Section 25 was inherently designed to not only oversee the protection of property rights from unreasonable interference by either private parties or the State, but it was also designed in part to oversee and guide the constitutionally mandated attempt to reconstruct society through social and economic land reforms.'[83]

This, as shown in the previous chapter, is due to the fact that the property of the majority of South Africans was taken away during and before apartheid. Thus, section 25 aims at

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[79] Ibid.

[80] Legislation falling under this category would be the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, PIE supra note 44 and the Interim Protection of Informal Land Rights Act 31 of 1996.

[81] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768.

[82] Ibid para 49.

[83] A J Van der Walt, S Viljoen 'The constitutional mandate for social welfare – Systemic differences and links between property land rights and housing rights' (2015) (18) *PER/PELJ* 4.

redressing this injustice by putting a duty on the State to foster conditions and promulgate legislation to redress the consequences of past discriminatory practices and laws.[84]

The last tool for the interpretation of section 25, is international and foreign law. At the dawn of the South African constitutional dispensation, many scholars were known to have turned to international and foreign law to attempt to interpret section 25.[85] This was for several reasons, but mostly because section 39(1) of the Constitution obliges courts, tribunals and forums to consider international law when interpreting the Bill of Rights, and also allows the consideration of foreign law. South African property lawyers used comparative law as early as when the property clause first appeared in the 1993 Interim Constitution. Unfortunately, at the time, the knowledge surrounding comparative constitutional property law was limited, and subsequently the research in the South African landscape was unsystematic at best.[86] Over time, the precedent and literature surrounding constitutional property law in South Africa became more refined, and eventually, 'senseless' comparative analysis ceased.[87] In fact, the Constitutional Court, in its adjudication of recent section 25 cases, has abstained on referring to foreign law and when it does, it is only in passing.[88] Although reference to international law is compulsory when it comes to interpreting rights in the Bill of Rights, case law on section 25 only rarely refers to international law. This could be explained by the fact that the international community has seldom had to deal with cases involving property law, except for wide-ranging case law under the property provision in article 1 of the First Protocol to the European Convention.[89] Hence, although it might seem like little consideration has been given to international law in the interpretation of the property clause, it is due to the lack of case law under the international law realm of constitutional property law.

(c) The Interpretation and Application of Section 26

[84] H J Kloppers, G J Pienaar 'The Historical Context of Land Reform in South Africa and Early Policies' (2014) *PER* Volume 17 Number 2 680.
[85] Supra note 46 at 20.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Council of Europe*, European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. It should be noted that although this pertains to regional international law, references to the European Convention on Human Rights is often seen as its special kind of foreign law.

Section 26(1) states that everyone has the right to have access to adequate housing while section 26(2) imposes a positive obligation on the State to put into place legislative measures, among others, to achieve the progressive realisation of the right of access to adequate housing – within its available resources. Per the Constitutional Court in *Grootboom*,[90] sections 26 (1) and (2) should be read together. The Court in *Grootboom* made a link between the government's positive and negative obligation. In his judgment, Yacoob J. elaborates on the need for section 26 extensively.[91] He discusses the shortage of housing as being an aftermath of apartheid through dispossession and rigid influx control. He goes on further to say that since section 26 cannot be seen in isolation vis-à-vis other socio-economic rights,'the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.'[92] It should be noted that the idea of housing and home has been seen by the Constitutional Court to include land.[93] As for section 26(3), it guarantees that no one may be evicted from their home, or have their home demolished, without a court order made after considering all the relevant circumstances. It further establishes that no legislation may permit arbitrary evictions.

Section 26 (3) of the Constitution has been given effect to through numerous legislations: the Extension of Security of Tenure Act,[94] the Prevention of Illegal Eviction and From Unlawful Occupation of Land Act (PIE),[95] the Land Reform (Labour Tenants) Act,[96] and the Rental Housing Act.[97] As this dissertation refers to evictions of unlawful occupiers who have no *prima facie* relation to the land, unlike with labour tenants, only PIE is applicable and thus, discussed. Under PIE, vulnerable groups who are unlawfully occupying land or property are provided a procedural buffer.[98]

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[90] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46.
[91] Ibid para 34.
[92] Ibid para 26.
[93] Ibid para 35.
[94] Supra note 80.
[95] Supra note 44.
[96] Supra note 80.
[97] Act 50 of 1999.
[98] Section (1)(xi) of PIE provides that:

> "Unlawful occupier means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land but the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)."

i. PIE and its interpretation through case law

Sections 4 and 6 of PIE provide the procedural requirements for lawful evictions. These requirements must be complied with by both private bodies and the State. These requirements are those which a court would rely on to declare that an eviction order is not 'just and equitable' and thus not capable of being granted. They can be summarised as follows. Firstly, an eviction order may only be applied for by the owner or person in charge of the land/property. Secondly, per section 4(2) of PIE, the owner must serve the occupiers with 'written and effective notice' of their intention to begin eviction proceedings, a minimum of 14 days before the court hearing. The notice must also be served on the municipality with jurisdiction over the property.

Case law has broadened these requirements extensively. As mentioned before, section 26(3) states that no one may be evicted from their home without a court order authorizing such, after having considered 'all the relevant circumstances'. PIE builds on this notion and states that a court may only grant an eviction order if the eviction would be 'just and equitable' given the circumstances. According to section 4(6) of PIE, this involves the consideration of numerous factors such as 'the rights and needs of the elderly, children, disabled persons and households headed by women'. Per section 4(9), the court also ought to consider 'the period [for which] the unlawful occupier and [their] family have resided on the land in question'. Whether an eviction order is just and equitable has been discussed in numerous cases and vastly supplemented. It has been established through many of these cases that a court would not be able to decide whether an eviction order is just and equitable if it were not provided with all the information necessary to come to this conclusion.[99]

The onus of proof in these proceedings has also been changed by case law. Generally, the party seeking relief must show the veracity of a particular set of facts. Thus, under common law, the property owner needed to show that the land was indeed theirs, and that they had not given consent to the occupiers nor did the latter have any right to live on said piece of land. Now landowners might be required in some cases to produce more information. Per Wallis JA, in

[99] Supra note 2 para 32; *Sailing Queen Investments v Occupants La Colleen Court* 2008 (6) BCLR 666 (W) paras 11, 14, 18 and 19; *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) 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) para 11; and *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 para 10.

Changing Tides,[100] the owner also needs to put such information before the Court to illustrate that the eviction would be just and equitable under the circumstances.

South African courts' jurisprudence also clarified whether the distinction between section 4(6) and (7) with respect to the provision of alternative accommodation was acceptable.[101] In *Shulana Court*, the Supreme Court of Appeal held that, although there were textual differences between sections 4(6) and (7), nothing suggested that the Court was not allowed to consider the availability of alternative accommodation in cases where the occupiers had been on the property for less than six months.[102] This was later established by the Constitutional Court in *Skurweplaas* and *Mooiplaats*.[103] Thus, the distinction was thereby obliterated. With respect to alternative accommodation, the Constitutional Court in *Blue Moonlight* confirmed the City's obligation to provide such in situations where private owners seek evictions.[104]

Perhaps more interestingly, the development in eviction jurisprudence which has made a significant difference in practice is the need for 'meaningful engagement'. The concept was first developed by the Constitutional Court in *PE Municipality*. While this is a simple concept, involving mediation between parties coupled with earnest engagement about possible solutions, it is also quite innovative. Due to the nature of eviction proceedings, and the interests at heart, an eviction might not be just and equitable unless 'proper discussions and, where fitting, mediation were not attempted'.[105] The concept was expanded on in *51 Olivia Road* where the Constitutional Court explained that meaningful engagement is a duty on the State,

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[100] Ibid.

[101] Section 4(6) of PIE states:

> "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).

Section 4(7) of PIE reads:

> "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).

[102] *Shulana Court* supra note 99 para 13.

[103] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* [2011] ZACC 36 and *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC).

[104] *Blue Moonlight* supra note 5 para 95.

[105] Supra note 2 para 43.

which flows from section 26(2) of the Constitution.[106] Since then, meaningful engagement has been a requirement in eviction proceedings and in the *Joe Slovo* case, the Constitutional Court highlighted the importance of this requirement, albeit through five separate concurring judgments.[107] Another significant development in the housing and eviction case law was the recently acclaimed judgment of the Constitutional Court in the *Berea* case, where the Court confirmed that evictions which lead to homelessness are unlawful and that courts have a positive obligation to consider all relevant circumstances in those cases.[108] It was emphasized by the Court that even when said evictions are agreed upon by the occupiers, they are still deemed unlawful.[109]

Hence, other than the requirements codified under PIE, there are numerous other factors which need to be considered by the Court for an eviction order to be considered just and equitable.

(d) Analysis of the relationship between sections 25 and 26

For the purposes of this dissertation, section 25(1) of the Constitution is the pivotal provision. This section holds that 'no one may be deprived of property except in terms of law of general application'. The requirement of 'law of general application' has mostly been interpreted in the context of section 36 of the Constitution. Literature on the subject deciphered this phrase as a law which ought to be 'properly adopted' and which applies indiscriminately. [110] Safe to say that the unlawful occupation of land is not a law, and thus there is no need to engage with this requirement at length. While PIE is a law of general application, it should be borne in mind that section 26(3) of the Constitution and PIE do not afford unlawful occupiers right to be on the land. Instead, section 26(3) and PIE give the unlawful occupiers a defense against being evicted arbitrarily from their homes. The main concern is whether unlawful occupation of land

[106] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).
[107] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Other*s 2010 (3) SA 454 (CC) (*Joe Slovo*). *Joe Slovo* leaves open the discussion of whether meaningful engagement ought to happen before or after the eviction order has been sought. It seems more plausible, as established in *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 (2) BCLR 99 (CC) paras 69 and 120 that if meaningful engagement were to take place after an eviction order was sought, said engagement might not be deemed to be sincere.
[108] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC) (*Berea*).
[109] Ibid.
[110] B V Sade 'The 'law of general application' requirement in expropriation law and the impact of the Expropriation Bill of 2015' (2017) *De Jure (Pretoria)* vol 50 n 2.

amounts to the landowner's deprivation. The Constitutional Court in *First National Bank* held that "any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[111] Unlawful occupation of land would easily fall under this broad category as it involves the possession, use, enjoyment and arguably exploitation of private property. As the term indicates, unlawful occupation is evidently not a law and thus cannot be saved by the exception of 'law of general application' under section 25. Thus, unlawful occupation amounts to deprivation of property, which is not protected under the Constitution, as has been confirmed in *Modderklip SCA* and will be expanded on later.

