THE POWER OF THE COURT TO GRANT ALTERNATIVE ACCOMMODATION ORDERS

An investigation into when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of PIE would comply with the court's constitutional mandate

by

Sarah Johanna Fick (FCKSAR001)

Thesis submitted to the Faculty of Law, University Of Cape Town in fulfilment of the requirements for the PhD degree

Date of submission: 6 March 2017

Supervisor: Professor Hanri Mostert, DST/NRF SARChI Research Chair: Mineral Law in Africa, Department of Private Law, Faculty of Law, University of Cape Town

THE POWER OF THE COURT TO GRANT ALTERNATIVE ACCOMMODATION ORDERS

An investigation into when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of PIE would comply with the court's constitutional mandate

by

Sarah Fick (FCKSAR001)

DECLARATION

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.

2. I have used the footnoting convention for citation and referencing. Each contribution to, and quotation in, this opinion from the work(s) of other people has been attributed and has been cited and referenced.

3. This opinion is my own work.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature Signed by candidate

To my mother

~ my fiercest critic, yet my strongest supporter ~

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to the following people:

First and foremost, my supervisor, Prof Hanri Mostert, for her support throughout the years, for asking insightful questions and offering invaluable advice.

My PhD hour group, for always making time to read my work and for giving valuable comments.

My examiners, for their thorough comments.

My husband, for always going large with me.

My father, for showing me that a Fick can get a PhD.

My mother, for making me believe that I can do anything.

My siblings, for never letting me cry.

The Van der Smutse for giving me their best, with love.

Zola, for her wisdom.

I want to thank God for carrying me through this whole process and through everything else that happened during these four years.

This research was made possible by the financial support of the National Research Foundation and the University of Cape Town. Opinions expressed in this research are my own and should not be attributed to the National Research Foundation or the University of Cape Town.

ABSTRACT

In an eviction matter, the court is required to consider all relevant circumstances and grant an order that is just and equitable. An important relevant circumstance to be considered is whether the unlawful occupiers have alternative accommodation. Courts are reluctant to grant eviction orders that would leave the unlawful occupiers homeless. In matters where unlawful occupiers are unable to secure their own alternative accommodation, courts often look to the state to provide alternative accommodation. Courts have ordered the state to provide alternative accommodation to the unlawful occupiers in certain cases as a condition of the eviction order (an alternative accommodation order). This thesis seeks to determine when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) would comply with the court's constitutional mandate.

Two criteria are determined against which to test whether alternative accommodation orders comply with the court's constitutional mandate. First, the court's constitutional mandate requires that its orders adhere to the existing legal framework. Second, the court's constitutional mandate requires that its orders respect the functions of the branches of government.

An alternative accommodation order would only adhere to the legal framework if there is a valid ground for placing this duty on the state. The possible grounds for holding the state liable relate to its constitutional duty to respect, protect, promote and fulfil human rights. One possible ground relates to the state's duty to fulfil the unlawful occupiers' right of access to adequate housing by implementing reasonable short-term housing programmes. Hence, whether the state has a duty to accommodate the unlawful occupiers within its short-term housing programme is a relevant circumstance to be considered by the court. A finding that the state has a duty to accommodate the unlawful occupiers, immediately, is likely to lead to an eviction with an order against the state to provide alternative accommodation, regardless of the other circumstances.

If the state does not have a duty to accommodate the unlawful occupiers immediately in terms of its duty to fulfil human rights, its liability to provide alternative accommodation might still be found on its duty to respect and protect human rights. This is because, under some circumstances, the granting of an eviction order that results in homelessness might

violate the rights of the unlawful occupiers, whereas a denial of the eviction or a delay in the granting or execution of an eviction order[1] might violate the rights of the landowner. Placing the duty on the state to prevent or mitigate the violation by compensating either of the parties could be justified due to the state's duty to respect and protect human rights. As an alternative to compensation, a court could order the state to provide alternative accommodation to the unlawful occupiers.

These two possible grounds for alternative accommodation orders are analysed to determine when alternative accommodation orders based on these grounds would adhere to the existing legal framework and respect the functions of the branches of government. These grounds are likely to have the same outcome. For both grounds, certain factors weigh heavily against an alternative accommodation order: blameworthiness on the part of the unlawful occupiers, a lack of blameworthiness on the part of the state, a finding that the state's limited resources should rather be spent on others who are needier or more deserving. In the conclusion of the thesis, recommendations are made regarding two problem areas in granting alternative accommodation orders in eviction matters – the availability of state resources and the burden of proof.

[1] Due to a postponement of the matter, a late eviction date, a postponement of the eviction date or a suspension of the eviction order.

This thesis considers the law up until 30 June 2017

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1 Problem statement and research question

Emfuleni Local Municipality v Builders Advancement Services CC[2] involved an application for a quite ordinary eviction[3] order.[4] A large number of people were being evicted from state-owned land by the municipality.[5] There was nothing particularly peculiar about the application, nor was there anything unusual to or different from the eviction applications nowadays heard frequently by South African courts.[6] Willis J's had to give judgment on the matter. He stated: [7]

> "I am bewildered and confused as to how a court is expected to deal appropriately with applications for eviction. … [W]e need clarity. We also need much wisdom. We need practical, but nevertheless fair and just answers to some highly vexing issues."

In the end, Willis J declined to decide on the eviction matter before him. He postponed the matter *sine die*, requesting the Judge President to appoint a full bench to hear the matter.[8]

Four years later, Human Settlements Minister Sisulu also alluded to the bewilderment and confusion reigning in eviction law. After an eviction by the South African National Road

---

[2] *Emfuleni Local Municipality v Builders Advancement Services CC* (2009/51258) [2010] ZAGPJHC 27 (hereinafter "*Emfuleni*").

[3] S 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 defines "evict" as "to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will and 'eviction' has a corresponding meaning".

[4] An eviction can be defined as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy". This definition can be found in United Nations Committee on Economic, Social and Cultural Rights *Forced Evictions (Art 11.1 of the Covenant, UN Doc E/1998/22) General Comment No 7* , as referenced in I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 587.

[5] *Emfuleni* para 3.

[6] In 2016, eviction applications were enrolled over 600 times for the Western Cape High Court alone and often the high court is not the court of first instance in eviction matters. For the Western Cape High Court rolls see Southern African Legal Information Institute *Court Roll: Western Cape High Court (Cape Town)* (2016) http://www.saflii.org/za/other/ZAWCHCRolls/2016/ 05-01-2017. Chilemba reports on the large number of evictions in 2014 alone. For example, it was reported that there are between 10 and 20 evictions in the inner city of Johannesburg every month. See, E Chilemba "State of evictions report" (2014) *Community Law Centre* 1 64. See also, Sosibo K at Mail & Guardian *City of Jo'burg Blamed For Not Providing Homes for Evictees* (2014) http://mg.co.za/article/2014-06-12-city-of-joburg-blamed-for-not-providing-accommodation-for-evictees 13-01-2017.

[7] *Emfuleni* para 31.

[8] *Emfuleni* para 1.

Agency Limited (Sanral) left hundreds of people homeless,[9] she called on landowners to halt eviction proceedings "until there is a clear understanding of the laws".[10] Similar to Willis J, she referred the matter to a group of her peers, a ministerial board of enquiry.[11]

What, one may ask, would cause bewilderment and confusion in the upper ranks of South Africa's legal profession and government?[12] What are the "highly vexing issues" that move a seasoned judge to refuse judgment in an eviction matter? What is it in the current law that the responsible Minister does not understand? These high-profile demands for clarity seem to relate to the understanding of some of the practical issues that arise from eviction proceedings.

In particular, the demands for clarity seem to relate to matters involving "unlawful occupiers". In this thesis, the term "unlawful occupier" is used as defined in s1(xi) of PIE: "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 (Act. No. 62 of 1997), and excluding a person whose informal right to land, but for 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)". The focus is on persons who occupy land without consent from the owner or person in charge, despite possibly having had consent at an earlier stage. The study is also limited to unlawful occupiers, who have made the land their home. It is generally understood that PIE only applies to such unlawful occupiers since the aim of PIE is to implement section 26(3) of the Constitution of the Republic of South Africa (the Constitution).[13]

---

[9] For more on this case, see Chilemba (2014) *CLC* 16-18.

[10] Ensor L at Business Day Live *Eviction Delays Sought While Laws Are Tightened* (2014) http://www.bdlive.co.za/national/2014/06/17/eviction-delays-sought-while-laws-are-tightened 24-07-2014.

[11] See, Vecchiatto P & Phakathi B at MSN *Ministers to Probe Sanral's Cape Evictions* (2014) http://news.howzit.msn.com/ministers-to-probe-sanrals-cape-evictions 24-07-2014.

[12] The term "government" in the Constitution refers to the executive, legislative and judicial branches of the state. See, s 40(1) of the Constitution. In this thesis, the term government is used to describe the executive authority unless the context indicates otherwise.

[13] Constitution of the Republic of South Africa, 1996. See, *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) para 37. For more on the definition of unlawful occupier, see J Pienaar *Land Reform* (2014) 688-699; J Pienaar ""Unlawful occupier" in perspective: history, legislation and case law" in Mostert H and De Waal M (eds) *Essays in Honour of CG van der Merwe* (2011) 309 309-327.

Moreover, the matters concern orders requiring the state[14] to provide such unlawful occupiers with alternative accommodation (hereinafter referred to as "alternative accommodation orders").[15] Willis J questioned the appropriateness of such orders, whereas Minister Sisulu questioned how a court could sanction an eviction without ensuring that alternative accommodation is available to the unlawful occupiers.[16]

The problem of clarity, it seems, relates to the very different expectations that different organs of state place upon the eviction process, and their very different understandings of the law flowing from such differing expectations. Willis J could not find authority for an eviction order to be accompanied by an obligation to provide alternative housing; Minister Sisulu believed that the law requires the provision of alternative accommodation in eviction matters.[17]

Neither the ministerial board nor the full bench provided sufficient clarity on the matter.[18] Writing for the full bench, Van Oosten J's answer is dissatisfying, to say the least: [19]

> "I do not think it is either appropriate or desirable for a full court to provide the clarity and guidance in the general terms sought by Willis J."

Van Oosten J reasoned that, since the facts of each case vary, it is impossible to provide the kind of guidance sought.[20] Impartial as this may be, it does not solve the very real problems experienced on the lower levels of the judiciary and in the highest echelons of the executive. Whether from a full bench, a ministerial board or the legislature, clarity is needed.

This thesis is concerned with seeking clarity about a single aspect of a larger problem. It asks when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) would comply with the court's constitutional mandate.

---

[14] In this thesis, the term "state" refers to the executive authority, unless the context indicates otherwise.

[15] *Emfuleni* para 28.

[16] See Vecchiatto P & Phakathi B at MSN *Ministers to Probe Sanral's Cape Evictions* (2014).

[17] Interestingly she seems to think that where an owner had failed to institute eviction proceedings within six months it is required to provide temporary accommodation. This seems to place an unfounded heavy burden on private citizens. See, Vecchiatto P & Phakathi B at MSN *Ministers to Probe Sanral's Cape Evictions* (2014).

[18] The report on the enquiry was published in 2014, but it did not provide clear guidance regarding alternative accommodation orders. See, Department of Human Settlements *The Lwandle Eviction Ministerial Enquiry* (2014).

[19] *Emfuleni Local Municipality v Builders Advancement Services CC* A5047/110 [2012] ZAGPJHC 39 para 7.

[20] *Emfuleni Local Municipality v Builders Advancement Services CC* para 7.

The study is not limited to an exploration of when courts can require the provision of alternative accommodation and when (if ever) it can order evictions that would lead to homelessness. A more problematic situation is one in which a court is reluctant to order an eviction that would result in homelessness. To this end, the study aims to determine when, in those circumstances, the powers of the court allow it to solve the dilemma by placing the duty to prevent the homelessness on the state, in other words, by granting an alternative accommodation order.

As explained, an alternative accommodation order involves the court requiring the state to provide unlawful occupiers with alternative accommodation as a condition of their eviction. In addition, it can also be considered a constitutional remedy[21] for the unconstitutional limitation of a right.[22]

2 Background

Apartheid and its consequences played a big part in the approach to unlawful occupation in South Africa. At the end of Apartheid, a large housing backlog existed that only increased during the Constitutional Era.[23] This increase was in part due to racial segregation during Apartheid.[24] Moreover, the inhumane measures used to evict occupiers during Apartheid[25]

[21] S 38 of the Constitution.

[22] See Chapter 4.

[23] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015) http://www.politicsweb.co.za/news-and-analysis/why-cant-we-clear-the-housing-backlog--irr 05-08-2016; Wilkinson K at Africa Check *Factsheet: The Housing Situation in South Africa* (2014) https://africacheck.org/factsheets/factsheet-the-housing-situation-in-south-africa/ 06-08-2016; Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016) http://www.engineeringnews.co.za/article/housing-backlog-at-21m-says-minister-sisulu-2016-04-22 05-08-2016. Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015); Wilkinson K at Africa Check *Factsheet: The Housing Situation in South Africa* (2014); Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016).

[24] The black rural areas were not "economically viable" so black people migrated to the city after Apartheid regardless of whether they had secured accommodation there, see 663. 663. See also, 80; Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options For Effective and Sustainable Delivery of Housing in South Africa* (2013) 10; Socio-Economic Rights Institute of South Africa *A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice* (2011) 34; Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016);Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016).

[25] Such as Prevention of Illegal Squatting Act 52 of 1951. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 8-10.

called for more humane and compassionate measures to be prescribed by the post-Apartheid Constitution of the Republic of South Africa, 1996.[26]

These factors – one, that many unlawful occupiers were desperate and faced homelessness through no fault of their own and, two, that the constitution requires constitutional requirements that evictions to be humane – contributed toward the court's developing stance in eviction matters and its eventual granting alternative accommodation orders. Interestingly, the backlog also suggests an inability on the part of the state to comply with such orders. This section explores the factors in more detail.

2.1 Unlawful occupation due to the post-Apartheid housing crisis

At the end of Apartheid, in 1994, South Africa had a housing backlog of 1.5 million households.[27] The backlog was expected to increase by 200 000 per annum, as the population grew and new families formed.[28] To clear the backlog, the state adopted a housing policy, the White Paper on Housing.[29] In terms of this policy, the goal was to deliver 350 000 housing units every year.[30] Accordingly, based on the backlog and expected increase, the backlog should have been cleared by 2006. It was not.

Since 1994, 2.5 million houses and 1.2 million serviced sites have allegedly been delivered.[31] Funding allocation to housing has grown faster than any other item on the budget, increasing by more than just inflation.[32] Housing and services account for 11.4% of the state's annual

[26] (hereinafter "the Constitution"), *PE Municipality* para 37.

[27] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015). See also, Wilkinson K at Africa Check *Factsheet: The Housing Situation in South Africa* (2014).

[28] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015).

[29] As well as the National Housing Subsidy Scheme, see Community Law Centre & Socio-Economic Rights Institute of South Africa *'Jumping the queue', waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa* (2013) 6, 14. See also, Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 14; H Mostert "Landlessness, housing and the rule of law" in Mostert HDW, MJ (ed) *Essays in Honour of CG van der Merwe* (2011) 82.

[30] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015). Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015).

[31] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015); Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 85. The Socio-economic Rights Institute argues that this number might be wrong. By 2009, only 1.44 million transfers had been registered, which amounts to 55% of the total houses that were alleged delivered. Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 23.

[32] See, Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015). See also, Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 33; Muller J at Financial Mail

expenditure.[33] In the 2016 budget, R 182.6 billion was allocated to housing. This allocation was surpassed only by basic education.[34]

Despite the government's obvious commitment to the provision of housing, and despite the attention paid to housing in the budget, the housing backlog is currently estimated at 2.1 million households, 600 000 more than in 1994.[35] The number of informal settlements[36] in South Africa has increased from 300 in 1994 to 2 225 in 2015.[37] In the Western Cape and Gauteng, over 50% of households in informal settlements have been on the waiting list[38] for housing for over five years.[39]

The apparent failure by the state relates to two primary factors: an increased demand for housing and a decline in housing delivery.[40] The increase in demand for housing was caused by several factors,[41] one being the migration to the cities.[42] This migration was primarily undertaken by black persons who, during Apartheid, were only allowed to live in the cities

---

Human Settlements: Housing Backlog Widens (2016) http://www.financialmail.co.za/specialreports/budget2016/2016/02/25/human-settlements-housing-backlog-widens 06-08-2016.

[33] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015).

[34] Muller J at Financial Mail *Human Settlements: Housing Backlog Widens* (2016).

[35] This estimate was given by Minister Sisulu, see Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016). This number is based on the state's waiting list, see Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015). In 2013 an estimated 9.7% of persons in South Africa were living in informal dwellings and 7.6% in backyard dwellings. That is more than 17% of the population. 24. See also, Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 6; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 34; K Pillay "Implementation of Grootboom: Implications for the enforcement of socio-economic rights" (2002) 6 *Law Democracy and Development* 255 1.

[36] An informal settlement is defined by Stats SA as "an unplanned settlement on land which has not been surveyed or proclaimed as residential, consisting mainly of informal dwellings (shacks)." See Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 4.

[37] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015). In 2013 the number of households living in informal settlements was 1.2 million, with 945 000 living in backyards. Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 26; Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016).