Ultimately, what can be found from the various eviction and housing cases is that the requirement to only make an order for eviction if the latter is just and equitable has the potential to limit the right to property. This was hinted at in *PE Municipality* and confirmed in *Blue Moonlight*.[112] Although not mentioned outright by the Constitutional Court in *Modderklip*, the landowner's right to property was significantly limited. Even if one were to not consider the act of unlawful land occupation, it is obvious that the provision of housing depends on the availability of land. To think about the provision of housing without thinking about facilitating land ownership or occupation, would be to put the proverbial cart before the horse. Thus, in the most elementary sense, the right to property and the State's duty to achieve transformation through remedying land dispossession is inextricably linked to the right to access to housing. In addition to this, in practice, it has become evident that section 26 has limited and will continue to limit landowners' right to property in cases where evictions are not just and equitable. In these cases, unlawful occupiers would acquire a momentary, limited right of occupation 'which persists for as long as the State does not perform its obligations to provide temporary shelter.'[113]

Some might say that this creates a tension between sections 25 and 26 of the Constitution. However, the Constitutional Court has said time and time again that the Constitution 'is one composite whole. As such, it could not have been framed to be contradictory.'[114] Thus, one

[111] Supra note 81 para 57.
[112] *Blue Moonlight* supra note 5.
[113] S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality' (2009) 126(2) *South African Law Journal* 289.
[114] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) para 63.

cannot assume that the Constitution is contradictory.[115] While often different individual rights are at odds with each other in practice, their interpretation should not be done in such a way. One is perfectly capable to interpret both rights in a way that is not contradictory. It is only in cases of unlawful occupation of private land that the rights operate against each other. However, this is not determinative of a tension but rather a relationship between the two rights.

(e) Conclusion

Due to the above developments in housing and eviction jurisprudence, private landowners do not necessarily enjoy the same privileges as they used to before the advent of constitutional dispensation. It is clear from the above analysis that eviction cases give rise to the potential infringements of two rights: the right of the landowner to not be deprived of property save by law of general application, and the right of the unlawful occupier to not be arbitrarily evicted from their home. This could lead to a misconstrued belief that there is a tension between the two rights. However, as will be seen from the next Chapter, the argument that the operation of the rights to property and to access to housing is indicative of a special relationship between the two is clear from the Constitutional Court's jurisprudence in eviction cases. The next Chapter will discuss how the Constitutional Court has dealt with this intersection between sections 25 and 26 and which remedies it has considered to alleviate the limitations on either right.

[115] *S v Rens* 1996 (1) SA 1218 (CC) para 17.

III. THE RELATIONSHIP BETWEEN PROPERTY AND HOUSING RIGHTS THROUGH THE LENS OF THE CONSTITUTIONAL COURT

As seen from the previous chapter, sections 25 and 26 have a peculiar relationship. Yet, while one would think that, given the high number of eviction cases which have culminated at the Constitutional Court, there would be lengthy discussions in each case on the intersection of these two rights, this is unfortunately not the case. As of now, the Constitutional Court has only ever discussed the interaction between property and housing rights in two cases: *PE Municipality* and *Modderklip*. In both cases, these discussions were not extensive, but they are nonetheless informative for the purposes of this dissertation and consequently, this chapter will discuss the relationship between the two rights through the lens of the Constitutional Court. Due to the importance of the case and the relevance of the facts and the remedy, this Chapter will also reflect on the High Court's judgment and the Supreme Court of Appeal's order in the *Fischer* case. This discussion will serve as a survey of the court's general approach to ordering judicial expropriation as a remedy in cases where evictions would be unjust and inequitable, in an effort to assess whether such a remedy has been considered as plausible by the judiciary.

(a) PE Municipality

In the year 2000, motivated by a petition signed by 1600 people in the neighbourhood, the Port Elizabeth Municipality approached the South Eastern Cape Local Division of the High Court seeking an eviction order against the respondents, 68 people including 23 children.[116] The respondents had erected 29 shacks on privately owned land within the Municipality's territory. The respondents purported that they had remained on the land for periods stretching between two to eight years and had relocated there after having been evicted from another property. According to the Municipality, the occupied land was zoned for residential purposes and the occupiers erected their shacks without the Municipality's consent. The occupiers stated that, should suitable alternative land be found, they were not opposed to relocating. The Municipality in turn offered to move them to a location known as Walmer Township (Walmer). However, the occupiers declined to move to Walmer, stating it was not safe, was over-crowded and offered them no security of tenure.[117]

[116] Supra note 2.

[117] It should be noted that, at no stage, had the occupiers applied to the Municipality for housing.

The Municipality retorted that, although it was conscious of its duty to provide housing, providing alternative land to the occupiers would amount to preferential treatment and 'queue-jumping'. This term is commonly raised by the State in cases where they are required to provide alternative accommodation to prospective evictees who have not applied for housing. It relies on the notion that 'there is a "waiting list system" which constitutes a housing "queue", and that people must wait patiently until their name is chosen in terms of a rational process of "first come first served".'[118] This prevailing discourse around housing delivery contains numerous fallacies which will be exposed in the next chapter. For now, it suffices to point out that this was the Municipality's main argument. The High Court found for the Municipality and held that it was in the public's interest that an end be put to the unlawful occupation and thus, accordingly granted the eviction order.

The occupiers knocked on the doors of the Supreme Court of Appeal, seeking to have the lower court's judgment overturned. The SCA established that the occupiers were not trying to obtain favourable treatment as they were not asking for housing to be allocated to them at the expense of the people in the housing queue. Instead, the occupiers were simply asking for alternative land to be identified for them to relocate without the risk of being evicted again. Having considered numerous factors, including the length of time during which the land was occupied, the suitability of the alternative land and the lack of prospective security of tenure of the occupiers in Walmer, the SCA held that the alternative land was not suitable. The SCA found that the High Court should not have granted the eviction order without a guarantee from the Municipality that the occupiers' tenure security would be respected. Thus, the eviction order was set aside. Disappointed by this outcome, the Municipality knocked on the doors of the Constitutional Court to overturn the SCA's judgment as well as to establish once and for all that it is not a constitutional requirement for the State to provide alternative accommodation or land in eviction cases.

In a unanimous judgment penned by Sachs J., the Court fleshed out the requirements under PIE and explained the different circumstances under which a court should be more inclined towards ordering an eviction and when it should be more cautious in evicting occupiers. The Court went to great lengths to explain that 'the eviction process is not automatic and … the courts are

[118] K Tissington, N Munshi, G Mirugi-Mukundi and E Durojaye ''Jumping the Queue', Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (2013) *SERI Report* 6.

called upon to exercise a broad judicial discretion on a case-by-case basis.'[119] The Court applied the different factors required by PIE to the relevant circumstances of the occupation and found that it was not persuaded that it would be just and equitable to order the eviction of the occupiers.[120] Thus, it dismissed the application for leave to appeal.

Based only on this brief account of the facts of the case and the outcome, the reader might not grasp the importance of this case. However, van der Walt had the following to say about how seminal *PE Municipality* was for constitutional property law.

> 'The new logic described in *PE Municipality* should guide the [process of development of the common law in line with section 39(2) of the Constitution]. The point of departure cannot be that existing, vested or acquired rights necessarily trump no-right interests or weaker rights, or that existing, vested and acquired rights have to be insulated against regulatory limitation at all cost.'[121]

While this judgment is not often praised, most probably due to its uneventful outcome, van der Walt's statement is undoubtedly accurate: the judgment indicated a 'fundamental shift from abstract, rights-based to [a] contextual, non-hierarchical thinking about property rights.'[122] This 'fundamental shift' occurred through an analysis of PIE in contrast to its predecessor, the Prevention of Illegal Squatting Act (PISA).[123] The Court explains how PIE was intentionally crafted so as to be diametrically opposed to PISA, by decriminalizing unlawful occupation of land and by 'temper[ing] common law remedies with strong procedural and substantive protections; and … facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgement of the necessitous quest for homes of victims of past racist policies.'[124] The judgment highlights the fact that PISA only required the determination of one question: whether the occupation of the land was lawful. If the answer was in the negative, occupiers faced summary evictions and criminal prosecution.[125]

[119] Supra note 2 para 31.
[120] Ibid para 59.
[121] Supra note 46 at 526-7.
[122] Ibid.
[123] Act 52 of 1951.
[124] Supra note 2 para 12.
[125] Supra note 2 para 8.

PISA, along with many other Acts, ensured that Black people could only live in certain areas cordoned for them, and apartheid state planning was thereby safeguarded. The Constitutional Court's interpretation of PIE and explanation of the shift from PISA, in *PE Municipality*, set a powerful precedent: property rights would no longer automatically trump occupiers' interests. The Constitutional Court thus stripped property rights of what was left of its once sacrosanct status. On a more conceptual level, the judgment emphasizes that, along with the replacement of PISA with PIE, there should be a significant shift in the way in which unlawful occupation should be regarded. The unlawful occupiers should be treated with dignity, and as the Court put it, eviction which was a 'former depersonalized process that took no account of the life circumstances of those being expelled' should now be a 'humanized procedure that focused on fairness to all'.[126]

However, for the purposes of this dissertation, the importance of this judgment lies in the fact that *PE Municipality* is the first Constitutional Court judgment to discuss the intersection between property and housing rights. The Court does so by considering the 'broad constitutional matrix for the interpretation of PIE'.[127] In simpler terms, the judgment sets out the bigger picture in which property rights, housing rights, homelessness and landlessness operate, and establishes how PIE fits in this machinery. This part of the judgment grounds the discourse as it explains that the 'broad constitutional matrix' and the purpose behind its existence points to the attempt to undo a racist past, the consequences of which have not yet been erased. Sachs J. considered the history of forced evictions in the apartheid era, emphasizing on the need for context when interpreting constitutional rights. He stated that the role of PIE was in two parts, 'people once regarded as anonymous squatters now became entitled to dignified and individualized treatment with special consideration for the most vulnerable… while the second part of the title established that unlawful occupation was also to be prevented.'[128]

This judgment is the first to delve into the juxtaposition of the right to not be arbitrarily evicted, the right to access to adequate housing and the right to not be deprived of one's property. The Court goes as far as to state that, in an eviction dispute much of the case 'turns on establishing

[126] Supra note 2 para 14.
[127] Ibid para 14.
[128] Ibid para 8.

an appropriate constitutional relationship between sections 25 and 26.'[129] Sachs J. sets out the framework in which these rights should operate and be interpreted when they interact with each other and limit one another. The judgment also considers the property clause and establishes that property rights under section 25 must be considered particularly in this context because of the 'blatant disregard manifested by racist statutes for property rights in the past.'[130] Thus, Sachs J. discusses subsections (4) to (9) of section 25, highlighting their aims to redress 'one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa'.[131] He does so by referring to Ackermann J.'s judgment in *First National Bank*.[132] Endorsing van det Walt's stance on the interpretation of section 25, namely that 'the purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest'.[133] He ties the transformative nature of subsections (4) to (9) of section 25 to the reason for the incorporation of section 26 of the Constitution, stating that the two create a wide overlap between land rights and socio-economic rights, as accepted in *Grootboom*.[134] Thus, the Court adopted van der Walt's approach that when a court considers the aim and content of the property clause, one should:

> '…move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamic, typically public-law view of the constitution as an instrument of social change and transformation under the auspices of entrenched constitutional values.'[135]

After elaborating on the interpretation of both sections 25 and 26 of the Constitution, Sachs J. establishes that 'the Constitution recognizes that land rights and the right of access the housing and of not being arbitrarily evicted, are closely intertwined.'[136] The Court here acknowledges the continuum of tenure rights by stating that 'the stronger the right to land, the greater the prospect of a secure home'.[137] This statement echoes the fact that the people who are more vulnerable to evictions are those who have temporary rights in land and low tenure security. This statement concretizes the notion that through the spectrum of tenure rights, from being

[129] Ibid para 19.
[130] Ibid para 16.
[131] Ibid para 16.
[132] Supra note 81.
[133] Supra note 2 para 16.
[134] Supra note 90 para 74.
[135] Supra note 2 para 16.
[136] Ibid para 19.
[137] Ibid.

evicted to obtaining strong tenure security, sections 25 and 26 in the Constitution are, in many ways, closely linked.

The Court also highlights that, in its interactions with each other in the context of evictions, sections 25 and 26 need to be balanced against each other. The need for this balancing exercise, on a case-by-case basis is emphasized throughout the judgment and its importance is re-iterated as it was the main change brought about by PIE: the consideration of personal circumstances in the balancing exercise,[138] as opposed to ownership rights trumping occupiers' interests. The Court also considered the role of courts in the balancing exercise between the multiple rights and interests at play in eviction proceedings. In his judgment, Sachs J. held that the judicial function is to 'balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.'[139]

According to section 6(3)(a) to (c) of PIE, courts should take into account factors including, the circumstances of the occupation of the land; the period for which the unlawful occupier and their family have been on the land; and the availability of a suitable alternative accommodation or land. When judging on all these factors, Sachs J. held that PIE 'expressly requires the court to infuse elements of grace and compassion into the formal structures of the law.' [140] He also went on to say the following about the courts' role in adjudication of eviction cases.

> 'The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.'[141]

Thus, the Court made it clear that no interests were to be prioritized over the other.

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[138] Per section 6 of PIE, the establishment of the facts that the occupation is either unsafe, unhealthy or unauthorised does not mean the court should make an eviction order, rather, it 'triggers' the court's discretion. The court must only grant an eviction when it is just and equitable to do so.
[139] Supra note 2 para 23.
[140] Ibid para 37.
[141] Ibid para 23.

> '[The Constitution] counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that normally go with title could clash head-on with the genuine despair of people in dire need of accommodation.'[142]

While such a statement is laudable, the nature of the rights at stake will be kept in mind by any court which engages in a balancing of the rights. When the unlawful occupier is on a piece of land under circumstances which allows them to fall under the scope of protection of PIE, the occupier develops an interest in the land. This interest that is developed in the land is at most temporary, and will almost never succeed against the right of ownership of the owner of the said piece of land.[143] That being said, this drives the importance of *PE Municipality* home. *PE Municipality* does not aim to change the nature of these rights but rather, the hierarchy at which the rights are seen. The rights of the landowner no longer take automatic precedence over those of the occupiers. Instead, a balancing exercise is at play and the latter requires the courts to take into consideration various factors. While in most occasions the exercise will still likely tend towards an eviction of the unlawful occupiers because of their temporary interests, there are many instances where these evictions will be delayed in an effort for alternative accommodation to be secured in the meantime. This helps to ensure that both sections 25(1) and 26(3) are complied with. However, there are certain cases where eviction orders are unenforceable, as will be seen in the following discussion.

(b) Modderklip

In 2000, Modderklip Boerdery (Pty) Ltd (Modderklip) was alerted by the local city council of the occupation of its farm. The occupiers were people who had been previously evicted from an informal settlement close to the farm. Instead of instituting eviction proceedings under PIE, Modderklip believed that it was the duty of the municipality to do so. After laying charges against the occupiers for trespassing and getting them convicted, the occupiers were released, and went back to occupying the land. The local head of the prison proceeded to request both

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[142] Ibid.

[143] In fact, it is clear from the Constitutional Court's jurisprudence on evictions that the primary interest which they value is not security of tenure for the occupiers but rather, that the occupiers are not rendered homeless by the eviction. See *Blue Moonlight* supra note 5 para 34; supra note 69 paras 20–22, 28; *Modderklip CC* supra note 5 para 46; *Occupiers of Skurweplaas* supra note 103 para 11; and *Berea* supra note 108 para 79.

Modderklip and representatives of South African Police Force (SAPS) to not engage in further criminal prosecutions as the prison did not have enough space to house all the unlawful occupiers in the event that they be sentenced to prison terms.[144]

The applicant thus approached the Witwatersrand Local division of the High Court. At the time, the occupation had not been in effect for more than six months and there were 400 occupiers. There were more delays and, by the time the case was heard, the number of occupiers had grown to 15 000. When the application was lodged at the Gauteng High Court, the High Court was most probably under the impression that this would be yet another run of the mill eviction case, which would explain the short six-page judgment.[145] In its judgment ordering for the occupiers to be evicted and their shacks demolished, the High Court found that the occupiers knew the land was owned privately and moved onto the land without the consent of the owner and that, in the absence of any law requiring the land owner to provide housing for the occupiers, the occupiers did not have any right to enforce against the land owner.[146] Having considered the various circumstances, the High Court held that the occupiers ought to be evicted.

An eviction order was issued by the Witwatersrand Local Division and authorized the Sheriff to enlist SAPS to help with the eviction and the removal or demolition of their informal dwellings.[147] Yet, SAPS refused to assist as it believed that the matter was a civil one concerning the respondent and occupiers only. The Sheriff was forced to reach out to a private security company which asked for a deposit of R 1.8 million. As this amount was much higher than the price of the land which was being unlawfully occupied, Modderklip did not entertain the offer. Instead, Modderklip approached the Minister of Safety and Security, the Minister of Agriculture and Land Affairs and the Minister of Housing, as well as the President, but received no assistance. As more time went by, the farm was occupied by a population of 40, 000 dwellers.[148]

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[144] *Modderklip CC* supra note 5 para 5.

[145] *Modderklip Boerdery (Pty) Ltd v Modder East Squatters And Another* 2001 (4) SA 385 (W) (the eviction case). Perhaps, it could have been an easy judgment, had it only been decided on private law. This is certainly the way in which the State and the South African Police Service (SAPS) approached the matter.

[146] Ibid at 394.

[147] *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) (the enforcement case).

[148] It is significant to note that, by then, the settlement was known as the Gabon settlement and despite the presence of a solitary water tap, there was a voluntary local civic structure running the Gabon settlement.