[38] Ebrahim defines a waiting list as "a register used to record information of households in need of housing assistance. It is usually arranged from the oldest registration to the most recent one." See, S Ebrahim "The right to housing: challenges associated with the 'waiting list system' Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5 2014 3 SA 23 (SCA)" (2015) 30 *Southern African Public Law* 112 114.

[39] Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 27.

[40] See discussion below.

[41] On this, see Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 79.

[42] See *Betta Eiendomme v Ekple-Epoh* 2000 (4) SA 468 (W) 1079H-J.

under limited circumstances.[43] They were often evicted by so-called "influx control" legislation.[44] Once the influx control rules were abolished, many black persons moved to the city, seeking employment.[45] Often, they moved from rural areas, where they had housing, to occupy inadequate housing in backyards and informal settlements.[46] This contributed to the increased housing demand.[47] Further reasons for the increased demand are an unforeseen high population growth and an increase in unemployment and poverty.[48]

The second reason for the state's failure to clear the backlog relates to the decrease in delivery rate over the years.[49] In the first few years after the implementation of the policy, around 200 000 units were delivered annually.[50] This peaked in 1998 at around 235 000 units. Since then, housing delivery decreased steadily. Now around 100 000 to 150 000 units are completed per year.[51] The decrease in housing delivery relates to the increase in the quality of

---

[43] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 80; S Liebenberg *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) 268; Pienaar "Unlawful Occupier in Perspective" in 311.

[44] L Chenwi "Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions" (2008) 8 *Harvard Law Review* 105 113; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 80; Liebenberg *Socio-Economic Rights* 268; Pienaar "Unlawful Occupier in Perspective" in 312. Examples of influx control legislation are the Slums Act 53 of 1934; Group Areas Act 41 of 1950 and Prevention of Illegal Squatting Act.

[45] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 80; Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 10; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 34; Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016). The black rural areas were not "economically viable", see, Pienaar *Land Reform* 663.

[46] See, *Betta Eiendomme v Ekple-Epoh* 1079I-J; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 80; Pienaar *Land Reform* 659-660.

[47] This migration from rural areas, away from housing, to inadequate housing in the cities was apparently not foreseen by the state, which only accounted for an increase in the backlog as a result of new family formation.

[48] Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 34. The figure of 200 000 new families per year was accurate. The population, especially those who require housing, is growing at a rate of around 280 000 per annum. See, Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 23. Other reasons for the increased demand in housing include households breaking up so that each smaller unit can apply for housing, an overstated housing demand and the global financial crisis of 2008. See, Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015); Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 34.

[49] See, Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015). See also, Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 9; Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 23; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 30.

[50] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015); Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 14.

[51] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015). In 2010, Minister Sisulu announced a plan to upgrade 400 000 units in informal settlements and provide 80 000 rental units by 2014. By 2012 only 91 558 serviced sites had been created and only 11 334 rental houses had been made available. See, Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 15, 23-24.

housing delivered.[52] As a result of political and community pressure,[53] national minimum norms and standards of housing were adopted.[54] For the same reason, the housing subsidy increased from R12 500 in 1994 to R160 500 in 2014.[55] Even if inflation is taken into account, the subsidy amount in 2014 is almost four times that of the subsidy amount in 1994.[56] The increase in the quality of the housing slowed down housing delivery and meant that less land was available for delivery to others since the bigger units required more land.[57]

A further reason for the decrease in housing delivery can be ascribed to poor performance by the state. Often, the state's management of its housing programme is seen as ineffective.[58] This can be due to a skills shortage,[59] poor intergovernmental relations[60] and underspending.[61] Moreover, corruption,[62] maladministration[63] and politics around housing allocation are said to hinder policy implementation.[64]

---

[52] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015).

[53] See, Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015); Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 14; Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 6.

[54] In terms of a new plan adopted in 2004, Department of Human Settlements *"Breaking New Ground" A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004). See, Department of Human Settlements *Simplified Guide to the National Housing Code* (2009) 9; See also, Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 14-15.

[55] Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015); Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 14. In addition to the demand for better quality housing, an increase in construction costs also contributed to the increase in the subsidy. See, Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 15; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10.

[56] R12 500 in 1994 would have been around R 44 000 in 2014. See, South African Inflation *Inflation Adjustment Calculator* http://www.inflationcalc.co.za/?date1=1994-01-01&date2=2014-08-01&amount=12500 06-08-2016.

[57] Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 9; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10. While the increase in quality slowed down housing delivery, the lower quality houses had their own flaws. The low quality meant that they required a considerable amount of maintenance. In 2012 the Department of Human Settlements spent R 400 million on the maintenance of these houses. See, Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) fn 62.

[58] Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 20; Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 8; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10.

[59] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 87; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10.

[60] Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 10-11; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10.

[61] Liebenberg *Socio-Economic Rights* 194; Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 15; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10.

[62] Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 8, 24, 61, 72. Corruption Watch reported that 5% of corruption complaints relate to housing. Housing allocations lists

The effect of the increasing housing backlog is that many people in South Africa do not have a place to live lawfully. As a result, they occupy land unlawfully.[65] This leads to evictions.[66]

2.2 Constitutional response to post-Apartheid unlawful occupation

The Constitution ensures humane evictions by providing, in section 26(3), that persons may only be evicted from their homes in terms of a court order after all relevant circumstances are considered. Any eviction order in terms of section 26(3) must be just and equitable.[67] Moreover, section 25(6) of the Constitution provides that persons, with legally insecure tenure due to previous racially discriminatory laws or practices, are entitled to legally secure tenure or comparable redress, to the extent afforded by legislation.

To give effect to section 26(3) of the Constitution, and potentially also to section 25(6) of the Constitution,[68] the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted.[69] PIE seeks to balance the rights of landowners and unlawful occupiers, that is, the landowner's constitutional right to property[70] and the unlawful occupiers' constitutional right of access to adequate housing.[71] To an extent, PIE provides tenure security by specifying strict requirements and procedures, to be followed before an eviction order can be granted and tenure terminated.[72]

---

are manipulated and housing is allocated to supporters of councillors or persons who pay bribes. See also, Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 87.

[63] Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 8, 24, 61.

[64] Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 61; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 10. Another reason for the apparent decrease in delivery is that the state's subsidised rental housing is not always accounted for in data. Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options* (2013) 9, 15.

[65] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 87. For more on the historic reasons for unlawful occupation, see J Pienaar ""Unlawful occupier" in perspective: history, legislation and case law" in Mostert H and De Waal M (eds) 309 310-315.

[66] See, *Betta Eiendomme v Ekple-Epoh* 1087B-C. See also, Chenwi (2008) *Harv L Rev* 107; Pienaar *Land Reform* 660.

[67] S 172(1)(b) of the Constitution.

[68] A Van der Walt & G Pienaar *Introduction to the Law of Property* 7 ed (2016) 371, 373.

[69] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

[70] S 25(1) of the Constitution.

[71] S 26(1) of the Constitution.

[72] Van der Walt & Pienaar *Introduction* 371. Van der Walt & Pienaar *Introduction* 371.

An eviction in terms of PIE consists of several phases.[73] Firstly, the eviction must be applied for (the application phase). PIE authorises both the landowner and the state to seek an eviction order from the court.[74] This phase includes certain requirements regarding the notice to the unlawful occupiers and the relevant municipality.[75] The second phase involves the adjudication of the matter (the adjudication phase). The court must decide whether an eviction would be just and equitable, considering the relevant circumstances.[76] It also has the power to postpone the matter as it sees fit. If the court finds that an eviction would be just and equitable, it must decide on a just and equitable date for execution of the eviction order,[77] as well as any reasonable conditions that must be attached the eviction order.[78] The third phase constitutes the execution of the eviction order (the execution phase). The sheriff of the court carries out the eviction on the date specified in the eviction order.[79] Another potential phase includes further court proceedings (the return phase). This phase occurs if one of the parties is dissatisfied with the decision or, possibly due to new evidence, alleges that it will be unable to adhere to the eviction order or its conditions. If for example, the state alleges that it cannot provide alternative accommodation by the eviction date, it might request the court to postpone the eviction date or suspend the eviction order until it is able to perform.[80]

This thesis focuses on the adjudication phase of the eviction process. An alternative accommodation order is a condition that the court sets for the eviction. The court considers all the relevant circumstances and decides that an eviction would be just and equitable, subject to the provision of alternative accommodation to the unlawful occupiers by the state. To some extent, the return phase is also relevant. Many of the cases discussed involve appeals against orders in eviction matters,[81] applications for the postponement of the eviction

---

[73] For more on phases and a different division of the phases in an eviction matter, see T Kotze *Effective Relief Regarding Residential Property Following the Failure to Execute an Eviction Order* LLM University of Stellenbosch (2016) 2-3.

[74] The landowner and the state are authorised to apply for an eviction in terms of s 4 and s 6 of PIE respectively.

[75] S 4(2)-(5) of PIE.

[76] S 4(6), 4(7), 6(3) of PIE.

[77] S 4(8) of PIE.

[78] S 4(12) of PIE.

[79] S 4(11) of PIE.

[80] *Hlophe v City of Johannesburg Metropolitan Municipality* 2013 (4) SA 212 (GSJ) para 18.

[81] For example, *PE Municipality*; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); *City of Johannesburg v Changing Tides 74*

date[82] or the suspension of the eviction order.[83] In deciding whether an eviction date should be postponed or an order suspended, a court must again consider whether granting such a request would be just and equitable, exactly as it had to in the adjudication phase. This is because the effect of delaying the eviction during this stage is similar to postponing the matter or requiring a later eviction date during the adjudication phase.

PIE lists certain relevant circumstance to be considered by the court to determine whether an eviction would be just and equitable. One such relevant circumstance is whether the state can provide the evictees with alternative accommodation.[84] This consideration is not unique to post-Apartheid legislation as it also featured in pre-constitutional eviction legislation.[85] Pie requires only that the availability of alternative accommodation must *be considered* before an eviction order can be granted, not for alternative accommodation to *be available* before an eviction order can be granted.[86] Yet, from a survey of the available case law, it seems that courts deem the availability of alternative accommodation to be the most important relevant circumstance to be considered in ordering an eviction and are reluctant to grant an eviction order that would leave the unlawful occupiers homeless.[87] A finding that no alternative

---

(Pty) Ltd 2012 (6) SA 294 (SCA); *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] 2 All SA 251 (SCA); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC).

[82] *Hlophe HC2* para 18.

[83] In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) the order was suspended.

[84] See, s 4(7) and s 6(3) of PIE.

[85] For example, s 3(1)(b)(ii) and 5(1)(b)(ii) of Prevention of Illegal Squatting Act enabled a magistrate to order that evictees be transferred to an alternative place. If it is shown that this place does not provide suitable accommodation, the magistrate can order that the person be moved to a more suitable place. S 6 allowed local authorities to establish emergency camps to accommodate the homeless. The Prevention of Illegal Squatting Amendment Act 104 of 1988 allowed for the declaration of transit camps instead of emergency camps. See the discussion of PIE in J Pienaar & A Muller "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" (1999) 10 *Stellenbosch Law Review* 370 378, 383.

[86] In *PE Municipality* para 28, the Constitutional Court stated that here is "no unqualified constitutional duty" on municipalities to prevent all evictions where no alternative accommodation is available.

[87] *PE Municipality* (hereinafter "*PE Municipality*"); *Olivia Road* (hereinafter "*Olivia Road*"); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (hereinafter "*Joe Slovo*"); *Blue Moonlight* (hereinafter "*Blue Moonlight*"); *Skurweplaas* (hereinafter "*Skurweplaas*"); *Changing Tides* (hereinafter "*Changing Tides*"); *Hlophe* (hereinafter "*Hlophe*"). See also, G Muller "On considering alternative accommodation and the rights and needs of vulnerable people" (2014) 30 *South African Journal on Human Rights* 41 42; J Strydom & S Viljoen "Unlawful occupation of inner-city buildings: a constitutional analysis of the rights and obligations involved" (2014) 17 *Potchefstroom Electronic Law Journal* 1207 1211.

accommodation is available has resulted in an order that the state is to provide alternative accommodation to the unlawful occupiers.[88]

The provision of alternative accommodation by the state relates to the state's constitutional housing duty in terms of section 26(2) of the Constitution.[89] This section requires the state to ensure the realisation of the right of access to adequate housing (section 26(1) of the Constitution), progressively, within its available resources.[90] To give effect to section 26(2) of the Constitution, the National Housing Act 107 of 1997 was enacted,[91] together with the National Housing Code.[92] The National Housing Code is a policy that contains the state's housing programmes,[93] including the Emergency Housing Programme (EHP),[94] a programme for the provision of temporary housing in emergency housing situations.[95]

The increasing housing backlog and persons living in desperate circumstances have the effect that the state often reports that it does not have the available resources to assist the evictees.[96] Nevertheless, these reports have not prevented the court from making alternative accommodation orders.[97] Against this background, this thesis considers when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of PIE would comply with the court's constitutional mandate.

---

[88] See, for example, *Blue Moonlight*; *Changing Tides*; *Skurweplaas*. For a discussion of these cases, see Chapter 2: 3.

[89] See Chapter 2:3. See also, Pienaar *Land Reform* 669.

[90] Similarly, s 25(5) of the Constitution requires the state to "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.

[91] Department of Human Settlements *National Housing Code* (2009) 9. See also, Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 13; Ebrahim (2015) *SAPR/SAPL* 113.

[92] Section 4 of the Housing Act requires the Minister of Human Settlements to adopt this policy.

[93] S 4(2)(a) of the Housing Act.

[94] See, Department of Human Settlements *National Housing Code* (2009) 21-22. For the full programme, see Department of Human Settlements *Emergency Housing Programme* (2009).

[95] Department of Human Settlements *EHP* (2009) Part A 2.3.1.(e). The EHP was adopted in compliance with *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereinafter "*Grootboom*"), see Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 44.

[96] See, for example, *Blue Moonlight* para 77-83; *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 214; *Brookway Property 30 (Pty) Ltd v People Who Intend Invading Portion 150 of the Farm Zandfontein 317 J.R., Portion 124* (33786/2010) [2010] ZAGPPHC 129 para 15; *Ives v Rajah* 2012 (2) SA 167 (WCC) para 7.

[97] See, for example, *PE Municipality*; *Grobler*.

3 Criteria for answering research question

To determine when an alternative accommodation order as a condition to the eviction of unlawful occupiers, in terms of PIE, would comply with the court's constitutional mandate, criteria must be identified against which to test such orders. The criteria must relate to the court's constitutional mandate. While several criteria might be considered,[98] the limited scope of this thesis necessitates a delimitation of these criteria. The thesis focuses on the powers and the functions of the court and on how these powers and functions are limited by certain constitutional principles. Two criteria are used in this thesis to determine when an alternative accommodation order would comply with the court's constitutional mandate. The first is that the order must adhere to the existing legal framework. Second, the order must respect the functions of government.

3.1 The court's constitutional mandate

The criteria used in this thesis are derived from certain principles underlying the Constitution and informing constitutional litigation – the rule of law, the separation of powers, co-operative government and subsidiarity.[99] These principles shape the court's constitutional mandate. These constitutional principles are briefly explained below. Thereafter, the relation between the criteria and these principles is illustrated.

3.1.1 The rule of law

South Africa subscribes to the rule of law.[100] Like most constitutional concepts, the rule of law is notoriously difficult to define.[101] The purpose of the rule of law is to constrain

[98] An important factor that is not discussed in full here, yet referred to where relevant, is under what circumstances alternative accommodation orders are in line with the values of the Constitution – dignity, equality and freedom. In addition, this thesis does not consider when alternative accommodation orders are in line with the constitutional principle of transformation. For a detailed analysis of this question, see the Liebenberg *Socio-Economic Rights* book.

[99] That the rule of law and the separation of powers underlie the Constitution is clear from the fact that the Constitution was adopted to give effect to these principles, as found in the Constitution of the Republic of South Africa Act 200 of 1993 schedule 4. Co-operative government forms part of the separation of powers doctrine and is also expressly recognised in the s 40(1) of the Constitution. The principle of subsidiarity informs constitutional litigation and is derived from the rule of law and the separation of powers. See Chapter 1:3.1.4.

[100] The fact that South Africa is governed by the Rule of Law is evident from s 1(c) of the Constitution. This is confirmed in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (hereinafter "*Pharmaceutical Manufacturers*") para 40. The Constitution was adopted to give effect to certain constitutional principles as set out in Constitution of the

government power and ensure that human rights are protected.[102] The rule of law stipulates that both the state and citizenry be subject to the laws of the country.[103] Where a country subscribes to a supreme constitution, as South Africa does, it means that the state (including the court) and its citizens are subject to the Constitution and that any action in conflict therewith is invalid.[104]

There are different views of the rule of law.[105] The main views relate to whether the rule of law must be interpreted as substantively[106] or whether it must be interpreted merely as a procedural or a formal protection.[107] It is submitted that South Africa subscribes to the rule of law as a formal, substantive and procedural protection.[108]

As a formal protection, the rule of law requires that all state actions be authorised by law and not contravene the law.[109] In South Africa, the powers of the state to perform actions are

---

Republic of South Africa Act preamble, s 71, schedule 4. The rule of law forms part of these principles (Principle IV and V). The concept of the "rule of law" was developed by Dicey. He did not invent the phrase but gave it prominence and meaning. See, A Dicey *Introduction to the Study of the Law of the Constitution* 8 ed (1915) xx. See also, T Bingham *The Rule of Law* (2011) 3; H Van Niekerk *Towards a New Understanding of Mineral Tenure Security: the Demise of the Property-Law Paradigm* PhD University of Cape Town (2016) 155.