Eventually, Modderklip went to the Pretoria High Court where both itself and the amicus curiae, AgriSA, conceded that the unconditional removal of the occupiers was not an option.[149] Modderklip sought a declaratory order stating that its property right under section 25(1) and equality rights under sections 9(1) and (2) had been violated, as well as the unlawful occupiers' right to housing under section 26. SAPS opposed the application and argued that the issue was not one which concerned the police but rather one of land reform. Relying on the expense of R18 million which would be required to implement the eviction order, SAPS contended that the eviction was not practical. Yet, the High Court made an order to the effect that the applicant's right to not be deprived of their property per section 25(1) of the Constitution had been infringed. Additionally, the High Court held that the State had an obligation under sections 26(1) and (2) of the Constitution, read with section 25(5), to take reasonable steps to realise the occupiers' right to access to adequate housing. Interestingly, the High Court also relied on section 165(4) of the Constitution to underscore the need for court orders to be complied with, and for the rule of law to be respected.[150] Hence, the State was ordered to put forward a comprehensive plan in front of the High Court on how it would implement the eviction order. The High Court had thus granted, per sections 38 and 172(1) of the Constitution, a declaratory order and a *mandamus* in the form of a structural interdict.[151]

Both the eviction and enforcement cases were appealed to the SCA by Modder East Squatters and the State respectively,[152] and four *amici curiae* were admitted.[153] Both matters were consolidated and heard in May 2004. There, it became clearer that despite its various efforts, the State was unable to prove that Modderklip's delay in bringing the eviction application to Court was unreasonable and even culpable, nor that Modderklip should therefore suffer the consequences of that delay as opposed to the State being called upon to explain its non-compliance to the High Court's order.[154] In fact, it came to light that the Municipality had its role to play in causing Modderklip to be delayed in instituting the eviction proceedings.

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[149] Supra note 147.
[150] Section 165(4) of the Constitution reads: "Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."
[151] Supra note 147 para 39. A structural interdict is an order under which the relevant court will exercise supervisory jurisdiction over the organ of state concerned.
[152] Supra note 147.
[153] The *amici* were AgriSA, Nkuzi Development Association, Community Law Centre (University of the Western Cape) and Programme for Land and Agrarian Studies (PLAAS, University of Western Cape).
[154] Ibid paras 34–38.

In May 2000, the Municipality had made Modderklip aware of the occupation of the farm through a letter instructing the latter to institute proceedings to evict the occupiers as per PIE.[155] As the occupation arose out of previous evictions carried out by the Municipality and was due to overcrowding in surround informal settlements,[156] Modderklip believed that it had no responsibility in evicting the occupiers and that it should be the Municipality's responsibility instead.[157] Ignoring Modderklip's response, the Municipality approached Modderklip and they entered into negotiations regarding the sale of the two portions of land which were occupied. In June, an offer was made by Modderklip, to which the Municipality only responded in August. The Municipality indicated that they would only be prepared to purchase the land at the suggested price during the next financial year, under specific conditions. Although Modderklip had agreed to the Municipality's stipulations, a week later the latter indicated that it was not interested in purchasing the said plots of land anymore and that Modderklip should apply for the eviction of the unlawful occupiers. Since Modderklip had to obtain expert evidence regarding the health hazards caused by the informal settlement developing on their land, it was only able to launch the eviction proceedings in October 2000.[158] It can be clearly observed that Modderklip was not solely responsible for the delay in launching the eviction proceedings. Additionally, the SCA held that it was unclear whether Modderklip would have been able to satisfy all the rigorous requirements of section 5 of PIE even if it had launched the urgent procedures.[159]

The SCA, in its judgment, expressed its qualms about the structural interdict, explaining that the interdict could potentially breach the principle of separation of powers and that the time limit set by the Court for the State to comply with the order was unrealistic.[160] In addition to several other defects, the SCA held that, in granting that order, the High Court was in effect prioritizing the development of the Gabon settlement which might seem to rubberstamp queue-jumping. The SCA thought this to be highly inappropriate and referred to the Constitutional

[155] Ibid para 35.
[156] It would seem that this case goes back to the 1990s. Several residents moved out of the overcrowded Daveyton Township and established the Chris Hani informal settlement on a nearby strip of municipal land. In May 2000, they were evicted from the Chris Hani informal settlement and approximately 400 of the evictees settled on Modderklip's land under the erroneous belief that it was owned by the Municipality; supra note 147.
[157] Supra note 147.
[158] Ibid para 38.
[159] *Modderklip CC* supra note 5 para 30.
[160] Ibid para 39.

Court's statement on self-help and land invasions in the *Grootboom* judgment.[161] But instead of merely criticizing the order of the High Court, the SCA acknowledged the predicament that the parties found themselves in, since the eviction order was, simply put, impossible to enforce. As there was no alternative land identified by the Municipality, it was not feasible to evict 40 000 occupiers since they would either return back to the land or occupy another plot of land, and the State would be faced with the same problem except in another area.

Faced with this dilemma, the SCA emphasized the need for courts to be creative but practical when crafting effective remedies. Since the occupiers could not be evicted, they would have to remain on Modderklip's land and hence, return of the land would be impossible.[162] This would be a continuing infringement of Modderklip's right to property under section 25, as it would effectively constitute a deprivation of property.[163] As the SCA found that the State was seen to have infringed the property rights of Modderklip under section 25(1) read with section 7(2) of the Constitution,[164] in addition to the section 26 rights of the unlawful occupier, it opted for an order against the State to pay constitutional damages to Modderklip, so that the 'Gabon occupiers [could] remain where they [were] while Modderklip [would] be recompensed for that which it has lost and the State [had] gained by not providing alternative land.'[165]. More interestingly, the SCA stated that, 'Although in an ideal world the State would have expropriated the land and have taken over its burden, which now rests on Modderklip, it is questionable whether a court may order an organ of State to expropriate property.'[166]

The SCA thereby left the question open and instead ordered, *inter alia*, that 'the residents were entitled to occupy the land until alternative land had been made available to them by the State or the provincial or local authority' and for damages 'to be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975'. [167] To its credit, the SCA approached this matter head-on and attempted to resolve the million-dollar question: 'How to approach and solve a direct

[161] Ibid para 16.
[162] Ibid para 43.
[163] The SCA, surprisingly, did not discuss whether the occupation constituted a deprivation of Modderklip's property or rather amounted to a constructive expropriation which will be explained later. It would seem that the SCA endorsed De Villiers J's analysis that "the refusal of the occupiers to obey the eviction order amounted to a breach of Modderklip's right under section 25(1)". This will be discussed further in the following chapter.
[164] Section 7(2) reads as follows:
"The State must respect, protect, promote and fulfil the rights in the Bill of Rights."
[165] Supra note 147 para 43.
[166] Ibid para 41.
[167] Ibid at para 52(b)(iii) and (iv).

clash between landownership and the right not to be evicted, combined with the right to access to housing?'.[168] Perhaps unsurprisingly, the Constitutional Court decided to take on a completely different approach.

The State approached the Constitutional Court for leave to appeal, the President of the Republic of South Africa, being the first applicant and the Minister of Agriculture and Land Affairs, the second.[169] Modderklip was the respondent and the same *amici* which were present at the SCA were admitted at this stage of litigation. In the Constitutional Court, the State persisted with the argument that Modderklip's delay in launching the eviction proceeds was culpable.[170] It argued that, under section 5 of PIE, timeous launch of eviction proceedings was a requirement and that the evictions would have otherwise been affordable and manageable. The Constitutional Court upheld the SCA's finding that Modderklip's delay was not culpable and that the latter had not neglected to assert its rights of ownership from the get-go, as required by *Mkontwana* for there to be culpability.[171] The judgment emphasized that the Municipality was also empowered under section 6(1) of PIE to institute eviction proceedings once Modderklip declined to do so.[172]

Another argument made by the State was that section 25(1) could not be relied on since the unlawful occupiers' conduct was not one envisaged by the constitutional provision. Rather, they argued that section 25(1) had no horizontal application and thus could not govern relations between private parties.[173] The Constitutional Court held that it was of no use debating the horizontal application of section 25 in this matter, while the SCA had made inconclusive and superficial observations about its horizontal application.[174] The SCA seemed to accept the reference to direct horizontal application but then rephrased the enforcement order to highlight the fact that it was the State which infringed on Modderklip's property right by not

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[168] AJ Van der Walt, *"The State's Duty to Protect Owners v The State's Duty to Provide Housing: Thoughts on Modderklip Case",* South African Journal on Human Rights, Vol. 21, no. 1, 2005, p 146.
[169] By the time this matter reached the Constitutional Court, approximately 50 hectares of Modderklip's land was being unlawfully occupied.
[170] *Modderklip CC* supra note 5 para 22.
[171] Ibid at para 31; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC) para 59.
[172] *Modderklip CC* supra note 5 para 32.
[173] Ibid para 23.
[174] Ibid para 26.

implementing housing policies which led to the occupiers unlawfully being on Modderklip's land.[175] Van der Walt believes that much thought should not be given to the High Court and SCA's approach to the horizontal application of section 25 as it was most likely superficially considered.[176]

In addition to those arguments, the Constitutional Court addressed various issues, namely those of access to justice, appropriate constitutional remedies and access to adequate housing for the vulnerable. The judgment poignantly reminds the reader of the reason why the unlawful occupiers found themselves in this position in the first place: due to the failure of the State to meet its duty in the provision of housing (or at least alternative accommodation following the first evictions) to the unlawful occupiers. The Constitutional Court also poignantly addressed the original sin:

> 'The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.'[177]

The Court highlighted that the situation was extraordinary, and even though the State could not turn to usual mechanisms to execute the eviction order, it still bore the duty to provide access to alternative accommodation. The Constitutional Court extricated itself from the situation of having to discuss the possibility of judicial expropriation by instead turning to the rights and remedies which were more traditionally discernable and enforceable. Rather than dealing with

[175] Supra note 8 para 21.
[176] Supra note 168 at 152.
[177] *Moddeklip CC* supra note 5 para 36.

the intersections of sections 25 and 26,[178] the Court emphasized on the duty of the State to provide citizens with the required mechanisms for the resolution of disputes.[179] Relying on sections 1(c) and 34 of the Constitution, the Court stated that this duty is an aspect which flows from the rule of law.[180] The Court further relied on *Chief Lesapo* where Mokgoro J pointed that:

> '[t]he right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.'[181]

The Constitutional Court relied almost exclusively on the duty of the State to comply with the rule of law to find that the State was in breach of said duty in this matter. Hence, the Constitutional Court upheld the finding that constitutional damages were the appropriate relief but reached that conclusion through other means. Of interest to this dissertation, the Constitutional Court also addressed the arguments for the Court to order the State to expropriate the occupied land. It stated that 'the Expropriation Act, in particular section 2 thereof, seems to reserve the decision to expropriate for the Minister of Public Works'.[182] It however avoided reaching a conclusion on the question, by finding that 'it [was] not necessary to decide, in this case, whether or not a court can order the expropriation of property.'[183] In doing so, the Constitutional Court thereby granted the application for leave to appeal and dismissed the appeal in part. Save for the costs order by the SCA, the other parts of order were set aside and replaced by the Constitutional Court.

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[178] Ibid para 26, where the Constitutional Court said that it finds it "unnecessary in this case to reach any conclusion on whether Modderklip's section 25(1) right to property and the rights of the unlawful occupiers under sections 26(1) and (2) have been breached and if so, to what extent."

[179] Ibid para 39.

[180] Section 1(c) reads:

"The Republic of South Africa is one, sovereign, democratic State founded on the following values:

(c) Supremacy of the Constitution and the rule of law."

Section 34 reads:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[181] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 22.

[182] *Modderklip CC* supra note 5 para 63.

[183] Ibid para 64.

It is interesting to note that the SCA's approach in *Modderklip SCA* was in line with that of the Constitutional Court in *PE Municipality* where the section 25 rights of the landowner was balanced against the section 26 rights of the unlawful occupiers.[184] The SCA's approach to this matter was progressive with respect to how far it was developing jurisprudence on the intersection of sections 25 and 26. Avoiding the issue of the horizontal application of section 25 of the Constitution, the SCA relied on two aspects to hold the State accountable for the infringement of Modderklip's section 25(1) right. The SCA held that it was the State's failure to provide adequate housing to the occupiers which made it impossible to enforce the execution order.[185] Additionally, the SCA found that the State failed to uphold the duties that it owed to both the landowner and the occupiers under section 7(2) of the Constitution, and was thus responsible for the constitutional infringement in this case.[186] This was an innovative approach to avoiding the question of the horizontal application of section 25, while still finding the State liable for the constitutional infringement. It was also novel in that it, in a way, presupposed that the promotion of the occupiers' section 26 rights would protect the landowner's section 25 rights.[187] This takes the intersection of the two rights further, as it now creates an abstract co-dependent relationship. This will be one of the founding blocks for the later argument in favour of courts ordering expropriation in such cases.

As opposed to the SCA, the Constitutional Court shied away from making any such progressive steps towards the development of the relationship between sections 25 and 26. However, one could not fault the Constitutional Court for doing so when the route of sections 1(c) and 34 could achieve the same purpose but in a less complicated manner. Sadly, for the purposes of this dissertation, readers were robbed of the Constitutional Court's views on the relationship between sections 25 and 26 when the eviction order is unenforceable, and on whether courts can order expropriation. Another such instance where lawyers hoped to have these questions answered by the SCA or even, at some stage, the Constitutional Court was the case of *Fischer*.

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[184] Supra note 62 and supra note 168 at 150.

[185] Ibid at p 154. Van der Walt states that there is a difference between the SCA holding that the lack of provision of adequate housing made the execution unenforceable and thus causing a deprivation of land, as opposed to the lack of provision of adequate housing cause the unlawful occupation in the first place. He emphasizes this difference because he believed that the SCA went with the former option because the second could have been easily countered by the lack of causal link. There would have probably not been any evidence to the effect that the State's failure to provide access to housing directly caused the respondents to unlawfully occupy Modderklip's land.

[186] Ibid.

[187] Ibid at 155.

(c) Fischer

In this matter, three different applicants approached the Western Cape High Court and their applications were consolidated.[188] The applications have different factual backgrounds, which Fortuin J covered extensively in a 116-page judgment handed down in August 2017. The three applicants were Mrs Fischer (first respondent in *Fischer*), Mr Stock (first respondent in *Stock*) and Copper Moon Trading 203 (PTY) Ltd (first respondent in *Coppermoon*). The first and second respondents for the three applications were the same, 'The persons listed on annexure X to the notice of motion and those persons whose identity are unknown to the applicant and who are unlawfully occupying or attempting to occupy ERF150 (remaining extent) Phillipi, Cape Division, Province of the Western Cape' and the City of Cape Town. The occupied land was known as 'Marikana'.

What makes this case noteworthy were the size of the occupation, which consisted of 60 000 unlawful occupiers, and the subsequent remedies sought by the landowners. The latter sought an order from the Court requiring the municipality to purchase or in the alternative, expropriate the occupied land. It was obvious from the sheer magnitude of the unlawful occupation that the municipality would not have the requisite resources to provide alternative housing within a reasonable amount of time. In fact, this much was conceded by the municipality.[189] While section 9(3)(a) of the Housing Act allows for a municipality to expropriate land under certain circumstances,[190] and in addition to that, the City of Cape Town might have had the available resources to purchase or expropriate the property, it did not do so.[191] This left the question open to the Court as to whether courts could order the State to expropriate land. The Court responded

[188] Supra note 9 para 6.
[189] Ibid paras 75 and 103.
[190] Housing Act 107 of 1997; Section 9(3)(a) says the following:
"(3) (a) A municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme, if-
(i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof;
(ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the Provincial Gazette; and
(iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted."
[191] Supra note 9 para 169.

in the negative, stating the following, 'As the Act assigned to the City the power to expropriate when necessary it would be inappropriate for the [C]ourt to usurp that power.'[192]

Instead, the Court ordered the municipality to enter into negotiations for purchase of the occupied land under section 9(3)(a)(i) of the Housing Act and, if those negotiations were to fail, that the State ought to report to court on why it decided not to expropriate. Hence, instead of ordering the State to expropriate the land, the Court asked for a report on the potential failure to expropriate as it would allow the court to review the decision and this would not technically be a breach of the principle of separation of powers.[193] In the first instance, if the parties entered into negotiations for purchase and reached an agreement, this would constitute a contract of sale of the occupied land. The existence of a contract presupposes the notion that the parties entered into it freely. In practice, the amount of money the landowners would receive would be one agreed upon.

Should the negotiations fail, the municipality was still entitled to expropriate the land under section 9(3)(a) of the Housing Act. In this case, the financial compensation awarded to the landowners would be determined under the Expropriation Act and would not technically be an agreement. If the municipality refused to expropriate the land, the High Court was empowered to review this decision under administrative law and set it aside. This approach, in practice, would achieve the same results as an expropriation order due to the fact that the Court would have had to assess why the municipality refused to expropriate the land, and the compensation would still be calculated under the Expropriation Act. Despite leading to the same results as a court ordering the State to expropriate, this approach does not answer the question as to whether courts are empowered to order the State to expropriate land for housing. This is because the court's power to engage in judicial review of an expropriation order does not engage issues of separation of powers and is significantly different from ordering the executive to rise to its duties through a specific method. The differences will be dealt with in the next chapter.

This decision was appealed to the SCA in 2019, by the Socio-Economic Rights Institute on behalf of the occupiers. However, around a year later, in March 2020, the parties reached an

[192] Ibid para 121.
[193] L Draga and S Fick 'Fischer v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) *South African Journal on Human Rights* 35:4 406.

agreement, which was made an order of the SCA. The City of Cape Town is required by the order to 'purchase the properties that are the subject of the High Court's order at a price to be determined in an arbitration between the City of Cape Town and the property owners.'[194] The order also establishes that the decision of the arbitrators may not be appealed. While this decision has been welcomed by the occupiers and is definitely a decisive and welcomed step away from expensive litigation, legal certainty would have benefitted from a judgment from the SCA as well as, potentially, the Constitutional Court on appeal.

(d) Conclusion

In Chapter II, this dissertation considered sections 25 and 26 of the Constitution and their interpretation. It established that their constant interaction with each other gives rise to a relationship between the two sections. This Chapter confirms the existence of such a relationship through jurisprudence of different South African courts. However, this Chapter also uncovers the flagrant apprehension of South African courts with respect to ordering the State to expropriate land even where it could potentially be the most blatant remedy. There is a general angst from the judiciary that courts would be encroaching on the territory of the executive, thereby breaching the principle of separation of powers, if they were to order the State to expropriate land. This patent hesitation has caused many scholars to believe that courts may simply not issue such an order. Even the scholars who venture to answer in the affirmative, do so with a faltering voice. The next chapter will thus steadfastly pursue the claim that South African courts can order the State to expropriate land.

[194] SCA order for *Fischer* supra note 7 available at https://www.seri-sa.org/images/SCA_Fisher_Order-4March2020.pdf, accessed on 18 November 2020.