[101] MJ Radin "Reconsidering the rule of law" (1989) 4 *Boston University Law Review* 781 at 781; Bingham *The Rule of Law* 5.

[102] Currie & De Waal *The Bill of Rights Handbook* 10.

[103] J Waldron "The Hamlyn lectures: the rule of law and the measure of property" (2012) *New York University School of Law Public Law and LEgal Theory Research Paper Series* 1 at 6; BZ Tamanaha "A concise guide to the rule of law" (2007) *St John's University School of Law Legal Studies Research Paper Series* 1 2; Currie & De Waal *The Bill of Rights Handbook* 10-11. This is Dicey's second conception of the rule of law. See, Dicey *Introduction to the Constitution* 114. See also, J Raz "Rule of law and its virtue" (1977) 93 *Law Quarterly Review* 195 212.

[104] The Supremacy Clause states that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." See also, Currie & De Waal *The Bill of Rights Handbook* 11; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 78.

[105] Waldron (2012) *NYU Research Paper Series* 5.

[106] Currie and De Waal suggest that these basic rights are human dignity, equality and freedom, in Currie & De Waal *The Bill of Rights Handbook* 13.

[107] J Waldron "The concept of the rule of law" (2008) *New York University School of Law Public Law and LEgal Theory Research Paper Series* 1 6.

[108] D Dyzenhaus "The pasts and future of the rule of law in South Africa" (2007) 124 *South African Law Journal* 734 737.

[109] Dicey *Introduction to the Constitution* 114; Tamanaha (2007) *St John's University Research Paper Series* 3; Currie & De Waal *The Bill of Rights Handbook* 11. This is known as the principle of legality. See, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) 56-59; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (hereinafter "*Sarfu 3*") para 148. See also, Waldron (2008) *NYU Research Paper Series* 5; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 77; R Stein "Rule of law: what does it mean" (2009) 18 *Minnesota Journal of International Law* 293 299; Raz (1977) *Law Quarterly Review* 210, 212.

primarily derived from and limited by the Constitution.[110] This means that an alternative accommodation order would only comply with the court's constitutional mandate if the Constitution authorises placing the duty to provide alternative accommodation on the state.

In addition, as a formal protection, the rule of law requires that the law adhere to certain norms to ensure that compliance with the law is possible.[111] The law must be prospective, known to the public, general, clear, stable and certain.[112] It must also be applied consistently and equally.[113] This means that courts should be consistent and clear in their application of the law in eviction matters. Courts must clearly identify the grounds upon which they grant alternative accommodation orders. This will allow an examination regarding whether such orders are authorised by law.

As a substantive protection, the rule of law requires government actions to promote and respect human rights.[114] This conception of the rule of law is not universally accepted.[115] Nevertheless, the fact that section 7(2) of the Constitution requires the state to respect,[116] protect,[117] promote[118] and fulfil[119] human rights indicates that South Africa subscribes to the rule of law as a substantive protection.

---

[110] S 41(1)(f) of the Constitution.

[111] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 77; Waldron (2008) *NYU Research Paper Series* 6.

[112] Tamanaha (2007) *St John's University Research Paper Series* 3; Currie & De Waal *The Bill of Rights Handbook* 10, 14. Waldron (2008) *NYU Research Paper Series* 5; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 77; Stein (2009) *Minn J Int'l L* 299; T Bingham "The rule of law" (2006) 66 *Cambridge Law Journal* 67 67; Raz (1977) *Law Quarterly Review* 210, 213-215. See also, C Smith "Eviction - need for a way out" (2014) *De Rebus* 40 41.

[113] Tamanaha (2007) *St John's University Research Paper Series* 3; Dicey *Introduction to the Constitution* 120; Bingham (2006) *Cambridge LJ*73.

[114] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 77; Stein (2009) *Minn J Int'l L* 299; Bingham (2006) *Cambridge LJ* 75.

[115] Bingham (2006) *Cambridge LJ* 75, refers to Raz (1977) *Law Quarterly Review* 211.

[116] To refrain from interfering with people's rights, see S Liebenberg "The interpretation of socio-economic rights" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 33 33-6.

[117] To prevent people from interfering with the rights of others, see Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-6.

[118] To ensure that people are aware of and educated on their rights, see Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-6.

[119] the To ensure the realisation of human rights, see Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-6.

As procedural protection, the rule of law requires procedural safeguards to ensure that the law is applied fairly and properly.[120] It allows people the opportunity to challenge the state's administration.[121] The law must be publicly administered by independent courts and there must be access to courts.[122] South Africa subscribes to this idea of the rule of law, as is evident from the Constitution. The Constitution entrenches the right of access to courts.[123] It allows persons to approach the court if their rights are violated.[124] Moreover, courts are empowered to declare any law or conduct that is inconsistent with the Constitution, invalid.[125] In this thesis, this aspect of the rule of law does not receive much attention. This is because the analysis is limited to matters before the court and, hence, matters where people do have the opportunity to challenge the state's administration.

Where relevant, the effect of limitations on others in similar positions to challenge the state's administration is discussed. When courts grant alternative accommodation orders they must take into account that they are only dealing with a small percentage of persons in South Africa and that several others in a similar position to those before the court might lack the opportunity to approach the court. As a result, their orders must include, rather than exclude, such persons.

3.1.2 Separation of powers

The principle of the separation of powers underlies the Constitution, although it is not expressly mentioned therein.[126] The Interim Constitution required that the final Constitution

---

[120] Waldron (2008) *NYU Research Paper Series* 7; Bingham *The Rule of Law* ch 1; Stein (2009) *Minn J Int'l L* 299-300.

[121] Waldron (2008) *NYU Research Paper Series* 7-8.

[122] Bingham (2006) *Cambridge LJ* 80; Raz (1977) *Law Quarterly Review* 216-217.

[123] S 34 of the Constitution.

[124] S 38 of the Constitution.

[125] S 172(1)(a) of the Constitution.

[126] C Gevers, D Brand, K Govender, P Lenaghan, P De Vos, D Mailula, W Freedman, N Ntlama, S Sibanda & L Stone *South African Constitutional Law in Context* (2015) 1, 5; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 77; Waldron (2012) *NYU Research Paper Series* 7; T Bingham *The Rule of Law* (2010) 48, 60; C Hoexter "The rule of law and the principle of legality in South African administrative law today" in Carnelley M and Hoctor S (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 5556; Currie & De Waal *The Bill of Rights Handbook* 7, 18; S Seedorf & S Sibanda "Separation of powers" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 12 12-16; P Langa "Symposium 'a delicate balance': the place of the judiciary in a constitutional democracy" (2006) 22 *South African Journal on Human Rights* 2 4; S Ngcobo "South Africa's transformative Constitution: towards an appropriate doctrine of separation of powers" (2011) 22 *Stellenbosch Law Review* 37 38.

adheres to the principle of the separation of powers.[127] Despite not being expressly entrenched in the final Constitution, its inclusion is clear from the separate branches of government[128] required by Chapter 4 to Chapter 8 of the Constitution.[129] Furthermore, the first certification judgment confirmed the inclusion of the separation of powers within the final Constitution.[130] Subsequent case law established that the separation of powers doctrine might be relied on directly in court.[131]

At an elementary level, separation of powers means that the state is separated into three different branches – the legislative branch, the executive branch and the judicial branch.[132] Each branch has its own functions and powers.[133] The legislative branch is responsible for making laws.[134] The executive branch is responsible for active government by implementing laws, as well as adopting and implementing policies.[135] The judicial branch comprises of the courts and is responsible for administering justice through interpreting and applying the law to resolve disputes.[136]

---

[127] In terms of Constitutional Principle VI of Schedule 4 of the Constitution of the Republic of South Africa Act. See also, Gevers et al *South African Constitutional Law* 5. The Interim Constitution preceded the Final Constitution. It is a product of negotiations between the Apartheid government and its opposition. The constitutional principles decided on during these negotiations and found in Schedule 4 of the Interim Constitution formed a framework for the final, current constitution. See, Currie & De Waal *The Bill of Rights Handbook* 4-5; S Woolman & J Swanepoel "Constitutional history" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 2 2-39.

[128] The term "government" in the Constitution refers to the executive, legislative and judicial branches of the state. See, s 40(1) of the Constitution. The composition and functions of these branches are discussed in Chapter5: 2.

[129] Currie & De Waal *The Bill of Rights Handbook* 18; Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-19.

[130] See, *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) (SA) 744 (CC) para 113. The purpose of the certification decisions was to determine whether the Final Constitution complied with the requirements set by the Interim Constitution. Subsequent cases endorsed this finding. See, *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC); *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC); *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

[131] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-37, referring to *South African Association of Personal Injury Lawyers v Heath* para 20-22.

[132] Liebenberg *Socio-Economic Rights* 66.

[133] Liebenberg *Socio-Economic Rights* 66.

[134] Liebenberg *Socio-Economic Rights* 66.

[135] Liebenberg *Socio-Economic Rights* 66.

[136] Liebenberg *Socio-Economic Rights* 66.

A primary purpose of the separation of powers doctrine is to ensure that the power of government is not concentrated in one entity.[137] By diffusing governmental power and requiring each branch to hold the other in check, abuse of governmental powers is limited.[138] Each branch is accountable toward the others and can be compelled by the other branches to perform its duties.[139] As with the rule of law, there is a substantive quality to the separation of powers doctrine. Requiring a separation of government power contributes to the respect, protection, promotion and fulfilment of human rights.[140] For example, a court can hold the executive authority accountable for providing housing, thereby ensuring that the right of access to adequate housing is fulfilled. This is because the aim of separation of powers should be to improve the accountability of the branches of government and their commitment to the realisation of constitutional rights.[141] An alternative accommodation order can be considered a means by which the court ensures that another branch of government fulfils its duties. However, there is a fine line between requiring a branch to fulfil its duties and dictating to the branch how it should fulfil its duty to such an extent that the power of that branch is relocated to the court.[142]

Another purpose of the separation of powers is for the state to function more efficiently.[143] Each branch has very specific functions and can concentrate on fulfilling these functions competently. Effectively, each branch is able to specialise and gain expertise to fulfil their specific functions.[144] This confirms the importance of ensuring that other branches comply

---

[137] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-1; I Rautenbach & E Malherbe *Constitutional Law* 5 ed (2009) 84; Liebenberg *Socio-Economic Rights* 67.

[138] Gevers et al *South African Constitutional Law* 5. See also, Liebenberg *Socio-Economic Rights* 67; M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383 385; *First Certification Judgment* 112, referred to in Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-20; Langa (2006) *SAJHR* 4.

[139] This idea of the separation of powers doctrine was only included in later conceptions. See, Gevers et al *South African Constitutional Law* 5.

[140] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-1, 12-6.

[141] D Davis "The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: what about separation of powers?" (2012) 15 *Potchefstroom Electronic Law Journal* 1 10.

[142] Chapter 5:3 considers how this line must be determined and respected.

[143] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-2.

[144] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-2, 12-20, referring to *First Certification Judgment* 112.

with their duties, while not taking over their functions since each branch should be best equipped to fulfil the duties allocated to it.[145]

3.1.3 Co-operative government

Not only is government separated into three branches, the executive and the legislative branches are also separated into national, provincial and municipal spheres.[146] Each sphere has its own powers and functions.[147] Provincial and municipal spheres are further separated into territorial areas.[148] The territorial areas for provincial spheres are in accord with the provincial boundaries.[149] The territorial area of each provincial sphere is subdivided into the territorial areas of each municipal sphere, called "municipalities".[150] Requiring the separation of government into smaller areas allows the government to better know and address the specific demands and needs within its jurisdiction.[151] Moreover, separation of government power into specific physical areas guarantees that government revenue is spent in every area of the country.[152]

Unlike the branches of government, the different spheres of government within a branch are not to function in a vacuum.[153] Section 40(1) of the Constitution provides that the spheres are distinct, interdependent and interrelated.[154] Spheres must each fulfil their own functions but

---

[145] This is not necessarily the case. See Chapter 5:3.

[146] S 40(1) of the Constitution. The judiciary is not similarly separated into spheres. See, Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (2008) 6. The national, provincial and municipal authorities are called spheres, rather than levels. This is because levels suggest a central government and a hierarchy of authority, whereas spheres suggest a federal government and a division of tasks. Despite this naming, the spheres operate on a hierarchical basis. South Africa is seen to have neither a central, nor a federal government. Instead, the system of government has been described as "co-operative federalism" (B De Villiers "Intergovernmental relations in South Africa" (1997) 12 *South African Public Law* 197 199). While provinces and municipalities may function separately, they must co-operate with one another, often to fulfil national goals. See, S Woolman & T Roux "Co-operative government & intergovernmental relations" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 14 14-1 – 14-2, 14-9 – 14-10, 14-33 – 14-34; Rautenbach & Malherbe *Constitutional Law* 92. See also, s 4 of the Intergovernmental Relations Framework Act 13 of 2005 (hereinafter "IGRFA").

[147] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-13.

[148] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14.

[149] S 103 of the Constitution.

[150] S 151 of the Constitution.

[151] It also allows for self-determination of the specific group(s) in the area, see Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14.

[152] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14.

[153] S 40(1) of the Constitution.

[154] See also, Davis (2012) *PER/PELJ* 4.

must work toward the same goal.[155] This is where the principle of co-operative government comes into play.[156] There must be both vertical co-operation between the spheres and horizontal co-operation within the spheres of government.[157]

Despite being assigned specific powers, the different spheres of government within a branch must assist and support each other in performing their functions.[158] They must inform and consult each other on matters of common interest and coordinate their actions.[159] One sphere cannot undermine the functioning of another sphere.[160]

When granting alternative accommodation orders a court must take cognisance of the fact that each sphere of government has different powers. It should not place a duty on one sphere that falls within the powers of another. A court must also take into account the fact that the different spheres of government are required to co-operate with one another and assist each other. Hence, where more than one sphere is responsible for the same matter a court should not focus on only one of these spheres. Yet, from a survey of the available cases, it appears that courts do tend to focus only on specific spheres of government for the fulfilment of alternative accommodation orders.[161] If this is the case, such orders might violate the principle of co-operative government.

3.1.4 Subsidiarity

The principle of subsidiarity is not expressly found in the Constitution. Nevertheless, subsidiarity can be found within other constitutional principles and courts have acknowledged it as part of South African law.[162]

---

[155] Woolman & Roux "Co-operative Government" in *CLOSA* 14-9, referring to *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 26.

[156] Chapter 3 of the Constitution deals with co-operative government. See also, Gevers et al *South African Constitutional Law* 9.

[157] Woolman & Roux "Co-operative Government" in *CLOSA* 14-7. See also, N Steytler "Local government in South Africa: Entrenching decentralised government" in Steytler N (ed) *The Place and Role of Local Government in Federal Systems* (2005) 183 204.

[158] S 41(1)(h)(ii) of the Constitution.

[159] S 41(1)(h)(iii) and (iv) of the Constitution.

[160] Woolman & Roux "Co-operative Government" in *CLOSA* 14-8.

[161] See, for example, *Blue Moonlight*; *Changing Tides*; *Hlophe*; *Skurweplaas*. These cases are discussed in Chapter 2:3.

[162] See argument below.

Subsidiarity requires that, where legislation was enacted to give effect to constitutional rights, disputes regarding this right should be adjudicated by applying the relevant piece of legislation. Under such circumstances, direct reliance should only be placed on the constitutional right if the constitutionality of the legislation is challenged.[163]

For example, PIE is considered to give effect to several constitutional rights, including the right to property, [164] the right of access to adequate housing[165] and the right to be evicted only in terms of a court order, after all the relevant circumstances have been considered.[166] If a landowner argues that the unlawful occupation of its land violates its right to property, the dispute must be based on PIE and not directly on section 25(1) of the Constitution.[167] It is only where the landowner argues that PIE allows for an unconstitutional limitation of its rights[168] that section 25(1) should be directly relied upon.[169]

Furthermore, where it is found that a legislative provision does not comply with a constitutional right, an order that strikes out the legislative provision should be a last resort.[170] As far as possible, a court should engage in a purposive interpretation[171] or amendment of the legislation to align it with the Constitution.[172] For example, if PIE is found to place an

---

[163] A Van der Walt *Property and Constitution* (2012) 36; A Van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77 101; L Du Plessis ""Subsidiarity": what's in the name for constitutional interpretation and adjudication?" (2006) 17 *Stellenbosch Law Review* 207 237; A Van der Walt *Constitutional Property Law* (2011) 263; L Du Plessis "Interpretation" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 32 32-2. Also referred to as "the principle of avoidance", see Currie & De Waal *The Bill of Rights Handbook* 13, 25, 67-71.

[164] S 25(1) of the Constitution.

[165] S 26(1) of the Constitution.

[166] S 26(3) of the Constitution. Liebenberg argues that PIE was enacted to give effect to s 25(1) and 26 of the Constitution, in Liebenberg *Socio-Economic Rights* 271. Van der Walt argues that PIE must be relied on in disputes regarding s 25 of the Constitution in the context of eviction, in Van der Walt *Property and Constitution* 41 fn68, 50, 55. See also, A Pope "A tricky balancing act: reflections on recent South African eviction jurisprudence" in *DCM Festschrift (forthcoming)* (2017) 5.