IV. CAN COURTS ORDER EXPROPRIATION?

> 'To be of the law, as opposed to philosophy and economic theory … one must take reality as the primary realm of activity. Law moves beyond articulation to implementation, and legal scholarship therefore must address the complexities of acting within an imperfect, resisting, often vulgar real world. In law, reality is not a footnote to theory or an appendix to the ideal. The claims of reality are a central intellectual imperative as much as a practical one.'[195]

One may talk endlessly about what would happen in a social utopia; there would be no housing crisis and no need for 'land grabs' as there would be no homelessness. However, as this quote perfectly illustrates, the law would be of no use if it did not consider the harsh reality in which it has to apply and regulate social behaviour. In this way, one simply cannot solely accept that expropriation would be the perfect remedy, and thus, the crux of this dissertation is whether it is a feasible remedy. Through the consideration of existing case law, it has become clear that South African courts have been hesitant to debate the issue of judicial expropriation of land when it comes to the provision of housing. Yet, with increasing numbers of unlawful land occupations and the continued failure of the State to cater for the housing needs of the South African population, unjust and inequitable evictions will become a common feature faced by our courts. Faced with another matter like *Fischer,* could a court order the State to expropriate land to house the unlawful occupiers? This Chapter will answer this question by looking at expropriation under section 172(1)(b) of the Constitution while addressing the concerns raised by numerous scholars and courts vis-à-vis why a court should steer clear of judicial expropriation.

(a) Alternative Means to Order the State to Expropriate Occupied Land for Housing

While the SCA 'tantalizingly' remarked in *Modderklip* that 'it is questionable whether a court may order an organ of State to expropriate property', it also became evident from then that separation of powers concerns reign supreme when it comes to this debate. The Constitutional Court, opting to remain quiet on the issue in *Modderklip,*[196] has since then not had the opportunity to decide the matter. Lower courts and scholars have found other ways in which to get the State to expropriate land for housing; *Fischer* being a case in point. There, the High

[195] P Gerwitz 'Remedies and Resistance' (1992) *Yale LJ* 680.
[196] *Modderklip CC* supra note 5 paras 61-64.

Court ordered the City of Cape Town to 'enter into good faith negotiations' with the owners of the properties 'in order to purchase their properties within two months of this order'.[197] In the event that these negotiations fail, the High Court ordered the City of Cape Town 'to report to this court within two months of this order whether expropriation of the properties in terms of section 9(3) of the Housing Act was considered, and if not, why not.'[198] Through the second, alternative leg of this order, Fortuin J. in effect required the City of Cape Town to exercise its power under section 9(3)(a) of the Housing Act and would review its decision not to exercise this power. In this way, the High Court avoided the much-debated issue of separation of powers,[199] as it did not directly order the municipality to expropriate land and instead would review this decision under administrative law.

However, it is clear that while this method allows the court not to breach the separation of powers principle, it is not an answer as to whether a court can order the State to expropriate land for the purposes at hand. Rather, it is an indirect way for the court to still somehow review the decision of the State to not expropriate the land as opposed to a direct order for the State to do so. Thus, it is not considered to be an alternative in this dissertation.

An additional means suggested, based on the same facts as the *Fischer* case, would be to read the 'may' in section 9(3)(a) of the Housing Act as a 'must'. This was argued by the occupiers in the case and further discussed by Fick and Draga.[200] The occupiers relied on *Levy v Levy*, where the SCA held that,

> 'a statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied.'[201]

[197] *Fischer* supra note 9 para 213.
[198] Ibid para 214.
[199] This will be discussed towards the end of this chapter.
[200] Supra note 193.
[201] *Levy v Levy* [1991] 2 All SA 407 (A) at para 32 and First Respondents' Heads of Argument (17 August 2016) at paras 117–131 available at https://www.seri-sa.org/images/Fischer_-_Stock_Heads_final.pdf, accessed on 18 November 2020.

This is an interesting approach which, although novel and fascinating, has constraints acknowledged within the article itself.[202] Section 9(3)(a)(ii) still requires the municipality to obtain the permission of the Member of the Executive Council (MEC). Thus, reading the 'may' in section 9(3)(a) of the Housing Act as a 'must' does not guarantee expropriation. Additionally, an argument could be made that the words 'any land *required* by [the municipality] for the purposes of housing development in terms of any national housing programme' (emphasis added) imply two things; that the land at stake already has to be within an existing programme, and that it ought to be 'required'. Fick and Draga get past these two implications swiftly, by suggesting that the national housing programme would be the State's Emergency Housing Programme (EHP),[203] which in its nature needs to be rapidly evolving and malleable for the needs of people who require housing, and that the land would be required for said programme because '[T]he municipality is required to house the occupiers, within its available resources, so as to avoid their homelessness and vindicate the landowner's rights.'[204]

While these are apt suggestions, they might not necessarily be applicable in this dissertation. As will be seen in the later discussion of the Modderklip land, now called 'Gabon', land occupations on a grand scale tend to develop into long-lasting – if not permanent – informal settlements. Thus, this dissertation does not pretend to claim that the housing provided on the expropriated land would be for temporary purposes. Instead, it acknowledges the need for security of tenure of the unlawful occupiers and consequently, that the housing ought probably not to be categorized under the State's EHP. Should the land then fall under a different national housing programme, the considerations under whether it is 'required for the purposes of housing development' under said program would be altered. These are considerations which would need to be kept in mind under this approach. Thus, all things being equal, this dissertation proposes an alternative empowering provision which would allow the court to expropriate land: section 172(1)(b) of the Constitution.

(b) Is expropriation a 'Just and Equitable order'?

Section 172(1)(b) reads as follows, 'When deciding a constitutional matter within its power, a court may make any order that is just and equitable.'

[202] Supra note 193 at 407.
[203] Ibid at 415.
[204] Ibid.

At first glance, this provision gives the court expansive discretion to craft *any* remedy which it might deem suitable. From an analysis of the Constitutional Court's interpretation of this section, it can be seen that the Court was careful not to constrict this discretion through a strict definition.[205] The Court instead opted to identify factors which ought to be borne in mind when crafting an order under the section. However, the Court still made a conscious decision to always remind parties that 'wide though this jurisdiction may be, it is not unbridled'.[206] In fact, in *Mhlope*, Chief Justice Mogoeng strictly emphasized the circumstances under which this power may be used by the Court:

> 'It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted.…'[207]

This was again highlighted by the Court in *Black Sash I.* [208] In addition to this, the Constitutional Court has indicated that the powers of the Court under section 172(1)(b) turns around the operational words 'just and equitable' and what constitutes justice and equity.[209] The majority in *Electoral Commission v Mhlope* held that the words "just and equitable" in section 172(1)(b) required that considerations of how equity will best be advanced needed to

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[205] This observation comes from a close reading of *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC) (*Corruption Watch*); *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) (*Mhlope*); *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) (*Black Sash I*); and *Hoffmann v South African Airways* 2001 (1) SA 1.

[206] *Corruption Watch* ibid para 68.

[207] *Mhlope* supra note 205 para 137.

[208] *Black Sash I* supra note 205 para 51.

[209] Surprisingly, not much has been written on section 172(1)(b) in this context and what renders an order just and equitable. The discussion around section 172(1)(b) has revolved around orders around declarations of invalidity and their extension. The focus of academics has instead been on what constitutes "appropriate relief" under section 38 of the Constitution. Section 38 "Enforcement of Rights" states the following:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> a. anyone acting in their own interest;
> b. anyone acting on behalf of another person who cannot act in their own name;
> c. anyone acting as a member of, or in the interest of, a group or class of persons;
> d. anyone acting in the public interest; and
>
> an association acting in the interest of its members."

be taken into account when choosing a remedy.[210] However, the Court did not define what justice and equity entails; and from a reading of the different cases which deal with section 172(1)(b), it would seem that the terms would consist of an intuitive understanding of these factors on a case-by-case basis. The issue of 'appropriate relief' in the form of a 'just and equitable' order was also discussed by the Constitutional Court in *Hoffman*.[211] There, the Court held that elements of justice and fairness were important when considering the appropriateness of a remedy.[212] According to the Court, 'fairness requires a consideration of the interests of all those who might be affected by the order'.[213]

It seems uncontroversial that an order which would be just and equitable would vindicate all the constitutional rights which have been infringed. In cases such as *Modderklip* or *Fischer*,[214] it can be seen from different courts' approaches that only two possible remedies were identified as being able to protect both the land owner's and land occupiers' rights; either allowing occupiers to stay on the property until alternative accommodation was provided and secured by the State, or awarding constitutional damages.[215] In *Modderklip*, these remedies were coupled. However, if one were to go to Gabon (the settlement which developed from the farmland occupied in *Modderklip*) in the year 2020, one would see that the occupation grew in size exponentially despite the State being under the duty to incrementally relocate occupiers to temporary housing so that the owner could regain full possession of their land. It has become evident that 17 years later, not only has no relocation been carried out but a seemingly permanent settlement has developed.

[210] *Mhlope* supra note 205 para 83.
[211] *Hoffmann* supra note 205 para 42.
[212] Ibid.
[213] Ibid para 43.
[214] *Modderklip* supra note 5 and *Fischer* supra note 9.
[215] Supra note 48.

Figure 1: A young child going to one of the water tanks in Gabon, Daveyton, to get the daily supply of water for the household (Tanveer Rashid Jeewa, 12 August 2020).

Figure 2: The site of the Daveyton Empilweni HIV & Aids Projects in Gabon, next to a creche (Tanveer Rashid Jeewa, 12 August 2020).

Figure 3: One of the streets in Gabon, Daveyton – with electricity supplied to numerous dwellings and movable toilets provided by the State (Tanveer Rashid Jeewa, 12 August 2020).

From mere observation, one could conclude that there is a degree of permanence in the occupation of Gabon. It would be almost practically impossible to relocate all the residents; and the longer the State takes to relocate the occupiers, the more the settlement will grow. Thus, over this time, the occupiers' rights to housing were only respected to the extent that they have been housed until they are relocated. They did not enjoy security of tenure as they lived in the belief, based on the Court order, that there would be impending relocation. Likewise, the land owner was never able to fully enjoy the benefits that come with ownership of the plot of land. According to the common law understanding of ownership, the owner has certain entitlements to the land, which include but is not limited to, "the entitlement to use the property (*ius utendi*); the entitlement to physically control the property (*ius possidendi*); the entitlement to alienate or encumber the property (*ius disponendi*); and the entitlement to vindicate the property (*ius vindicandi*)".[216] As illustrated before, the constitutional dispensation has now enabled limitations on the common law concept of ownership but these entitlements remain existent. The entitlement most prominently associated with ownership is the right to possess and physically control the property. While the landowner in *Modderklip* still possesses this right, in practice it is almost unenforceable due to the presence of the unlawful occupiers.

The land owner only has a title deed to prove ownership of the property but cannot occupy it or have possession because there are already occupiers on the land. He may in theory sell the land but in practice, the land's value depreciates from the moment the land is occupied. The more permanent this occupation becomes, the more the land's value depreciates. This is logically based on the fact that no sensible farmer would want to buy Modderklip's land if it is occupied by more than 40 000 people whose evictions would be practically impossible. Additionally, as Modderklip had claimed when he first approached the Pretoria division of the High Court, land which has been used for informal settlements is often riddled with health hazards. Modderklip can then only dispose of the land, as it is the only other ownership benefit that he still enjoys. Although the owner received constitutional damages, this was meant to be temporary and thus, there has been an ongoing limitation to the owner's section 25 rights to property.

[216] H Mostert, A Pope, E du Plessis, et al *The Principles of the Law of Property in South Africa* (2013) 94.

Hence, despite the Constitutional Court's order in *Modderklip CC* being a combination of the only remedies which can protect both the land occupiers' and owners' rights, their rights were still being limited. As of 2020, the limitation has been ongoing for 17 years. In light of this, it is argued that an order from the Constitutional Court amounting to judicial expropriation would be just and equitable in those circumstances. The land owner would have been compensated for the value of the land, and not being burdened with an uncertain future of owning land which might be good for nothing save for being disposed of. As for the occupiers, there would be no urgency to have them relocated as the land would now be State's land. Thus, they would have shelter, have more security of tenure and not have to face the possibilities of being relocated to an area far from their place of work, or children's schools. Understandably, this proposed court order is not as straightforward, and this dissertation will explore the obstacles later.

In *Mhlope* and *Corruption Watch*, the Court emphasized that 'paramount in the relief [under a just and equitable order] is the vindication of the rule of law'.[217] While factors such as fairness, justice and equity are those which more often than not lie within the discretion of the Court, the rule of law does not. Out of all the factors mentioned by the court which are relevant to the dispensation of a just and equitable order, it is the only one with a definition and a constant application in the Court. The rule of law is a founding value of the Constitution,[218] and is best articulated in the *Pharmaceutical Manufacturers* case where the Constitutional Court said, 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[219]

To put it simply, the rule of law is the notion that laws, as they stand, apply to each individual by virtue of the fact that they are public knowledge and clear in meaning.[220] The national legislature is admittedly best placed to generalize and create laws as they have been democratically put into this role by the people and are seen to be 'the most responsive to the

[217] Supra note 48 at para 130 and *Corruption Watch* supra note 205 para 69.
[218] Section 1(c) of the Constitution states the following:
> "The Republic of South Africa is one, sovereign, democratic state founded on the following values… supremacy of the constitution and the rule of law."
[219] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*) at para 44.
[220] T Carothers 'The Rule of Law Revival' (1998) *Foreign Affairs* Vol 77 Issue 2 1.

people'.[221] As the late Antonin Scalia has written, 'Executives and judges handle individual cases; the legislature generalizes.'[222] The rule of law demands many things of the Court, but mostly that the law is applied to everyone alike, and that it is respected. Thus, a society where the State does not comply with an order of the Court, as is clearly the case from what can be seen of the lack of relocation from Gabon, the rule of law would be undermined. The State had a duty, arising from the Constitutional Court's order in *Modderklip CC* to slowly relocate the occupiers so that Modderklip would eventually get their land back, and it has clearly not complied with this order. However, the author is conscious that relocation is no easy feat, especially for such a high number of occupiers. In fact, it could occur in such a small number that it would seem inconsequential compared to the number of new occupiers on the land. Yet, conceding on this point only further reinforces the proposed argument. The sheer magnitude of this relocation makes the order practically impossible to be complied with, which further undermines the rule of law.

As opposed to the existing *Modderklip CC* order, unless budget restraints prevent expropriation, an order for the State to expropriate the land would be possible to comply with. Should the State fail to comply with this order, they could be held in contempt of court, save if there are intervening impossibilities. Consequently, an order amounting to judicial expropriation would be in line with the rule of law. Given the fact that this Court order promotes the rule of law, and as elaborated on before, is just and equitable given the circumstances, section 172(1)(b) allows for judicial expropriation in exceptional circumstances. Yet, if that is the case, then why has the Court never ordered the State to expropriate land for housing, despite having had the opportunity to do so?

(c) Arguments against Judicial Expropriation

Numerous scholars believe that the Court is not empowered to order the State to expropriate land. Property law luminary van der Walt believed that 'the power of expropriation is based on statute and granted to specific administrators, who must exercise their statutory discretion when taking the administrative decision whether or not to expropriate',[223] and he added more firmly

[221] A Scalia 'The Rule of Law as a Law of Rules' (1989) *The University of Chicago Law Review,* Vol 56 No 4 1176.
[222] Ibid.
[223] Supra note 46 at 386.

'courts cannot usurp this discretion or direct the expropriator in its exercise of the discretion.'[224] However, van der Walt also acknowledged that there was the potential for judicial expropriation where '*uncommonly* … legislation can authorize a court to bring about judicial expropriation by making an appropriate order in terms of the statute.'[225] It is evident from the Housing Act and the Expropriation Act[226] that these pieces of legislation do not empower the Court to expropriate land.

This reluctance by scholars and courts to suggest that judicial expropriation is possible in South Africa goes back to the principle of separation of powers. Separation of powers was one of the constitutional principles against which the Constitutional Court had to consider whether the 1996 Constitution complied. Constitutional Principle IV, namely, specified that 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'[227] The aim of this principle is to ensure that no branch of government steps in the shoes of the other so as to allow a certain level of independence which facilitates 'appropriate checks and balances' between the three branches of government.

Yet, although somewhat defined, separation of powers is flexible as 'the [branches] are partly interacting, not wholly disjointed'.[228] Due to the absence of a universal model of separation of powers, South African courts have over time developed its characteristically South African model which the Constitutional Court had, in 1998, hoped would be 'one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.'[229]

In this case, since the form of expropriation most commonly known is administrative expropriation and in the absence of a legislative sourcing power for judicial expropriation, the

[224] Ibid.
[225] Ibid at 433.
[226] Act 63 of 1975.
[227] Annexed to the Constitution of the Republic of South Africa 200 of 1993.
[228] Supra note 62 paras 108-9.
[229] *De Lange v Smuts* 1998 (3) SA 785 (CC) para 60.

principle of separation of powers has been the biggest concern of scholars and judges alike. If expropriation lies exclusively in the realm of the executive's powers, judicial expropriation would be a blatant breach of separation of powers. However, the matter becomes more complicated when the Court is encountered by factual scenarios where, as discussed before, judicial expropriation seems to be a justified remedy which is just and equitable and would be the only remedy to vindicate the constitutional rights of all those concerned. This much was made clear by the Constitutional Court in *Mwelase*:

> 'The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.'[230]

More relevant to the factual scenarios discussed in this dissertation, the Court in *Mwelase* added:

> 'In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in *Black Sash I*, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery.'[231]

When it comes to an ongoing housing crisis where more than 40 000 people are so desperate for housing that they occupy land and build shacks in order not to be homeless, there is little space to doubt that the occupiers fall under the category of 'the most vulnerable and most marginalized' who 'suffered from the insufficiency of government delivery'. Cases like *Modderklip* and *Fischer* are those which 'cry out for effective relief' and justify the flexibility of the principle of separation of powers. This is even more so because the Constitutional Court

[230] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) para 46.
[231] Ibid para 48.

in *Doctors for Life* guarded the Court against 'the bogeyman of separation of powers concerns'[232] causing the Court from evading its duties:

> '[W]hile the doctrine of separation of power is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.'[233]

It is clear that in such cases where the State has failed to fulfil its duties, in this case the occupiers' rights to housing which thereafter caused an infringement of the land owner's right to property, the Court should not shun its duty by not ordering the State to fulfill theirs. Other less substantive arguments against expropriation of land to provide for the housing of occupiers are that the remedy would encourage 'shack-farming' or would be rewarding 'queue jumping'. In *Modderklip*, the land owner was accused of shack farming which entails providing land for the building of shacks for the exchange of money. The Court dismissed this allegation as there was no evidence to prove such. Even if the State could prove that shack-farming was encouraged by singular instances of judicial expropriation, the Court would need to engage in a balancing exercise to determine whether the need for prevention of shack-farming outweighs the rights of land occupiers and owner from being vindicated. Evidence would also need to be produced to prove that judicial expropriation would reward queue-jumping. This would be quite difficult as NGOs such as SERI have proved, time and time again, through vast research that a waiting list for housing does not exist and thus, it would be impossible to jump a non-existent queue.[234]

As some of these factors would depend on a case-by-case basis, the only concrete objection to judicial expropriation in exceptional circumstances would be, the encroachment of the principle of separation of powers. Yet, it is clear from consistent jurisprudence of the Constitutional Court that encroaching the principle to get the State to fulfill its duties towards

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[232] Supra note 229 para 51.
[233] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) (*Doctors for Life*) para 200.
[234] Supra note 119.

all parties and thus vindicating the latter's rights, would be justified given the exceptional circumstances.[235]

(d) Conclusion

From this enquiry about the feasibility of an order for judicial expropriation, it is clear that many obstacles lie in the way of the courts. This paper does not aim to make light of a fundamental and necessary principle such as that of separation of powers. This mechanism to keep the branches of government accountable through checks and balances is a pillar of South African democracy. Yet, as was seen from the Constitutional Court's jurisprudence, it is a flexible principle which ought to be adapted to meet society's current needs. The solution is one of balance and balance is struck in this case by only using expropriation as a remedy in exceptional circumstances, to avoid the ongoing limitation of the rights of all parties involved. This ongoing limitation, if not put an end to despite a court order requiring it to be remedied, would lead to an unjustifiable limitation. In addition to this, if judicial expropriation is rejected as a remedy, any other remedy would result in unenforceable eviction orders which would undermine the rule of law as it would take away the bite from court orders.