[167] Van der Walt *Property and Constitution* 50, 55.

[168] If the limitation is reasonable and justifiable then it would be constitutional as per s 36 of the Constitution.

[169] Van der Walt *Property and Constitution* 55.

[170] This is called "constitutional severance" – where unconstitutional words or sections are removed from the act. See, Liebenberg *Socio-Economic Rights* 383.

[171] Also called "reading-down" – where a statute is interpreted in line with the Constitution in terms of s 39(2) of the Constitution. This is done to avoid a finding that the provision violates the Constitution. See also, Currie & De Waal *The Bill of Rights Handbook* 70, 187, 554.

[172] Van der Walt *Property and Constitution* 37, 66; Du Plessis (2006) *Stell LR* 237. This is also called "reading in" – where words are added to the provision to make it in line with the Constitution. Currie & De Waal *The Bill of Rights Handbook* 180, 187; Liebenberg *Socio-Economic Rights* 383.

unconstitutional limitation on the landowner's right to property, PIE should ideally be interpreted or amended to avoid such a limitation.[173]

As stated, the principle of subsidiarity is not expressly found in the Constitution. The term "subsidiarity" in the context of South African constitutional law was first used by Du Plessis to describe the approach of the Constitutional Court in the minority decision of *S v Mhlungu.*[174] In this case, the minority deemed it a general principle that, where possible, a court should decide an issue using civil or criminal law, instead of applying the Constitution directly.[175] Subsequent to this statement, the Constitutional Court acknowledged this general principle as part of South African law.[176] For example in *South African National Defence Union v Minister of Defence*,[177] the Constitutional Court found that a litigant could not assert his right to participate in collective bargaining on section 23(5) of the Constitution,[178] but should rely on the legislation enacted to enforce the right. If the litigant believes that the legislation is unconstitutional, it should challenge the constitutionality of the legislation.[179]

A compelling argument can be made for founding this principle on the rule of law and the separation of powers.[180] In terms of the rule of law, the government and the persons within South Africa are subject to the laws of the country.[181] To enable these entities to comply with

---

[173] Currie & De Waal *The Bill of Rights Handbook* 187.

[174] 1995 3 SA 867 (CC). See, Du Plessis (2006) *Stell LR* 207. Van der Walt developed the concept further, see Van der Walt *Property and Constitution* 35-91; Van der Walt (2008) *CCR* 99-125.

[175] *S v Mhlungu* 1995 3 SA 867 (CC) para 56.

[176] See, for example, *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC) para 3; *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) para 21; *Ferreira v Levin NO and others; Vryenhoek v Powell NO and others* 1996 (1) SA 984 (CC) para 7; *S v Bequinot* 1997 (2) SA 887 (CC) para 7; *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 4 SA 753 (CC) para 33; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21; *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 19.

[177] *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC).

[178] S 23(5) of the Constitution reads:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with s 36(1)."

[179] *South African National Defence Union v Minister of Defence* paras 51-52, referred to in Van der Walt (2008) *CCR* fn 104.

[180] Van der Walt *Property and Constitution* 60.

[181] See Chapter 3:3.1.1.

it, the law must adhere to certain norms, including that the law must be certain and applied equally.[182] The principle of subsidiarity enables the law to adhere to these norms.

The norm of certainty is promoted through the application of the principle of subsidiarity since it prevents the creation of parallel systems of law. Where both a piece of legislation and a constitutional right apply to a specific matter, subsidiarity determines which source of law must be relied on directly. Without rules regarding which laws to apply directly, an aggrieved party can effectively choose which legal rule must apply.[183] This creates parallel systems of law since the rules within the different sources of law will be applied and interpreted independently. Hence, two separate, potentially quite different, sets of rules might develop that would apply to one matter at the same time. This creates uncertainty as to the source of law that should apply and the outcome of the matter. In this regard, the principle of subsidiarity promotes the one-system-of-law principle adopted by the Constitutional Court, which regards all laws in the country as part of a single system, with the Constitution "shaping and giving force" to the other laws.[184]

Furthermore, if a party is of the opinion that the legislation, giving effect to a constitutional right, does not provide an effective remedy and, hence, relies directly on the constitutional right to grant a remedy, the remedy would only benefit the individual before the court. Equal application of the law requires that the legislation must be amended so that everyone, whose rights are similarly infringed, can find relief.[185] For example, if an unlawful occupier claims that PIE does not provide sufficient protection of his right of access to adequate housing, a remedy should ideally be read into PIE and not be granted on an *ad hoc* basis. In that way, not only does the occupier before the court find relief, but also other unlawful occupiers in similar positions. Developing unconstitutional laws to be in line with the Constitution, instead of bypassing such law and relying directly on the constitutional provision, also promotes the

[182] See Chapter 3:3.1.1.

[183] Van der Walt *Property and Constitution* 66, 86; Van der Walt (2008) *CCR* 116.

[184] para 44. Van der Walt explains this principle in relation to the statement made in this case, see 20-24. *Pharmaceutical Manufacturers* para 44. Van der Walt explains this principle in relation to the statement made in this case, see Van der Walt *Property and Constitution* 20-24.

[185] Remedies should be "forward-looking" and "community-oriented" rather than "backward-looking, individualistic and corrective or retributive". See, Currie & De Waal *The Bill of Rights Handbook* 181.

supremacy of the Constitution. In a country that subscribes to a supreme constitution, laws that are not in line with the Constitution cannot remain in force.[186]

Criticism against the principle of subsidiarity includes that it allows the court to ignore the Constitution in favour of other legislative provisions.[187] However, in terms of the rule of law and constitutional supremacy, all legislation and common law must be interpreted and developed in line with the Constitution.[188] This means that, even when a legislative provision is applied instead of a constitutional right, the interpretation and application of that law must be informed by the Constitution. In eviction matters, for example, the court must apply the provisions of PIE, instead of sections 25 and 26 of the Constitution. Nevertheless, its interpretation and application of PIE must be in line with these constitutional rights. Hence, subsidiarity does not allow a court to ignore the applicable constitutional provisions. It simply provides a starting point for adjudicating matters involving constitutional rights.[189]

In addition to giving effect to the rule of law, subsidiarity promotes the separation of powers doctrine. It requires the court to respect the functions of the branch of government tasked with making laws, to the extent that these laws are in line with the Constitution.[190] In doing so, it balances the separation of powers doctrine and the rule of law.[191] Klare criticises this aspect of the principle of subsidiarity in that it relies on an idealistic idea of separation of powers, in which the legislature aims to serve the people and the judiciary does not.[192] The legislature is given the power to define and delimit constitutional rights.[193] A counterargument is that adherence to the principle of subsidiarity does not prevent courts

---

[186] Du Plessis (2006) *Stell LR* 238.

[187] K Klare "Legal subsidiarity and constitutional rights: a reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129 154. Du Plessis also warns against this, see Du Plessis (2006) *Stell LR* 221-222.

[188] S 39(2) of the Constitution. This provision requires courts to promote the "spirit, purport and objects of the Bill of Rights" whenever interpreting legislation. This is also referred to as "indirect application" of the Bill of Rights. See, Currie & De Waal *The Bill of Rights Handbook* 57-60; Du Plessis "Interpretation" in *CLOSA* 32-20, 21, 143.

[189] Van der Walt *Property and Constitution* 37, 40, 42.

[190] Du Plessis (2006) *Stell LR* 221, 235; Van der Walt (2008) *CCR* 102; Van der Walt *Property and Constitution* . Allowing the litigant to rely directly on s 23(5) of the Constitution ignores the constitutional function of the legislature to respect, protect, promote and fulfil the rights in the Bill of Rights. See, *South African National Defence Union v Minister of Defence* paras 51-52, referred to in Van der Walt (2008) *CCR* fn 104.

[191] K Klare "Legal subsidiarity and constitutional rights: a reply to AJ van der Walt" 129 135.

[192] Klare (2008) *CCR* 135-137.

[193] Klare (2008) *CCR* 140.

from deviating from the legislature's decisions.[194] It could still find that the legislation enacted by the legislature violates the Constitution. In doing so, it brings the existing law in line with the Constitution so that the whole population is served and not only the parties before the court.

3.2 Criteria derived from principles

Two criteria can be derived from the above principles. One, the court must adhere to the existing legal framework. Two, the court must respect the functions of government when granting alternative accommodation orders. These criteria and their relation to the constitutional principles are explained below.

3.2.1 Adherence to the existing legal framework

The term "legal framework" in this thesis includes the constitutional provisions relating to a specific matter, the legislation enacted to give effect to these provisions, applicable common law rules, binding policies and binding precedent that interpret and apply these laws and instruments. International instruments are not considered extensively, although brief mention is made where relevant.[195] An assumption of this thesis is that courts must adhere to the existing legal framework applicable to the matter at hand. This assumption is based on the rule of law and the principle of subsidiarity. The rule of law requires the court to grant orders that are in line with the relevant laws.[196] The principle of subsidiarity dictates which laws must be applied where more than one is applicable.[197]

An order requiring the state to provide alternative accommodation to unlawful occupiers facing eviction would adhere to the existing legal framework if the framework authorises the state to comply with the order. In other words, an alternative accommodation order can be granted if justification for placing such a duty on the state can be found in the legal

---

[194] Van der Walt *Property and Constitution* 36; Van der Walt (2008) *CCR* 101; Du Plessis (2006) *Stell LR* 237.

[195] Much has been written on the court's approach in socio-economic rights cases and international instruments elsewhere. See, for example, Chenwi (2008) *Harv L Rev*; G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD Stellenbosch University (2011) 158-227; Liebenberg *Socio-Economic Rights* 101-118; P De Vos "Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" (1997) 13 *South African Journal on Human Rights* 67.

[196] See Chapter 1:3.1.1.

[197] See Chapter 1:3.1.4.

framework. This relates to the rule of law as a formal protection.[198] In determining whether the granting of an alternative accommodation order is authorised, a court must apply the legislative provision or policy that gives effect to the relevant constitutional provision. A court should not apply the constitutional provision directly unless the constitutionality of the constitutional provision is challenged. This relates to the principle of subsidiarity.[199] Moreover, in applying the legal framework, the rule of law as a substantive and procedural protection requires that a court must take cognisance of the fact that others are not before the court and their rights should not be prejudiced by its order.[200]

The inclusion of "binding policy" in the existing legal framework, which a court order must adhere to, is controversial. Binding policy, also called "executive policy",[201] refers to policy authorised by binding legislation. The executive authority adopts such policy to implement the legislation.[202] While some do not consider binding policy law,[203] case law suggests that policies that are given binding effect by legislation must be adhered to by those who are bound by it.[204]

In fact, the Constitutional Court, in *Nokotyana v Ekurhuleni Metropolitan Municipality*,[205] found that it would apply the state's housing policy,[206] instead of relying directly on the

---

[198] See Chapter 1:3.1.1.

[199] See Chapter 1:3.1.4.

[200] See Chapter 1:3.1.1.

[201] ON Fuo "Constitutional basis for the enforcement of 'executive' policies that give effect to socio-economic rights in South Africa" (2013) 16 *Potchefstroom Electronic Law Journal* 1 7.

[202] Fuo (2013) *PER/PELJ* 7-8.

[203] See, Fuo (2013) *PER/PELJ* 3.

[204] See, *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) 24. In *Minister of Education v Harris* para 10-11, the court found that "There is nothing in the Act which suggests that the power to determine policy in this regard confers a power to impose binding obligations". Based on this the court did not find the policy binding. This suggests that a policy will have binding power if this power is conferred upon it by an act. Similarly, in *In re: National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC) para 31, the court found that "Nothing in the Bill imposes an obligation on the provinces to act in conformity with national education policy." Again, this suggests that such an obligation imposed by legislation would require provinces to act in conformity with the policy. In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* (252/99) [2001] ZASCA 59 para 7, the court accepted the binding force of such policy since its force was not challenged. It found that "In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear: does it have precedence above ministerial regulations and Board rules where these form part of the definition of 'the Law'? The inadvisability of having yet another level of subordinate legislation is immediately obvious; its legality was not debated and need not be decided and I shall assume its propriety for purposes of this judgment.". See also, C Murray & O Ampofo-Anti "Provincial executive authority" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 20-1 20-11.

[205] 2010 (4) BCLR 312 (CC).

Constitution and the right of access to adequate housing.[207] It justified this approach by referencing the principle of subsidiarity.[208] Bilchitz observes that this case extended the principle of subsidiarity to include policy.[209] He argues that there is no clear justification for this extension.[210]

Justification for this extension can be based on the rule of law. For one, if the specific government entity is bound by the policy in terms of legislation, a court cannot order that entity to act outside its powers unless such policy or legislation is unconstitutional. Second, if a court is of the opinion that a policy does not comply with the Constitution, it should not simply disregard the policy for purposes of its decision since that would create uncertainty and unequal application of the law. Those before the court would not be subjected to the policy, thus, the policy would continue to be applied to those outside the court. There would be uncertainty regarding the extent to which the policy is to apply. Parallel systems of law would be created. Hence, to ensure certainty and equal application of the law, the relevant policy must be applied instead of the constitutional principle. If the policy is found to be unconstitutional, it must be amended accordingly.

Further justification for extending the principle of subsidiarity to binding policy can be found in the separation of powers doctrine, which requires the court to respect the functions of the other branches of government. This includes the power of the executive authority to adopt and implement policy. It should only interfere if such policy contravenes the Constitution.

3.2.2 Respect for the functions of government

The second criterion that can be deduced from the principles discussed above is that, in granting an alternative accommodation order, a court must respect the functions of government. A court respects the functions of government when, one, it acknowledges the separate functions of other branches of government and, two, it fulfils its own functions properly. Acknowledging the separate functions of other branches of government involves

---

[206] For a guide to this policy see Department of Human Settlements *National Housing Code* (2009).

[207] *Nokotyana v Ekurhuleni Metropolitan Municipality* para 24.

[208] *Nokotyana v Ekurhuleni Metropolitan Municipality* para 24. While the court did not mention the term subsidiarity, it used the wording that is used to define subsidiarity. See, D Bilchitz "Is the constitutional court wasting away the rights of the poor - Nokotyana v Ekurhuleni Metropolitan Municipality" (2010) 127 *South African Law Journal* 591 594.

[209] Bilchitz (2010) *SALJ* 598.

[210] Bilchitz (2010) *SALJ* 598.

respecting the fact that other branches of government have different functions and that the court should not interfere with these functions. In other words, the court must respect the constitutional principle of the separation of powers.[211]

In addition, acknowledging the separate functions of other branches of government relates to the notion of co-operative government. It requires respecting that, within those other branches, different entities have different functions and powers. In the context of alternative accommodation orders, this means that a court should not order one entity to perform the duties of another. Moreover, a court must also take into account the fact that the different spheres of government are required to co-operate with one another and assist each other. Hence, where more than one sphere is responsible for the same matter, a court should not place the duty to comply with an alternative accommodation order on only one of the spheres.

Another aspect of the requirement that the court must respect the functions of government is that it must fulfil its own functions properly. Its primary function is the administration of justice.[212] The dictionary defines justice as fairness and reasonableness.[213] While this seems simple, the fact that there are several forms and theories of justice suggests some complication.[214]

Forms of justice relate to the different contexts within which it must be served.[215] For example, justice in the distribution of resources is different from justice in the allotment of punishment.[216] Theories of justice concern the content of these forms of justice and the theoretical basis underlying each form.[217] Depending on the form and the theory applied,

---

[211] Constitutional Principle VI of Schedule 4 of the Interim Constitution.

[212] S 165(2) of the Constitution.

[213] See, English Oxford Living Dictionaries *Justice* https://en.oxforddictionaries.com/definition/justice 12-01-2017. This idea of justice as fairness comes from Rawls' notion of justice, see J Rawls *A Theory of Justice* (2009) 10. See also, J Jenkins *The American Courts: a Procedural Approach* (2011) 4; Aristotle *Nicomachean Ethics* (1962) 72; EJ Weinrib "Corrective justice" (1991) 77 *Iowa Law Review* 403404.

[214] J Konow "Which is the fairest one of all? A positive analysis of justice theories" (2003) 41 *Journal of economic literature* 1188; Jenkins *The American Courts* 4, 10-11.

[215] Jenkins *The American Courts* 5; KS Cook & KA Hegtvedt "Distributive justice, equity, and equality" (1983) *Annual review of sociology* 217219-220; Weinrib (1991) *Iowa L Rev* 407, 413.

[216] These forms of justice are called distributive and retributive justice respectively.

[217] Barry defines a theory of justice as "a theory about the kinds of social arrangement that can be defended." See, B Barry *Theories of Justice* (1989) 3.

different court orders might be considered "just".[218] Hence, under some forms and theories of justice, alternative accommodation orders might be considered just, whereas under other forms and theories they might not.

To determine when alternative accommodation orders are just, the appropriate form of justice must be identified. Once the appropriate form is identified, it is possible to determine under what circumstances alternative accommodation orders are just. Moreover, the content of a just alternative accommodation order can be established.

4 Methodology

The research in this thesis is based on a desktop study. This includes document analysis, which is a qualitative research method that consists of reviewing and evaluating existing material.[219] The materials used to answer the research question include case law, legislation and legal policy. An analytical methodology is employed to evaluate these primary legal sources critically.[220]

In Part One, early Constitutional Court decisions are explored to determine how the court's approach developed and led to its first alternative accommodation orders. Thereafter, the subsequent Constitutional Court and Supreme Court of Appeal decision, in which alternative accommodation orders were granted, are analysed to determine the grounds for alternative accommodation orders.

Once these grounds are determined, Part One explores when an order based on these grounds would adhere to the legal framework. This involves considering the requirements stipulated in the relevant constitutional provisions, legislation and policies. The interpretation and application of these requirements, by the courts, are also considered. In addition, the role of international law instruments is discussed. Secondary sources, such as scholarly articles and reports, are relied on in support of the conclusions reached.

---

[218] C Mbazira *Litigating Socio-economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 137.

[219] GA Bowen "Document analysis as a qualitative research method" (2009) 9 *Qualitative research journal* 27.

[220] C Kothari *Research Methodology: Methods and Techniques* (2004) 3.

In Part Two, the thesis considers when alternative accommodation orders would respect the functions of the other branches of government. This involves considering the effect of the separation of powers doctrine, as well as the principle of co-operative government. To define and explain these concepts, the relevant constitutional and interim constitutional provisions are consulted, as well as secondary sources such as scholarly articles and books. In investigating when an alternative accommodation order would comply with the separation of powers doctrine and the principle of co-operative government, reference is made to case law, as well as scholarly articles and books.

Part Two also considers when alternative accommodation orders would comply with the court's duty to administer justice. In determining the meaning of justice, secondary sources, especially works on philosophy, are consulted. These sources, in conjunction with case law, are also used in explaining when alternative accommodation orders would be just.

Part Three concludes the thesis. The recommendations and concluding remarks are primarily based on the analysis in Parts 1 and 2 of the thesis and cross-reference is made to the relevant sections. Some primary sources, such as legislation and case law, as well as secondary sources, such as scholarly articles, are referred to where necessary.

5 Argument outline

This thesis is separated into three parts. Part 1 encompasses Chapter 2 to Chapter 4. It deals with the first criteria for alternative accommodation orders. That is, that an alternative accommodation order must adhere to the existing legal framework. Part 2 encompasses chapters 5 and 6 and deals with the second criteria for alternative accommodation orders. That is, that an alternative accommodation order must respect the functions of government. Part 3 comprises only of Chapter 7 and concludes the thesis.

5.1 Part One: Adherence to the existing legal framework

The purpose of Chapter 2 is to identify the possible constitutional grounds upon which courts have founded alternative accommodation orders in the past. Only once these grounds are established can it be determined whether the orders adhere to the existing legal framework.

To identify the possible constitutional grounds, the first Constitutional Court eviction-and-housing jurisprudence is examined. Not only are the decisions, in which alternative accommodation orders were granted, discussed, but also the cases preceding these decisions. This is because the subsequent cases, in which alternative accommodation orders were granted, were influenced by these earlier decisions.

Chapters 3 and 4 analyse the possible grounds for alternative accommodation orders, identified in Chapter 2, to determine when they would adhere to the existing legal framework. This is done by explaining and analysing the relevant constitutional provisions, legislation, common law, binding policy and precedent. The limitations placed on the court's ability to grant alternative accommodation orders by the existing legal framework are identified.

5.2 Part Two: Respect for the functions of government

Chapter 5 examines when alternative accommodation orders show appropriate respect for the functions of the other branches of government. This entails a discussion of the different functions and powers of each branch of government. Once these powers are established the effect of the separation of powers on eviction matters is explored. Furthermore, the role of co-operative government in determining the court's ability to grant an alternative accommodation order is discussed.

The aim of Chapter 6 is to determine when alternative accommodation orders are just. The primary function of the court is to administer justice. Its orders must seek to achieve just outcomes. To determine whether an alternative accommodation order is just, the appropriate form of justice must first be identified. Thereafter, the chapter establishes under what circumstances alternative accommodation orders will be just.

5.3 Part Three: Concluding remarks and recommendations

Chapter 7 summarises the findings of the thesis and provides concluding remarks and recommendations. One of the aims of this chapter is to clarify when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of PIE would comply with the court's constitutional mandate Hence, when would alternative accommodation orders adhere to the law, respect the functions of government and pursue

justice? Some recommendations are also made regarding the key issues identified in the granting of alternative accommodation orders.

PART ONE: ADHERENCE TO THE EXISTING LEGAL FRAMEWORK

This part considers when alternative accommodation orders would comply with the first criterion – adherence to the existing legal framework. An order requiring the state to provide alternative accommodation to unlawful occupiers facing eviction would adhere to the existing legal framework if the framework authorises the state to comply with the order and enables the court to place such a duty on the state. In other words, an alternative accommodation order can be granted if justification for placing such a duty on the state can be found in the legal framework. In determining whether the granting of an alternative accommodation order is authorised, a court must apply the legislative provision or policy that gives effect to the relevant constitutional provision. A court should not apply the constitutional provision directly unless the constitutionality of the constitutional provision is challenged. Moreover, in applying the legal framework, a court must take cognisance of the fact that others are not before the court and their rights should not be prejudiced by its order.

To be able to test alternative accommodation orders against this criterion the possible constitutional grounds for alternative accommodation orders are identified. Once these grounds are established they are each tested against the existing legal framework to determine when they would adhere to this framework. Chapter 2 identifies the possible constitutional grounds for alternative accommodation orders, where after Chapter 3 and Chapter 4 tests these grounds against the relevant legal frameworks.

CHAPTER TWO: GROUNDS FOR ALTERNATIVE ACCOMMODATION ORDERS

1 Introduction

The purpose of this chapter is to identify the possible grounds upon which alternative accommodation orders are granted. Unfortunately, courts have granted alternative accommodation orders without specifying the ground for the order.[221] Whether alternative accommodation orders adhere to the existing legal framework can only be determined once the grounds for the orders are clear. Hence, the grounds identified in this chapter are not suggestions for ways to seek of seeking alternative accommodation orders. Instead, in trying to identify the possible grounds for alternative accommodation orders, the chapter seeks to understand the court's existing jurisprudence and to determine on which grounds alternative accommodation orders have been granted in the past.

To identify the possible grounds for alternative accommodation orders, the grounds, upon which the first two alternative accommodation orders by the Constitutional Court were granted, are examined. These decisions are *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[222] (hereinafter "*Blue Moonlight*") and *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd*[223] (hereinafter "*Skurweplaas*").

While these were the first decisions in which the Constitutional Court granted alternative accommodation orders, they were not the first decisions in which this court grappled with the issue. The first alternative accommodation order by the Constitutional Court was made in 2012;[224] the first case requesting such was heard eleven years earlier.[225] This decision *Government of the Republic of South Africa v Grootboom*[226] (hereinafter "*Grootboom*"), including other Constitutional Court decisions preceding the first alternative accommodation

[221] As is evident from the cases discussed below.
[222] 2012 (2) SA 104 (CC).
[223] 2012 (4) BCLR 382 (CC).
[224] *Blue Moonlight*.
[225] *Grootboom* (hereinafter "*Grootboom*").
[226] 2001 (1) SA 46 (CC).

order,[227] is critical for understanding the subsequent alternative accommodation orders. The following section briefly discusses the influence of these cases. In the subsequent section, the first two cases, in which alternative accommodation orders were granted by the Constitutional Court, are explored to identify the grounds upon which the orders were made.

2 Lessons from decisions that preceded alternative accommodation orders

Three Constitutional Court judgments greatly influenced the subsequent decisions to grant alternative accommodation orders. These judgments are *Grootboom*, *Port Elizabeth Municipality v Various Occupiers*[228] (hereinafter "*PE Municipality*") and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[229] (hereinafter "*Modderklip*"). These cases involved situations where unlawful occupiers either faced homelessness because of a possible eviction order or were already homeless because of an executed eviction order.

From these cases, three lessons can be learned, which clearly affected the court's reasoning in decisions that resulted in alternative accommodation. These lessons are that the state's housing duty includes a duty to assist persons living in emergency housing situations;[230] that the availability of alternative accommodation can affect whether an eviction is just and equitable; and that a lack of alternative accommodation can result in the infringement of other human rights. This section explores the lessons learnt from the early Constitutional Court decisions.

2.1 The state's housing duty includes a duty to assist persons living in emergency housing situations

The first lesson, learnt from *Grootboom*, the first of these early Constitutional Court decisions, is that the state's housing duty includes a duty to assist persons living in emergency housing situations. Prior to this decision, the state aimed to comply with its

[227] *PE Municipality Modderklip* (hereinafter "*Modderklip*") and *Olivia Road*.

[228] 2005 (1) SA 217 (CC).

[229] 2005 (5) SA 3 (CC).

[230] A person lives in an emergency housing situation if he has no roof over his head or if his housing is inadequate, dangerous or unsafe. See Chapter 3: 4 for a full discussion on the meaning of this term.

housing duty, in terms of section 26(2) of the Constitution,[231] by implementing a housing programme that maximised its available resources.[232] It focused on providing medium and long-term housing solutions.[233] No special attention was paid to those persons who were most in need, who had no homes – those living in emergency housing situations.[234]

In *Grootboom*, a large group of people moved from a state-owned informal settlement, called Wallacedene, onto private land without the consent of the landowner.[235] The living conditions in Wallacedene were given as justification for the unlawful occupation. There was no service delivery,[236] the area was partially waterlogged, lay close to a highway and was overcrowded.[237] In response to their unlawful occupation, the landowner obtained an eviction order against the unlawful occupiers in the Magistrates' Court.[238] The eviction was executed prematurely. It also involved the burning of the occupiers' building materials and possessions.[239] This resulted in them moving onto the Wallacedene sports field. Since their building materials had been burnt, they did not have much with which to construct new shelters.[240]

The group approached the Constitutional Court on the basis that, in failing to accommodate them after the eviction, the state failed to fulfil its housing duty in terms of section 26(2) of the Constitution.[241] Consequently, they sought relief in the form of having basic shelter

---

[231] S 26 of the Constitution reads:

"(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."

[232] *Grootboom* para 14.

[233] *Grootboom* para 64.

[234] *Grootboom* para 64.

[235] *Grootboom* para 3, 4, 7, 8. The group consisted of 900 people of which 510 are children. See *Grootboom* para 4 fn 2.

[236] I.e. water, sewage and refuge removal. 5% of the occupiers had electricity, but it is not specified whether the electricity was legally acquired. See, *Grootboom* para 7.

[237] *Grootboom* para 7, 85.

[238] *Grootboom* para 3, 4.

[239] *Grootboom* para 10.

[240] *Grootboom* para 11.

[241] *Grootboom* para 4.The municipality was actually ordered to accommodate the occupiers. That they had been in contempt of court is not canvassed in the CC order. This was probably due to the fact that the municipality had agreed to provide the unlawful occupiers with alternative accommodation. See, Liebenberg *Socio-Economic Rights* 400.

provided to them by the state, which they could occupy until they could find permanent housing.[242] The group argued that to fulfil its housing duty the state must ensure at least minimum core realisation of their right of access to adequate housing.[243] In other words, the state must provide at least basic housing to all, regardless of the internal limitation within section 26(2).[244] This internal limitation refers to the provision that the state only needs to fulfil its housing duty progressively and only to the extent that its available resources allow. The court found against such an obligation.[245]

Instead, it found that sections 26(1) and (2) must be read together and that the state's fulfilment of its housing duty must be measured against the standard of reasonableness provided for in section 26(2) itself.[246] It proceeded to test the state's conduct against this standard of reasonableness. The court found that reasonable legislative and other measures include a reasonable housing programme that caters for long, medium and short-term housing needs.[247] Although the state's medium and long-term national housing programme was reasonable, its overall programme was unreasonable to the extent that it did not acknowledge the state's duty to assist people in desperate need.[248] It made a declaratory order, which required the state to implement a short-term housing programme that ensures temporary shelter, within its available resources, for "people who have …no roof over their heads, for

---

[242] *Grootboom* para 4, 9, 13.

[243] This was based on Art. 2.1 and 11.1 of the International Covenant on Economic, Social and Cultural Rights, 1996 as interpreted in paragraph 10 of general comment 3 issued in 1990, see United Nations Committee on Economic, Social and Cultural Rights *The Nature of State Parties' Obligations (Art 2.1 of the Covenant, UN Doc E/1991/23) General Comment No 3* (1990). Art 11.1 provides:

> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

Art 2.1 provides:

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

This minimum core was argued by the amici; Human Rights Commission and the Community Law Centre of the University of the Western Cape. See, *Grootboom* para 26-27. See also, Kruuse 'The art of the possible' *SALJ* 621.

[244] *Grootboom* para 31.

[245] *Grootboom* para 28-33.

[246] *Grootboom* para 34, 41.

[247] *Grootboom* para 42, 43.

[248] *Grootboom* para 66, 68.

people who are living in intolerable conditions and for people who are in crisis because of natural disasters …or because their homes are under threat of demolition."[249]

This order played a crucial role in the ensuing alternative accommodation orders. It provided justification for finding that the state's housing duty requires it to provide alternative accommodation to evictees facing homelessness.

2.2 The availability of alternative accommodation can affect whether an eviction is just and equitable

The second lesson, taught by the early Constitutional Court decisions, is that the availability of alternative accommodation can affect whether an eviction is just and equitable. In *Grootboom*, the extent to which the eviction order was just and equitable was not at issue. This is because *Grootboom* did not involve an appeal against the initial eviction order, but a demand for housing based solely on the state's housing duty.[250] *PE Municipality* was the first actual eviction matter heard by the Constitutional Court. Hence, it provided the first opportunity for the court to deliberate the effect of a lack of alternative accommodation on the just and equitableness of an eviction order.

In *PE Municipality*, the municipality sought the eviction of around 68 unlawful occupiers.[251] They had erected informal dwellings on private land within the jurisdiction of the municipality and had been occupying the land for between two and eight years.[252] Similar to *Grootboom*,[253] many of the unlawful occupiers had previously been evicted from other land.[254] The eviction application was made in response to a petition signed by 1600 people living in the neighbourhood, as well as the landowners.[255] Unlike in *Grootboom*,[256] the unlawful occupiers were not on the municipality's waiting list for housing, since they had not applied

[249] *Grootboom* 52, 68, 96, 99.
[250] See discussion of *Grootboom* in Chapter 2:2.1.
[251] *PE Municipality* para 1.
[252] *PE Municipality* para 2.
[253] See discussion of *Grootboom* in Chapter 2:2.1.
[254] *PE Municipality* para 2.
[255] *PE Municipality* para 1, 49.
[256] See discussion of *Grootboom* in Chapter 2:2.1.

to be on the list.[257] Despite this, the unlawful occupiers contended that they were only willing to move off the land if the municipality provided them with alternative accommodation.[258]

In response, the state offered them alternative land in the township of Walmer.[259] The unlawful occupiers rejected this offer on the basis that the township was crime-ridden and overcrowded. Furthermore, since the state had not proved that it owned the land on which the township was established, they would not have tenure security if they settled there.[260] Accommodation offered in Greenbushes[261] was also rejected, as it was too far away from their schools and employment.[262]

Despite these objections, the High Court granted the eviction order.[263] On appeal, the Supreme Court of Appeal set aside the eviction order on the basis that no alternative accommodation was available to the unlawful occupiers. It rejected Walmer Estate as potential alternative accommodation since the state did not prove that it owned the land.[264] This order was appealed against to the Constitutional Court.[265]

One of the main contentions of the state was that it did not have a constitutional duty to provide alternative accommodation to evictees.[266] Despite the fact that this argument clearly calls on the court to discuss the housing duty of the state in eviction matters, the court's decision did not focus on section 26(2) of the Constitution. It simply stated that there is "no unqualified constitutional duty" on municipalities to prevent all evictions where no alternative accommodation is available.[267] It continued by saying that whether such a duty exists in a specific situation will depend on the availability of resources and the housing

[257] *PE Municipality* para 2.
[258] *PE Municipality* 2, 49.
[259] *PE Municipality* para 2.
[260] *PE Municipality* para 2, 54.
[261] No description of this accommodation is offered. *PE Municipality* para 54.
[262] *PE Municipality* para 54.
[263] *PE Municipality* para 4.
[264] *PE Municipality* para 5.
[265] *PE Municipality* para 6.
[266] *PE Municipality* para 6.
[267] *PE Municipality* para 28.

needs of others.[268] However, the court did not proceed to examine whether such a duty on the state existed in the matter before it.

Instead, it considered as a relevant circumstance in terms of section 26(3) of the Constitution the fact that no alternative accommodation was available.[269] In this regard, the court stated, "[c]ourts should generally be reluctant… to grant an eviction order against relatively settled occupiers unless a reasonable alternative was available".[270] This statement is often quoted in eviction matters and has been cited in support of the granting of alternative accommodation orders.[271] These cases create the idea that the statement could be used to justify an alternative accommodation order to "make" the eviction of relatively settled unlawful occupiers just and equitable.[272] It is not certain whether the court had such a result in mind when it made the statement.