[235] The author is aware that regardless of whether judicial expropriation is allowed in these cases, there remains other concerns regarding whether it is possible. This unfortunately falls outside the scope of this dissertation, but the reader ought to keep in mind that other concerns would relate to whether the Court is well-placed to make such an order. This would vary on a case-by-case basis depending on whether adequate information about the land, the State's budget and its current housing policies have been put in front of the Court.

V. CONCLUSION

> 'We have no reason to celebrate this so-called 'freedom' while we live in indignity. We have no reason to celebrate 'freedom' while we have no land. … We have no reason to celebrate 'freedom' when many of us remain without safe and dignified homes, and continually at the mercy of evictions, fires and floods in our shacks.'[236]

This quote from S'bu Zikode, the President of Abahlali baseMjondolo (Shack Dwellers), on Freedom Day 2019 puts the hopes and aspirations of the Constitution in perspective. As illustrated in the previous chapter, 'law without remedies is like a broken pencil. Pointless.'[237] Likewise, no matter how transformative the Constitution purports to be, if it does not change the living circumstances of its constituents, it will sooner or later lose its credibility to said constituencies. With respect to the right to access to adequate housing, the State has done a meager job at providing housing to the South African population.

Consequently, this leads the reader to a pattern that this dissertation aims to have exposed by now. The pitiful attempt and dismal failure of the State to provide housing has led to people taking matters in their own hands. The increasing numbers of land occupations occur as a direct result of people failing to have their housing needs met. As homeless people occupy land and get evicted, the vicious cycle of insecure tenure repeats itself. Similar to what happened in the cases of *PE Municipality*[238] and *Modderklip*,[239] the occupiers simply move to another plot of land and resume occupation. Thus, as the Supreme Court of Appeal found in *Modderklip SCA*, the State is indirectly responsible for the occupation of private land in cases where people were driven to occupy this land out of homelessness.[240] This, in turn, results in a deprivation of land of the land owner which is not under a law of general application, thereby infringing on their right under section 25(1). This clearly demonstrates the interplay of sections 25 and 26 of the Constitution. The State can be, and has been, held responsible for failing to give effect to the right to access to adequate housing of the land occupiers, as well as causing the deprivation of land of the owner of the private land which is being occupied.

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[236] 'Abahlali Mourn Freedom Day' *Berea Mail* 4 May 2019, available at https://bereamail.co.za/155707/abahlali-mourn-freedom-day/, accessed on 18 November 2020.
[237] S Woolman *Constitutional Law of South Africa* (2008) 9-1.
[238] Supra note 2.
[239] *Modderklip CC* supra note 5.
[240] Supra note 8.

This limitation can be temporary, depending on whether an eviction is just, equitable, and enforceable. However, in cases such as *Modderklip*[241] and *Fischer*,[242] where ordering an eviction order would not have been just and equitable or enforceable, the occupation tends to be ongoing. This is because it would be impossible to relocate such a large number of occupiers without causing mayhem in society and causing further occupation. As established in previous chapters, ongoing limitations of rights are potentially unjustifiable if a remedy is available. The only remedy which will give effect to both the land owner's right to not be deprived of property, as well as the occupiers' right to not be arbitrarily evicted from their home without an order of court (which ought to be PIE compliant), is for the State to expropriate the land. Thus, the owner would be compensated as per the Expropriation Act,[243] and the occupiers would not be evicted arbitrarily from their homes.

At the outset, this dissertation was authentic in conceding to the harshness of expropriation as a remedy. In light of how drastic this remedy is, it was not argued that expropriation was a preferred remedy. Instead, the focus of the research question was whether the courts can order the State to expropriate the occupied land if an eviction order would be unjust and inequitable or unenforceable. When making such an order, the Court will have to consider several factors, such as the data available regarding the land and its sustainability as temporary or permanent housing location. However, due to the limitations of this dissertation, it was impossible to also devote time and effort to this separate question. In any event, the factors which the Court ought to consider when making this order does not affect whether the Court has the power to make such an order in the first place.

To answer this question, this dissertation has looked into the ways in which the Constitution revolutionized the lens through which the courts ought to look at eviction cases. Rather than prioritizing the owner's right to their land and automatically evicting the occupiers, the adjudicating body ought to engage in a balancing exercise. Having been stripped of its sacrosanct status, ownership no longer automatically trumps unlawful land occupation. Consequently, although in many cases sections 25 and 26 operate at odds with each other, the aim should be to make a fair order which does justice to both rights-holders as opposed to

[241] *Modderklip CC* supra note 5.
[242] Supra note 9.
[243] No 63 of 1975.

turning to the draconian approach to occupation which apartheid had imposed in the pre-constitutional era.

This was further confirmed in the Constitutional Court's judgment in *PE Municipality*.[244] The unanimous judgment in this case discussed how this new approach was cemented by the promulgation of PIE which aimed at infusing grace in the process of this balancing exercise. Far from trying to change the nature of the occupiers' non-right on the land, PIE aimed at putting in place safeguards which would guard against homelessness and further entrenching racial policies that had been put into place and anchored during apartheid. However, when the Constitutional Court had another chance to discuss this interplay between sections 25 and 26, it wisely opted not to broach the subject of judicial expropriation, opting instead to order the State to pay constitutional damages in *Modderklip CC.*[245]

This evident avoidance of the matter of judicial expropriation by the Constitutional Court led scholars and other courts to believe that it was strictly off the table. In fact, as mentioned, the Supreme Court of Appeal explicitly said that this would a breach of the principle of separation of powers.[246] This is manifestly because no legislation allows for the courts to order expropriation and it would seem that this would be strictly reserved to the executive.

Yet, this dissertation argues that under section 172(1)(b) of the Constitution, courts are empowered to order judicial expropriation if it qualifies as a "just and equitable" order. Whether an order would fall under this category would depend on different factors and has to be judged on a case-by-case basis. This extraordinary remedy is to be rarely resorted to, but it is contended that the occupation of privately-owned land by a number of occupiers which would be impossible to relocate, resulting in an unenforceable eviction order and ongoing limitation of rights, is an extraordinary case. Under these circumstances, it is argued that the court would be empowered under section 172(1)(b) to order judicial expropriation.

The main obstacle which would still need to be overcome would be whether courts would be breaching the principle of separation of powers. It is unfortunate that the judiciary and civil society has had to flex their saviour muscle in light of the repetitive failures of the State to

[244] Supra note 2.
[245] *Modderklip CC* supra note 5.
[246] Supra note 8.

provide for its citizens. However, much like the Constitution is a living document, so should the courts be adaptable to the times as well as the needs of society. The separation of powers principle should never be used as a bar to prevent the courts from also performing their duties. While the court should not place itself in the shoes of the executive or legislature, it also has its own duties to abide to, and in many circumstances, it unfortunately has to be creative in crafting novel remedies which can give effect to the rights of all parties and remedy all constitutional violations which have occurred. This was seen in *Mwelase,*[247] *Black Sash I,*[248] *Corruption Watch*[249] and many other cases where the Constitutional Court had to be more innovative to play its role as guardian of the Constitution. The principle of separation of powers is after all elusive and flexible. It is this flexibility that allows for checks and balances.

With the gift of hindsight, having now seen Modderklip's land, one can attest to the fact that, at most, very evictions were carried out. This means that the limitations of both the rights of the land owners and the occupiers have been ongoing for 19 years. If one were to consider this with the backdrop that the owner wanted to sell the land to the State, one would have to agree with the SCA; in an ideal world the State would have expropriated the land.[250] Unfortunately, this is not an ideal world. In fact, South Africa is the furthest from being an ideal society. Inequality is rampant and pungent in this country and the unfaltering branch of the government has been the judiciary. This, of course, does not mean that the judiciary should remain unchecked, but it also should not be deterred from fulfilling its role. This task should be carried out by the Court whether the State is failing tremendously or not. Unfortunately, when the violations of rights are so gross and blatant as is the case in these types of unlawful land occupations, the Court might have to intervene by crafting novel remedies. And should it have to do so, it is empowered to order judicial expropriation under section 172(1)(b) of the Constitution.

From myths about shack-farming to valid concerns about breaching the separation of powers, the important notion which one ought to keep in mind is that such an order would only be applicable in exceptional circumstances. The branches of the government are like those of a tree; under inexplicably strong gusts of wind, they will bend and touch each other. However,

[247] Supra note 230.
[248] *Black Sash I* supra note 205.
[249] *Corruption Watch* supra note 205.
[250] Supra note 51.

it is the very flexibility of these branches that allows the tree not to snap under the strength of the wind. Thus, while the principle of separation of powers is a safeguard against abuses, it should also not be a determinative stumbling block. It should require the courts to only consider an order for judicial expropriation under narrow circumstances, but not bar the order from being made. It is consequently clear that judicial expropriation would fall squarely under section 172(1)(b) of the Constitution. This is because, under the extraordinary circumstances which would lead to an unenforceable eviction order, judicial expropriation would amount to a just, equitable and fair order.

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