What is certain is that, in *PE Municipality* itself, the statement was not used as justification for an alternative accommodation order. Rather, it supported a finding that, under the circumstances, an eviction order would not be just and equitable and should be denied.[273] Not only were the occupiers a relatively settled, small group of genuinely homeless persons, but the court also found that there was no proof that the landowners needed the land.[274] Still, this finding of the court opened the door for arguments in later cases that the court should grant an alternative accommodation order to ensure a just and equitable eviction.[275]

2.3 A lack of alternative accommodation can result in the infringement of other human rights

The third lesson, taught by the early Constitutional Court decisions, is that a lack of alternative accommodation can result in the infringement of human rights other than the

[268] *PE Municipality* para 29.

[269] *PE Municipality* para 28.

[270] *PE Municipality* para 28. The court refers to at least temporary alternative accommodation pending formal housing.

[271] *Modderklip* para 64; *Dihlabeng Local Municipality v Makhotsa* (569/2005) [2005] ZAFSHC 63 para 22; *Grobler* para 200; *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) para 40; *Joe Slovo* para 148; *Ark City of Refugee v Bailing* (A107/2011) [2012] ZAWCHC 285 para 18.

[272] See, Chapter 2:3.1.2.1; see also the subsequent discussion in Chapter 4:4.3.

[273] *PE Municipality* para 60.

[274] *PE Municipality* paras 57-59.

[275] See, Chapter 2:3.1.2.1; see also the subsequent discussion in Chapter 4:4.3.

positive right to receive access to housing from the state.[276] This lesson emerges from the *Modderklip* decision. As with the unlawful occupiers in *Grootboom* and *PE Municipality*,[277] the people in *Modderklip* were previously evicted from land; in this case, land owned by the municipality.[278] Since they had nowhere to go, they moved onto a privately owned farm, Modderklip Boerdery.[279] The municipality instructed the landowner to institute eviction proceedings, in terms of section 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).[280] Yet, the landowner refused to institute eviction proceeding, contending that it was the state's duty to evict the unlawful occupiers and requesting the state to comply with this duty.[281] The municipality did not respond to this request.[282]

Within 6 months the settlement grew from 400 to 18 000 unlawful occupiers.[283] Realising that no relief would come from the state, the owner sought an eviction order from the High Court in terms of section 4 of PIE.[284] That the eviction was sought within six months of unlawful occupation is significant, since it removes the obligation on the court to consider whether alternative accommodation is available.[285] PIE only requires the court to consider the availability of alternative accommodation if the unlawful occupation had endured for more than six months.[286] This supports the finding, in *PE Municipality*, that the availability of

---

[276] S 26(1) and (2) of the Constitution.

[277] See discussion of these cases in Chapter 2:2.1 and 2.2 respectively.

[278] *Modderklip* para 33.

[279] *Modderklip* para 3.

[280] *Modderklip* para 4. This section reads, "An organ of state [who is authorised to apply for the eviction in terms of s6(1) of PIE]... may ... give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier."

[281] *Modderklip* para 4.

[282] *Modderklip* para 4.

[283] *Modderklip* paras 3, 6.

[284] *Modderklip* para 7. This section authorises the owner or person in control of the land to apply to court for an eviction of unlawful occupiers. See, s 4(1) of PIE.

[285] S 4(6) of PIE; *Modderklip* 7.

[286] S 4(6) of PIE deals with shorter unlawful occupations and reads: (emphasis added)

> "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."

S 4(7) of PIE deals with longer unlawful occupations and reads: (emphasis added)

> "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

alternative accommodation plays an important role if the unlawful occupiers are relatively settled.[287]

Despite being granted an eviction order,[288] the landowner was unable to execute the order.[289] The number of occupiers had grown to 40 000 and the cost that the owner would have to carry to execute the order was R1.8mil.[290] In response, the owner obtained an order from the High Court requiring the state to execute the eviction order.[291] An appeal against this order, as well as the eviction order, was heard by the Supreme Court of Appeal.[292] The decisions of the High Court and the Supreme Court of Appeal were similar.[293] This discussion focusses on the findings of the Supreme Court of Appeal.

The main finding was that the state breached several of its constitutional duties towards both the landowner and unlawful occupiers.[294] In failing to implement reasonable short-term measures to fulfil the housing needs of those living in emergency housing situations and to provide alternative accommodation to the unlawful occupiers, the state breached its duty to fulfil the rights entrenched in section 26(1) of the Constitution.[295] Moreover, by not providing the unlawful occupiers with alternative accommodation, the state prevented the landowner from executing the eviction order.[296] This is because the unlawful occupiers did not have alternative accommodation and would simply reoccupy the property once evicted, thereby

---

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."

Note that the difference between an unlawful occupation of shorter than six months and one of longer than six months is that the court is only obliged to consider the availability of alternative accommodation in the latter case.

[287] *PE Municipality* para 28.

[288] *Modderklip* para 7.

[289] *Modderklip Boerdery (Pty) Ltd v Modderklip East Squatters* 2001 (4) SA 385 (W) (hereinafter "*Modderklip HC1*").

[290] *Modderklip* 8-9.

[291] *Modderklip Boerdery (Pty) Ltd v President van die Republiek van Suid-Afrika* 2003 (1) All SA 465 (T) (hereinafter "*Modderklip HC2*"); *Modderklip* para 11.

[292] *Modderklip* para 16.

[293] *Modderklip* para 18.

[294] *Modderklip HC2* para 21, 43; *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) (Hereinafter *"Modderklip SCA*") para 52. *Modderklip* 19.

[295] As interpreted in *Grootboom.* See discussion of *Grootboom* in Chapter 2:2.1. See also, *Modderklip HC2* para 46, 52; *Modderklip SCA* para 22, 52; *Modderklip* para 15, 19, 25.

[296] *Modderklip HC2* para 30; *Modderklip SCA* para 28; *Modderklip* para 1.

negating the effect of the eviction.[297] This, in turn, amounted to a breach of the state's duty to protect the landowner against the horizontal infringement of its right to property in terms of section 25(1) of the Constitution.[298] Furthermore, this failure on the part of the state also violated its duty to protect the right to equality of the landowner, in terms of section 9(1) of the Constitution. [299] This is because it resulted in the landowner having to carry the housing burden that the state should carry, a burden that is not equally placed on other citizens.[300]

The Supreme Court of Appeal found that the unlawful occupiers should not be evicted until alternative accommodation is available.[301] In the meantime, the Department of Agricultural and Land Affairs was to pay the owner constitutional damages to be calculated in terms of section 12(1) of the then Expropriation Act 63 of 1975.[302]

The state appealed to the Constitutional Court. This court found it unnecessary to deal with the issue of whether section 25(1) has horizontal application and whether the state violated the landowner's right in terms of section 25(1) or the unlawful occupiers' rights in terms of section 26 of the Constitution.[303] The refusal to deal with these sections indicates a strong caution on the side of the Constitutional Court to comment on the positive duties of the state.[304] This relates to the separation of powers doctrine.[305] Instead of following the High Court and Supreme Court of Appeal's reasoning, the Constitutional Court founded its decision on the rule of law[306] and section 34 of the Constitution, the right of access to courts.[307] It found that the rule of law places a duty on the state to ensure that citizens can

---

[297] *Modderklip HC2* para 45; *Modderklip SCA* para 10; *Modderklip* para 14, 16, 25.

[298] *Modderklip HC2* para 44, 52; *Modderklip SCA* para 21, 27. This duty is placed on the state by s 7(2) of the Constitution.

[299]*Modderklip HC2* para 1.6.1 of the order; *Modderklip SCA* para 31; *Modderklip* para 15, 19.

[300] *Modderklip HC2* para 52; *Modderklip SCA* para 31; *Modderklip* para 15, 19.

[301] *Modderklip SCA* para 41. *Modderklip* para 1.

[302] Expropriation Act 63 of 1975. See, *Modderklip SCA* para 43, 44, 51; *Modderklip* para 1, 21.

[303] *Modderklip* para 26. Currie and De Waal argues that s 25(1) has no horizontal application, in Currie & De Waal *The Bill of Rights Handbook* 553-554.

[304] This indicates respect for the functions of the other branches of government. For a further discussion on this see Chapter 5.

[305] For a discussion on the separation of powers, see Chapter 2:3.1.2 and Chapter 5:2.

[306] For a discussion on the rule of law see Chapter 1:3.1.1.

[307] This section 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."

enjoy the rights enshrined in the bill of rights.[308] In respect of the right of access to courts, this means that the state must ensure that citizens are able to resolve the disputes between them.[309] Under the circumstances in *Modderklip*, ensuring that the landowner can resolve the dispute entailed facilitating the execution of eviction orders.[310] In facilitating the execution of eviction orders, the state must also ensure that the execution does not disrupt the social order.[311]

While the state does have mechanisms in place for the execution of eviction orders, these were insufficient under the circumstances of the case due to the scale of the unlawful occupation.[312] Not only was it too expensive for the landowner to pay the sheriff to execute the order, the risk was that the unlawful occupiers would simply reoccupy the property since they had nowhere to go.[313] The court ruled that such situations could not be tolerated. The high cost of the eviction might compel landowners to take the law into their own hands.[314] Moreover, placing such a large number of people on the street might cause social unrest.[315] With the eviction of smaller groups, this would not be a problem, because the existing mechanisms would suffice.[316] Thus, the state must ensure the execution of court orders in a way that prevents social chaos.[317] The Constitutional Court found that the state acted unreasonably by not ensuring the orderly execution of the eviction order.[318] In not providing the landowner with effective relief by either expropriating the property or by providing alternative accommodation to the unlawful occupiers, the state violated section 34 of the Constitution.[319]

---

[308] Chapter 2 of the Constitution entrenches human rights.

[309] *Modderklip* para 39.

[310] *Modderklip* para 41.

[311] *Modderklip* para 43.

[312] *Modderklip* para 45.

[313] *Modderklip* para 45.

[314] *Modderklip* para 45.

[315] *Modderklip* para 46.

[316] *Modderklip* para 46, 47. It is interesting that the court makes this distinction between smaller and larger evictions. It suggests that the court is less concerned about the individual rights of the unlawful occupiers, but rather with upholding the social order. For a discussion on how the court distinguishes between the sizes of groups to be evicted, see Chapter 4:3.2. For a discussion on upholding the social order, see Chapter 4:5.1.

[317] *Modderklip* para 46.

[318] *Modderklip* para 48. It is unclear why the court is using the standard of reasonableness when it has chosen not to address the matter in terms of s 26(2) of the Constitution.

[319] *Modderklip* para 51.

As relief, the court confirmed the Supreme Court of Appeal order for the state to pay constitutional damages and for the unlawful occupiers to remain in occupation until alternative accommodation is made available to them by the state.[320] In ordering the state to pay constitutional damages based on the amount it would cost to expropriate the land, instead of actually ordering an expropriation, the court technically avoided separation of powers issues.[321] This is because it avoided dictating to the state how it should fulfil its functions. Nonetheless, the effect of the order is similar. The unlawful occupiers were allowed to remain on the property and the owner was compensated in the form of constitutional damages.

Moreover, on the part of the unlawful occupiers, there is no real difference between this outcome and one where the state is ordered to provide alternative accommodation.[322] The unlawful occupiers were not evicted without alternative accommodation. Yet, by not relying on section 26(2) of the Constitution, the court avoided the very technical investigation into whether the state fulfilled its duty and whether non-fulfilment of its duty can justify an alternative accommodation order.

Not only does this case show that a lack of alternative accommodation can result in the violation of rights like the right of access to courts, it also shows that constitutional damages can remedy such a violation. Furthermore, the case suggests that an alternative accommodation order could also be a remedy for such a violation.

3 Decisions that resulted in alternative accommodation orders

The lessons taught by the early Constitutional Court decisions clearly influenced the decisions that resulted in alternative accommodation orders. In this section, the first two Constitutional Court decisions, in which alternative accommodation orders were granted, are discussed.[323] The discussion is limited to cases decided in terms of PIE,[324] in which the

[320] *Modderklip* para 54, 65, 66, 68.

[321] *Modderklip* para 63.

[322] In fact, the outcome might be more favourable to them since they would not need to relocate.

[323] The reason for focusing on Constitutional Court and Supreme Court of Appeal decisions is the precedent-value created by these higher-court decisions. For a discussion regarding the levels of the courts, see Chapter 5:2.3.

[324] Examples of other measures impacting evictions include the Extension of Security of Tenure Act 62 of 1997 (hereinafter "ESTA"), the Land Reform (Labour Tenants) Act 3 of 1996, the National Building Regulations and Building Standards Act 103 of 1977, the Trespass Act 6 of 1959, the Domestic Violence Act 116 of 1998, the

relevant municipality refused to provide alternative accommodation[325] because it argued that it was either not obliged or not able to do so. These cases are *Blue Moonlight* and *Skurweplaas*.[326]

As part of the *Blue Moonlight* discussion, two Supreme Court of Appeal decisions are briefly explained, namely *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[327] (hereinafter "*Changing Tides*") and *City of Johannesburg Metropolitan Municipality v Hlophe*[328] (hereinafter "*Hlophe*"). These two cases have similar facts to *Blue Moonlight.* They are explored to show how the findings in *Blue Moonlight* have been applied in subsequent decisions.

3.1 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd

Blue Moonlight involved an eviction from "bad buildings" in inner-city Johannesburg.[329] In the 1990s, there was a decline of the inner city.[330] After the influx controls were removed,

---

Re-Emergence of Slums Act 6 of 2007, the Disaster Management Act of 57 of 2002 and other common law remedies. See J Van Wyk "The role of local government in evictions" (2011) 14 *Potchefstroom Electronic Law Journal* 50 52; Pienaar *Land Reform* 784-797. Pienaar also refer to other measures that limit evictions in certain circumstances, these include the Interim Protection of Informal Land Right Act 31 of 1996, the Rental Housing Act 55 of 1999, the Restitution of Land Rights Act 22 of 1994. See also her discussion on the sections of the Magistrates' Courts Act 32 of 1944 and the court rules that may affect evictions pursuant to sales in execution at 797-800.

[325] Cases where the provision of alternative accommodation was not disputed, or where it was common cause that alternative accommodation would be provided, are not discussed here. An example of such a case is *Joe Slovo* (hereinafter *"Joe Slovo*"), in which the court included the state's offer of alternative accommodation in the order. See also, *Grobler*. Here the state said it would only be able to provide alternative accommodation in two years' time. By the time judgment was made, only six months of the two years were left. The court, therefore, ordered the state to provide alternative accommodation after six months. Despite not being discussed here, these cases are referred to in other parts of the thesis where relevant.

[326] Cases that are not at all procedurally sound are also not discussed here. An example of such a case is *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) (hereinafter "*Schubart Park*"). In this case, the state evacuated the occupiers of three dilapidated flat blocks after a fire broke out in one. The evacuation amounted to a *de facto* eviction since the occupiers were not allowed to return. No court order was obtained by the state. The eviction was neither procedurally sound nor in compliance with s 26(3) of the Constitution. As a remedy, the Constitutional Court ordered the state to provide the evictees with alternative accommodation.

[327] 2012 (6) SA 294 (SCA).

[328] [2015] 2 All SA 251 (SCA).

[329] *Blue Moonlight* para 1.

[330] S Wilson "Litigating housing rights in Johannesburg's inner city: 2004-2008" (2011) 27 *South African Journal on Human Rights* 127 132.

black people moved to the inner cities to find employment.[331] Many of them rented flats from private landowners. As demand increased, the rent followed suit. Several tenants were unable to pay their rent, despite subletting. Since rent was not paid, rates for services delivery by the municipality could not be covered. The lack of funds, as well as the increase in demand, meant that the municipality found it difficult to deliver services. Without an income and with increasing arrear rates, landowners abandoned their properties.[332] Slumlords took over abandoned buildings and unlawfully charged rent.[333] Properties were dilapidated and services delivery was discontinued.[334] This caused a health and safety risk for the occupiers.[335] These dilapidated and unsafe buildings were referred to as "bad buildings".[336] Around 67 000 people were living in bad buildings.[337]

In response to the deterioration of the inner city, the municipality adopted the Inner City Regeneration Strategy.[338] This involved a plan to acquire ownership of these bad buildings.[339] Properties were sold to private developers for the regeneration of the inner city. As an incentive, the municipality took it upon itself to evict the occupiers and offered arrear rates and tax write-offs to the developers who bought the properties.[340]

Initially, occupiers were evicted without assistance from the state, regardless of their ability to secure their own alternative accommodation. Only after around 10 000 people had already

---

[331] *Betta Eiendomme v Ekple-Epoh* 1079H-J; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 80.

[332] City of Johannesburg *Chapter 11 Inner City Regeneration* (2003) 195, 197. Often the arrears were higher than the value of the building. See, SSF Ngwabi *Urban Regeneration and Private Sector Investment: Exploring Private Sector Perception of Urban Regeneration Initiatives in the Johannesburg Inner City* PhD (Town and Regional Planning) University of Pretoria (2009) 150. See also, Strydom & Viljoen (2014) *PER/PELJ* 1210.

[333] See, for example, the discussion of *Changing Tides* in Chapter 2:3.1.2.1.

[334] Wilson (2011) *SAJHR* 332-333.

[335] Centre on Housing Rights and Evictions *Any room for the poor? Forced evictions in Johannesburg, South Africa* (2004) 17.

[336] Wilson (2011) *SAJHR* 134.

[337] *Olivia Road* para 19.

[338] City of Johannesburg *Inner City Regeneration* (2003) 195; *Olivia Road* para 19. See also, Wilson (2011) *SAJHR* 134-135.

[339] This was achieved through to sales in execution pursuant to cover rates-arrears, forced liquidations of the landowner companies due to the high rates-arrears, private sales and expropriations. See, *Olivia Road* para 134; Centre on Housing Rights and Evictions *Any Room For The Poor?* (2004) 68, Ngwabi *Urban Regeneration and Private Sector Investment* 149.

[340] City of Johannesburg *Inner City Regeneration* (2003) 197, 200; Ngwabi *Urban Regeneration and Private Sector Investment* 215; 68. See also, H Kruuse "The art of the possible in realising socio-economic rights: the SCA decision in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd" (2011) 128 *South African Law Journal* 620 625.

been evicted without alternative accommodation was this addressed by the Constitutional Court,[341] in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*[342] (hereinafter "*Olivia Road*").[343]

The Supreme Court of Appeal had found that the state has a duty to assist the evictees under the national Emergency Housing Programme (EHP).[344] This programme was adopted in response to the finding, in *Grootboom*, that the state should adopt a housing programme that caters for emergency housing situations, such as evictions that would lead to homelessness.[345] On appeal from the Supreme Court of Appeal, the Constitutional Court ordered the municipality to engage with the unlawful occupiers to resolve the disputes between them.[346] The engagement order was based on the decisions in *Grootboom* and in *PE Municipality* that municipalities are expected to engage with unlawful occupiers and that a court can order such engagement.[347]

During the engagement, the parties reached a settlement agreement.[348] The agreement included a plan to make the buildings, occupied by those before the court, safe and habitable.[349] Pending the renovation of the building, the municipality agreed to house the

[341] Wilson (2011) *SAJHR* 137.

[342] 2008 (3) SA 208 (CC).

[343] *Olivia Road* para 1.

[344] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) para 47.

[345] See discussion on *Grootboom* in Chapter 2:2.1.

[346] *Olivia Road* para 5.

[347] *Olivia Road* para 10-12. See, *Grootboom* paras 82-83, 87; *PE Municipality* para 39. The CESCR also requires "genuine consultation", see United Nations Committee on Economic, Social and Cultural Rights *General Comment No 7* . Many regard engagement as a requirement in eviction matters, see Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 94; G Muller "Conceptualizing meaningful engagement as a deliberative democratic partnership" (2011) 22 *Stellenbosch Law Review* 742 742; Socio-Economic Rights Institute of South Africa *Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government* (2013) 30-34; Van Wyk (2011) *PER/PELJ* 62-65; S Wilson "Planning for inclusion in South Africa: the state's duty to prevent homelessness and the potential of "meaningful engagement"" (2011) 22 *Urban Forum* 272-274; Liebenberg *Socio-Economic Rights* 298-299, 301-302. For a critical analysis of this requirement and recommendations regarding the court's role in the engagement process, see S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 1.

[348] *Olivia Road* para 6.

[349] *Olivia Road* para 25.

occupiers in other buildings.[350] The court confirmed the agreement. It found that the municipality had fulfilled its duty by responding reasonably to the engagement process.[351]

Subsequent to this decision, the municipality changed its strategy for regeneration. It accepted its duty toward the occupiers that it evicted from bad buildings. Due to resource constraints, it identified bad buildings and, based on the risk to the lives of the occupiers, the municipality progressively removed the occupiers and provided them with temporary alternative accommodation.[352] Where the buildings were privately owned, it requested the owner to address the health and safety concerns.[353] *Blue Moonlight* involved one such request.[354]

3.1.1 Reasoning in Blue Moonlight

Blue Moonlight involved the eviction of 86 unlawful occupiers from commercially zoned bad buildings in inner-city Johannesburg.[355] The property consisted of office space, a factory building and garages.[356] The unlawful occupiers were poor and some of them belonged to vulnerable groups.[357] As a result, it was argued and accepted that they would be unable to secure their own alternative accommodation.[358] All of them had occupied the property for more than six months; many have stayed there for years.[359] Although unlawful at the time of the hearing, their occupation was once lawful. They lawfully rented the property until it was purchased by Blue Moonlight Properties 39 (Pty) Ltd (the landowner) in 2004, who wished to

[350] *Olivia Road* para 26.

[351] *Olivia Road* para 26.

[352] See, for example, discussion on *Blue Moonlight* and *Changing Tides* in Chapter 2:3.1.1 and 3.1.2.1 respectively.

[353] See, for example, discussion on *Blue Moonlight* and *Changing Tides* in Chapter 2:3.1.1 and 3.1.2.1 respectively.

[354] See discussion on *Blue Moonlight* in Chapter 2:3.1.1 below.

[355] *Blue Moonlight* para 1.

[356] *Blue Moonlight* para 1.

[357] *Blue Moonlight* para 6. In terms of this thesis vulnerability refers to someone who falls within one of the categories identified in s 4(6) and (7) of PIE. These are children, elderly and disabled persons and women headed households. In *Blue Moonlight*, five of the unlawful occupiers were children, one was disabled, two pensioners and several were woman heading households. The average income per household was R940 per month. For an in depth discussion on vulnerability of unlawful occupiers in eviction matters, see Muller (2014) *SAJHR*.

[358] *Blue Moonlight* para 6.

[359] *Blue Moonlight* para 7.

redevelop it.[360] The unlawful occupiers argued that their previous rent had been very low and that they would be unable to rent accommodation elsewhere.[361]

As with the other bad buildings in the inner city, the property had deteriorated to such an extent that it posed health and safety risks to the occupiers.[362] Subsequent to *Olivia Road*, instead of trying to evict the occupiers itself, the municipality requested the landowner to address the health and safety issues.[363] In response, the landowner posted a notice to vacate, cancelling any existing leases.[364] It proceeded to apply for the eviction of the unlawful occupiers in terms of PIE.[365] This was opposed by the occupiers on the basis that an eviction would leave them homeless.[366] They argued the municipality should provide them with alternative accommodation.[367] The unlawful occupiers also successfully applied to join the municipality to the matter.[368] Joinder was required since the municipality had an interest in the outcome of the case, as relief was sought against them.[369]

The municipality reported that it was unable to provide alternative accommodation for the unlawful occupiers.[370] It had a programme in which unsafe buildings were identified and, based on the risk to the lives of the occupiers, the municipality progressively removed the occupiers and provided them with temporary alternative accommodation.[371] This programme did not cater for the provision of alternative accommodation for people living in other

---

[360] *Blue Moonlight* para 3, 7, 8.

[361] *Blue Moonlight* para 6.

[362] *Blue Moonlight* para 1, 9.

[363] According to the notice, allowing the building to remain in the state it was in constituted a violation of the City of Johannesburg Emergency Services Bylaws of 2003, which were adopted in terms of s 16 of the Fire Brigade Services Act 99 of 1897.

[364] *Blue Moonlight* para 9-10.

[365] *Blue Moonlight* para 11.

[366] *Blue Moonlight* para 11.

[367] *Blue Moonlight* para 14.

[368] *Blue Moonlight* para 11.

[369] Muller and Liebenberg explore this requirement of the joinder of the state in eviction matters in G Muller & S Liebenberg "Developing the law of joinder in the context of evictions of people from their homes" (2013) 29 *South African Journal on Human Rights* 554. In addition to *Blue Moonlight*, they discuss five preceding cases that lay the foundation for the requirement of joinder. These are *Absa Bank bpk v Murray* (8946/02) [2003] ZAWCHC 48; *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 (1) SA 332 (T); *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands* 2008 (3) BCLR 325 (W); *Sailing Queen Investments v Occupants La Colleen Court* 2008 (6) BCLR 666 (W); *Chieftain Real Estate Incorporated in Ireland v City of Tshwane Metropolitan Municipality* 2008 (5) SA 387 (T). See also, Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 27; Van Wyk (2011) *PER/PELJ* 60-62.

[370] *Blue Moonlight* para 70.

[371] *Blue Moonlight* para 70.

emergency housing situations, such as those facing evictions sought by private landowners.[372] Justification for this differentiation was that they could not foresee and budget for such emergency housing situations. Accordingly, the municipality addressed such situations by applying to the provincial government for funding in terms of the EHP, which makes provision for municipalities to seek assistance from the provincial government.[373]

In response, the unlawful occupiers argued that the municipality's housing programme was unconstitutional. By reserving municipal funds for evictions sought by the municipality, it discriminated against those who require alternative accommodation because of a private eviction.[374]

The Constitutional Court found that in considering all the relevant circumstances to determine whether an eviction order would be just and equitable two conflicting considerations are prevalent – the landowner's right to the property and the unlawful occupiers' potential homelessness.[375] This conflict relates directly to the imperatives of fundamental rights protection and creates a tension between sections 25(1) and 26(1) of the Constitution.[376]

The Constitutional Court confirmed that the landowner has a fundamental right against unlawful deprivations in terms of section 25(1) of the Constitution. It further confirmed the finding in the Supreme Court of Appeal decision of *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd*[377] that unlawful occupation of land amounts to a deprivation of property.[378] Such a deprivation will only be lawful if it is not arbitrary and authorised by a law of general application.[379] PIE is a law of general application.[380] The court found that the landowner knew it was purchasing property that had been unlawfully occupied by poor persons for a long time. It must have known that it would have to wait to get vacant

---

[372] *Blue Moonlight* para 70.

[373] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (Appellant's Heads of Argument)* 2012 (2) SA 104 (CC) para 44.

[374] *Blue Moonlight* para 14.

[375] *Blue Moonlight* para 34.

[376] *Blue Moonlight* paras 17, 18. This imperative is found in s 7(2) of the Constitution that requires the state to respect, protect, promote and fulfil human rights.

[377] 2004 (6) SA 40 (SCA).

[378] See the discussion of *Modderklip SCA* in Chapter 2:2.3.

[379] As per s 25(1) of the Constitution.

[380] See Chapter 4:5.1.1.

occupation of the property; therefore, a temporary deprivation would not be arbitrary. Nevertheless, a private owner could not be deprived of its property indefinitely, since that would amount to an arbitrary deprivation or a *de facto* unlawful expropriation.[381] Hence, an eviction order must be granted, to prevent arbitrary deprivation, but there can be some delay in the execution of the order.[382]

The issue remained when and under what circumstances the inevitable eviction would be just and equitable.[383] To determine this, the court turned to the other side of the balance, the fact that the unlawful occupiers faced homelessness. In this regard, it found that the circumstance that would make an eviction order just and equitable was the provision of alternative accommodation by the municipality.[384] This approach relates to *PE Municipality* and the second lesson taught by the previous Constitutional Court cases. This lesson teaches that the availability of alternative accommodation can affect whether an eviction is just and equitable. The third lesson, that a lack of alternative accommodation might result in the violation of human rights, is also relevant. This is because the court suggests that a denial of the eviction, which might occur if no alternative accommodation is available, would violate the right of the landowner.

Moreover, evident from this discussion is the fact that the court does not balance the two primary relevant circumstances, namely, the owner's right to property and the occupiers' potential homelessness. Based on the owner's right to property, it finds that there *must* be an eviction and then tries to find a way to *make* it just and equitable.[385] This seems to be in conflict with section 4(7) of PIE, which reads, "a court may grant an eviction order if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances". Here the court looks at one circumstance to decide it must grant an eviction order and then considers what the content of the order must be to make the eviction just and equitable.

---

[381] *Blue Moonlight* para 31. This was also argued in *Modderklip SCA* para 19.

[382] *Blue Moonlight* para 39, 40, 96. On this mere acceptance that s 25(1) of the Constitution would be violated, see Strydom & Viljoen (2014) *PER/PELJ* 1207-1208.

[383] *Blue Moonlight* para 41, 96.

[384] *Blue Moonlight* para 97.

[385] This reminds one of the courts' approach during the Apartheid era. See, 667-670. This reminds one of the courts' approach during the Apartheid era. See, Pienaar *Land Reform* 667-670.

To determine whether the state had a duty to provide alternative accommodation, the court considered the state's housing duty in terms of section 26(2) of the Constitution.[386] The state argued that it was unable to provide alternative accommodation to the unlawful occupiers and it was, at any rate, not obliged to accommodate them within its short-term housing programme.[387] This was, firstly, because it was a private eviction and it was only obliged to cater for evictions sought by the state within its short-term housing programme.[388] Second, it had already applied to the provincial government for funding in terms of the EHP and this request was denied. It had, therefore fulfilled its role under the EHP.[389] Its role was to implement emergency housing plans, but not to provide the resources for such implementation. The resources were to be provided by the provincial government.[390] Accordingly, the provincial government had failed the unlawful occupiers, not the municipality. Hence, the provincial government should be joined to the proceedings and held accountable.[391]

In respect of the first contention, the court disagreed with the municipality that its short-term housing programme need not cater for persons evicted at the instance of private landowners. Instead, the court found the municipality's short-term housing programme unconstitutional to the extent that it did not cater for persons evicted by private landowners. Failure to cater for this category of persons amounted to an unfair discrimination in terms of section 9 of the Constitution.[392]

As for the second contention, the court found that the municipality had the primary duty, in terms of the EHP, to fund emergency housing.[393] It must budget for such situations.[394] The provincial government should be involved only if, despite budgeting, it does not have sufficient funds.[395] The court, therefore, rejected the state's assertion that it did not have a

[386] *Blue Moonlight* para 86-87.
[387] *Blue Moonlight* para 3.
[388] *Blue Moonlight* para 32.
[389] *Blue Moonlight* para 48.
[390] *Blue Moonlight* para 50.
[391] This was applied for by the municipality in the High Court. The application was denied. See, *Blue Moonlight* para 43.
[392] *Blue Moonlight* para 19, 27, 79, 84, 87, 95.
[393] *Blue Moonlight* para 54-67.
[394] *Blue Moonlight* para 63.
[395] *Blue Moonlight* para 66-67, with reference to Department of Human Settlements *EHP* (2009) Part A 2.6.1.

duty to use its own resources to implement the EHP.[396] This relates to the first lesson taught by the previous Constitutional Court decisions. The state's housing duty includes a duty to assist persons living in emergency housing situations, which includes persons facing eviction by private landowners.

The next issue addressed by the court was whether the municipality, in fact, had the available resources to provide the unlawful occupiers with alternative accommodation.[397] It was necessary to answer this question since the state's housing duty in section 26(2) is limited to the extent that it has available resources. Moreover, it would be pointless to grant an order that could not be implemented. It was argued by the amicus curiae that the municipality was running a budget surplus.[398] In response, the municipality argued that the surplus was only a budgetary projection and was inaccurate. It was actually operating on a budget deficit.[399] The Constitutional Court rejected this argument. It criticised the municipality for not proving that it was operating on a budget deficit.[400] In fact, the municipality did not supply any proof that it was unable to provide the unlawful occupiers with temporary alternative accommodation.[401] Furthermore, in its contention that it lacked the available resources, the municipality primarily spoke about its housing budget and did not specify whether it had the available resources within its general budget.[402]

What is peculiar about these findings is that they were based on incomplete information, despite the court's emphasis in *PE Municipality* on the importance of ensuring that all relevant information is laid before the court.[403] While the court identified the missing information, it made no creative managerial effort to ensure that it had the missing information before making a decision.[404] The court seems to place the burden of proof

[396] *Blue Moonlight* para 22, 48, 51, 96.
[397] *Blue Moonlight* para 67.
[398] *Blue Moonlight* para 71.
[399] *Blue Moonlight* para 73.
[400] *Blue Moonlight* para 73.
[401] *Blue Moonlight* para 71.
[402] *Blue Moonlight* para 74.
[403] See discussion of *PE Municipality* in Chapter 2:2.2.
[404] See discussion of *PE Municipality* in Chapter 2:2.2.

regarding its ability to provide alternative accommodation on the municipality. In the absence of such proof, it presumed that the state had the available resources.[405]

It is also strange that the court wanted to hear evidence on the municipality's general budget, since scrutinising its entire budget would require a technical analysis in which a multitude of different interests must be balanced. Such a scrutiny raises separation of powers concerns.[406]

What is more, the court highlighted the blameworthiness of the state.[407] It stressed that the municipality had known about the pending eviction for three years, but still had not budgeted for it.[408] A counterargument could be that the municipality was under the impression that it did not have a duty towards the unlawful occupiers.[409] The court also contended that the unlawful occupiers should not be prejudiced because the municipality had unconstitutionally excluded them from its budget.[410] It is unclear how the fact that the municipality is blameworthy features in an investigation regarding whether, in fact, the municipality has available resources. Rather, these allegations, regarding the blameworthiness of the municipality, make the consequent alternative accommodation order seem like a bid to punish the municipality.[411]

Unfortunately, the court failed to engage with the question of the municipality's available resources in a meaningful way. Rather, after making the contentions mentioned above, it abruptly ended the discussion.[412] As justification, it stated that its duty is merely to decide whether the Supreme Court of Appeal's findings were incorrect and whether it should be set aside. To this, it "cannot answer yes" since the municipality has not shown that it is unable to

---

[405] For a discussion of the general rule regarding burden of proof in matters regarding the limitation of human rights, see Chapter 4:5.1. Recommendations regarding this burden are made in Chapter 7:3.2.2.

[406] See the municipality's concerns regarding the court violating the separation of powers doctrine in *Blue Moonlight (Appl HoA)* para 36. On separation of powers, see Chapter 1:3.1.2. On scrutinising the state's budget, see Chapter 3:6.3. Recommendations regarding the extent to which the state's budget should be scrutinised are made in Chapter 7:2.1.3 and 3.1. Van der Berg argues that the court should be able to scrutinise the entire budget in S Van Der Berg "The need for a capabilities-based standard of review for the adjudication of state resource allocation decisions" (2015) *South African Journal on Human Rights* 330 335.

[407] *Blue Moonlight* para 74.

[408] *Blue Moonlight* para 71.

[409] Since it argued such, see *Blue Moonlight* para 32.

[410] *Blue Moonlight* para 69.

[411] On the blameworthiness of the state, see Chapter 3:6.3, Chapter 4:5.2, Chapter 5:3.1.2, Chapter 6:3 and Chapter 7:2.1.2.

[412] In para 75.

provide alternative accommodation.[413] It then ordered the municipality to provide the unlawful occupiers with temporary alternative accommodation as close as possible to the property within four months.[414] The court linked the alternative accommodation order with the date of eviction, stating that the eviction is only to occur after alternative accommodation had been provided.[415]

It would be interesting to know what the court would have done, had it found that the state does not have the resources to provide alternative accommodation. Such a finding would obviously have frustrated the court's endeavour of making the eviction order just and equitable. This might explain why it was so adamant to decide that the state has a duty to provide alternative accommodation to the unlawful occupiers, without all of the relevant information before it.

In conclusion, the decision to order the state to provide alternative accommodation was founded on its duty to provide emergency accommodation in terms of section 26(2) of the Constitution.[416] Instead of weighing this factor in the balance, the court seemed to consider it its duty to make the eviction just and equitable in terms of section 26(3) of the Constitution.[417] It found that an eviction had to be granted since the land was privately owned and a denial of the eviction would violate the landowner's right in terms of section 25(1) of the Constitution.[418] The duty to provide alternative accommodation was placed on the municipality alone.[419] However, the municipality would only be required to provide such accommodation if it has the resources.[420] The municipality must budget for emergency housing situations to ensure it has resources available.[421] It is uncertain what the effect would have been had the court found that the municipality did not have sufficient resources available.

---

[413] *Blue Moonlight* para 76.
[414] *Blue Moonlight* para 69, 75, 104.
[415] *Blue Moonlight* para 104.
[416] *Blue Moonlight* para 86-87.
[417] *Blue Moonlight* para 41.
[418] *Blue Moonlight* para 40. On the weight of the fact that the land is privately owned, see Chapter 4:3.1.
[419] *Blue Moonlight* para 67.
[420] *Blue Moonlight* para 69.
[421] *Blue Moonlight* para 67.

3.1.2 Subsequent Supreme Court of Appeal decisions

Subsequent to *Blue Moonlight*, the Supreme Court of Appeal heard two other matters regarding evictions from bad buildings in the inner city of Johannesburg. These cases are *Changing Tides* and *Hlophe.* In both of these matters, alternative accommodation orders were granted. The remainder of this section considers to what extent these decisions followed the reasoning of *Blue Moonlight.*

3.1.2.1 City of Johannesburg v Changing Tides 74 (Pty) Ltd

Changing Tides involved the occupation of an old warehouse by over 97 people.[422] Similar to *Blue Moonlight*, the building was not safe for human habitation and the municipality gave the landowner, Changing Tides, notice to address the health and safety concerns.[423] In response to the municipality's notice, the landowner applied for an eviction order in 2011.[424]

The High Court followed the decision of *Blue Moonlight.* It granted the eviction order, together with an order that the state must provide every occupier with temporary emergency accommodation.[425] The municipality appealed against the latter part of the High Court's decision to the Supreme Court of Appeal.[426] The occupiers opposed this appeal.[427]

Interpreting *Blue Moonlight*, the Supreme Court of Appeal found that coming to a just and equitable order involves a two-step process. First, the court must decide whether to grant an eviction order at all.[428] An eviction order must be granted if all of the procedural requirements were met, no valid defence exists and the eviction will be just and equitable.[429] The outcome of this step demands that an eviction be just and equitable if sought by a private landowner

---

[422] *Changing Tides* para 2-3.

[423] *Changing Tides* para 2. In terms of the City of Johannesburg Emergency Services Bylaws, as well as the NBRBSA. S 12(4) of the NBRBSA provides:

> "If the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered-
>
> (a) order the owner of any building to remove, within the period specified in such notice, all persons occupying or working or being for any other purpose in such building therefrom, and to take care that any person not authorized by such local authority does not enter such building;"

[424] *Changing Tides* para 4.

[425] *Changing Tides* para 4.

[426] *Changing Tides* para 5.

[427] *Changing Tides* para 5.

[428] S 4(7) of PIE.

[429] *Changing Tides* para 11.

unless the landowner has no need for the land.[430] The finding that the outcome might be different if the landowner does not need the land seems to be an attempt to justify its deviation from the conclusion in *PE Municipality*, in which an eviction from private land was denied.[431] Interestingly, in this case, as in *PE Municipality*,[432] it was not the landowner's decision to evict the unlawful occupiers. The landowners in *Changing Tides* applied for the eviction at the instance of the state.[433] In contrast, the municipality, in *PE Municipality*, applied for the eviction at the instance of the landowner.[434]

The second step requires the court to decide what conditions must be attached to the eviction order to ensure a just and equitable outcome.[435] This step deals with the rights of the unlawful occupiers and the fact that a condition that the municipality must provide them with alternative accommodation might ensure that the eviction is just and equitable. Hence, as in *Blue Moonlight*, the court first considered the rights of the private landowner in determining whether to grant an eviction. Second, it considered the rights of the unlawful occupiers in "making" the order just and equitable.[436] The Supreme Court of Appeal, in *Changing Tides*, justified this second step in terms of PIE.[437] Section 4(12) of PIE allows the court to make an eviction order subject to any conditions that it deems reasonable.[438]

Since the eviction would leave the unlawful occupiers homeless, the alternative accommodation order can be considered a condition to "make" the eviction just and equitable.[439] The Supreme Court of Appeal justified placing this duty on the municipality in terms of the state's housing duty in section 26(2) of the Constitution.[440] In response, subsequent to *Blue Moonlight*, the municipality accepted that it has a "duty to assist people

---

[430] *Changing Tides* para 18, fn 23. On this mere acceptance that s 25(1) of the Constitution would be violated, see Strydom & Viljoen (2014) *PER/PELJ* 1207-1208.

[431] See discussion of *PE Municipality* in Chapter 2:2.2.

[432] See discussion of *PE Municipality* in Chapter 2:2.2.

[433] *Changing Tides* para 2, 4.

[434] See discussion of *PE Municipality* in Chapter 2:2.2.

[435] The court relies on s 4(12) of PIE. *Changing Tides* para 12.

[436] On this decision to grant the eviction order and then to decide on whether alternative accommodation order should be granted, see Strydom & Viljoen (2014) *PER/PELJ* 1215-1216.

[437] *Changing Tides* para 25.

[438] Reasonableness, in this regard, would depend on the circumstances of the matter. It is assumed that a condition that the court considers just and equitable would be reasonable.

[439] *Changing Tides* para 18.

[440] *Changing Tides* para 14.

who face homelessness upon eviction, through no fault of their own and which they can do nothing about".[441] However, it contended that this duty was limited to complying with the EHP.[442] Accordingly, it required the unlawful occupiers to approach its centres that deal with emergency housing and to apply for emergency housing.[443] The effect of this would be that that the applications of the occupiers would be dealt with on the same basis as any other person living in emergency housing situations. Furthermore, accommodation will be provided as and when the available resources of the municipality allow.

The court rejected this approach since it would result in a delay of the eviction if the eviction were to be made conditional upon the provision of alternative accommodation.[444] It stressed that the building was a "death trap" and that the occupiers could not stay there until the municipality has decided whether they qualify for emergency housing in terms of its emergency housing programme.[445] Although it accepted that the municipality has a right to decide who qualifies for emergency accommodation, it should not do so at the risk of the health and safety of the occupiers who do qualify.[446] The municipality should, first, provide all of the occupiers with alternative accommodation and then "weed" them out afterwards.[447]

The effect of this approach is that the unlawful occupiers are prioritised above others living in emergency housing situations.[448] Moreover, it disregards whether the municipality has the available resources to provide the alternative accommodation within the given timeframe.[449] In fact, the court did not address the available resources of the municipality at all.

There are two possible explanations for the court's disregard of the state's available resources. For one, the municipality accepted its duty to provide alternative accommodation, which suggests that it has the available resources.[450] However, it only accepted that it has a

[441] *Changing Tides* para 43.
[442] *Changing Tides* para 44.
[443] *Changing Tides* para 44.
[444] *Changing Tides* para 53.
[445] *Changing Tides* para 52.
[446] *Changing Tides* para 53.
[447] *Changing Tides* para 53. To call this process "weeding out people" seems inappropriate, however, for ease of reference the term that the court used is used in this thesis.
[448] This is referred to as queue jumping. For more on queue jumping, see Chapter 6:4.1.
[449] The municipality's duty is limited to the extent that it is able to comply within its available resources. See S 26(2) of the Constitution.
[450] *Changing Tides* para 42.

duty toward the unlawful occupiers in terms of its emergency housing programme.[451] Had it been allowed to act according to this programme, it would have accommodated only those who qualified and only to the extent that its resources allowed. This means that it might only have provided alternative accommodation on a much later date.

Second, in *Blue Moonlight* the court found that this same municipality had the available resources because of an alleged budget surplus.[452] The occupiers alleged that the surplus was predicted to increase in the following years.[453] Unfortunately, the court, in *Changing Tides*, did not address in its decision to what extent it relied on the alleged surplus and whether the surplus would be sufficient for the provision of alternative accommodation.

Despite the apparent urgency of the matter, the court prescribed quite a lengthy procedure prior to the execution of the eviction order. First, it afforded the legal representatives of the unlawful occupiers a month to draft a list of all of the occupiers who would require alternative accommodation once evicted.[454] Second, after receiving the list, the municipality had a month to report on the accommodation it would provide.[455] A third month was awarded to the unlawful occupiers to consider the report, where after the municipality had another two weeks to respond to any comments from the unlawful occupiers.[456] This added up to three and a half months of delay. The matter was then to be set down for hearing in the High Court, for a decision on a just and equitable date for eviction.[457] Alternative accommodation was to be provided by the municipality two weeks prior to eviction.[458] Eventually, the eviction was only executed eight months after the Supreme Court of Appeal decision was handed down.[459] Such

---

[451] *Changing Tides* para 44.

[452] See discussion of *Blue Moonlight* in Chapter 2:3.1.1.

[453] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (Second Respondent's Heads of Argument)* 2012 (2) SA 104 (CC) (hereinafter "*Blue Moonlight (2nd Resp. HoA)*") para 60.

[454] *Changing Tides* para 48.

[455] *Changing Tides* para 56.

[456] *Changing Tides* para 57.

[457] *Changing Tides* para 58.

[458] *Changing Tides* para 65.

[459] This case was not reported and this discussion relies on a report on the website entry of the Socio-Economic Rights Institute (SERI), the *amicus* in the matter. See, Socio-Economic Rights Institute of South Africa *City of Johannesburg v Changing Tides Properties and the Unlawful Occupiers of Tikwelo House* (2013) http://www.seri-sa.org/index.php/19-litigation/case-entries/117-city-of-johannesburg-v-changing-tides-properties-and-the-unlaawful-occupiers-of-tikwelo-house-tikwelo-house 21-06-2016.

a significant delay questions the urgency of the eviction. Throughout the municipality insisted that it did not have available buildings in which to house the unlawful occupiers. [460]

The court, in this case, evidently followed the decision of *Blue Moonlight* closely. It followed the same procedure of, first, deciding that the rights of the landowner necessitated an eviction order and then granting an alternative accommodation order to make the eviction order just and equitable toward the unlawful occupiers. Despite responding to the decision in *Blue Moonlight* and including evictees from private land within its emergency housing programme, the court still did not allow the municipality to implement this programme to assist the unlawful occupiers. Justification provided for this approach was that the building was unsafe. However, the subsequent eight-month delay does not support this assertion. Moreover, the court disregarded the state's contention that it could not provide alternative accommodation. Unlike in *Blue Moonlight*, the court did not even address this issue in the judgment.

3.1.2.2 City of Johannesburg Metropolitan Municipality v Hlophe

Hlophe involved another eviction application by the private property developer Changing Tides. Again, it had acquired ownership of a bad building for development in inner-city Johannesburg.[461] The property was unlawfully occupied by between 180 and 250 persons.[462] In the initial unreported High Court decision, the municipality agreed to provide the unlawful occupiers with alternative accommodation in terms of its emergency housing programme.[463] However, the provision would be limited to those occupiers who qualified for assistance based on the rules of its emergency housing programme.[464] The High Court accepted this and afforded the municipality two months within which to identify those who qualify for assistance and report to the court on its findings.[465] The municipality failed to comply with this order.[466]

---

[460] Socio-Economic Rights Institute of South Africa *City of Johannesburg v Changing Tides Properties and the Unlawful Occupiers of Tikwelo House* (2013).

[461] *Hlophe* para 1.

[462] *Hlophe* fn 1.

[463] *Changing Tides 47 (Pty) Ltd v The Unlawful Occupiers of Chung Huo Mansions* unreported case no: 2011/20127 para 5.

[464] *Hlophe HC1* para 9.

[465] *Hlophe* para 4.

[466] *Hlophe* para 4.

The landowner re-enrolled the matter and supplied a list of those persons who would require alternative accommodation once evicted.[467] The municipality requested a postponement of the matter to examine the list to determine whether the persons on the list qualified under its housing programme.[468] The court denied this request.[469] Instead, it ordered the municipality to provide the unlawful occupiers on the list with alternative accommodation that is secure against further evictions.[470] This order deviated from *Changing Tides*, where the court allowed the municipality to "weed out" the persons who do not qualify for emergency housing in terms of its programme.[471] However, this seems to be due to the municipality's failure to take the opportunity to examine which occupants qualify under its programme. Moreover, neither *Blue Moonlight* nor *Changing Tides* required the alternative housing to be secure against eviction. The notion of tenure security for alternative accommodation was created in *PE Municipality*, where the alternative land was not accepted as alternative accommodation since the state did not prove that it owned the land and could ensure undisturbed occupation.[472]

In determining a date of eviction, the municipality agreed to an eviction date within about six months,[473] on condition that it would only accommodate those occupiers who qualified for assistance in terms of its emergency housing programme.[474] It also requested a later date for the execution of the order, but this request was denied.[475]

At the end of the six months, the municipality applied for a suspension of the alternative accommodation order on the ground that was unable to provide accommodation in time. It contended that it could not fast-track the provision of accommodation without the assistance

---

[467] *Hlophe HC1* (hereinafter "*Hlophe HC1*") para 3, 10.

[468] *Hlophe HC1* para 3.

[469] *Hlophe HC1* para 2.

[470] *Hlophe HC1* para 6-7. The living circumstances in this matter were likely to have also been unsafe and unhealthy. See, *Hlophe HC2* (hereinafter "*Hlophe HC2*") para 30.

[471] See the discussion of *Changing Tides* in Chapter 2:3.1.2.1.

[472] See the discussion of *PE Municipality* in Chapter 2:2.2. For a discussion on alternative accommodation that affords security against eviction, see 5.2.

[473] *Hlophe HC1* para 8.

[474] *Hlophe HC1* para 9. Moreover, it was argued on behalf of the unlawful occupiers that the assistance that the municipality required the unlawful occupiers to apply for did not result in alternative accommodation. See, *Changing Tides 47 (Pty) Ltd v The Unlawful Occupiers of Chung Huo Mansions (Unlawful Occupiers' Heads of Argument)* unreported case no: 2011/20127 para 14.

[475] *Hlophe HC1* para 14.

of other spheres of government.[476] This argument seems to relate to the principle of co-operative government.[477] Moreover, the municipality asserted that, if the court finds that an eviction without alternative accommodation would not be just and equitable, it should suspend the eviction order until the municipality is able to provide such.[478] This application for suspension was granted and the municipality was required to report within three months on the accommodation to be provided.[479] The buildings that were to be used should be identified, as well as the terms of accommodation, such as any rent to be paid.[480]

By the deadline, no alternative accommodation had been provided.[481] The municipality reported that it was previously ordered to house those evicted in *Changing Tides*, in the buildings it planned to use to house persons evicted in this matter.[482] Hence, the municipality's argument was based on its lack of available resources. It argued that no suitable buildings were available, but that it was planning to build suitable buildings and renovate existing buildings.[483] Furthermore, the effect of the decision in *Blue Moonlight* was that it had a duty to assist all persons evicted by private landowners within its emergency housing programme.[484] This further limited its available resources and affected the date on which alternative accommodation could be provided since the needs of those to be evicted from other buildings should be taken into account.[485] Accordingly, it requested the eviction order to be suspended for another nine months.[486]

In response, the unlawful occupiers applied to the High Court to hold individual members of municipality personally liable for complying with the court order: the Executive Mayor, the City Manager and the Director of Housing.[487] The owner also contended that it was not

[476] *Hlophe HC2* para 12.
[477] On co-operative government, see Chapter 1:3.1.3 and Chapter 5:4.
[478] *Hlophe HC2* para 14, 15.
[479] *Hlophe HC2* para 1.
[480] *Hlophe HC2* para 15.
[481] *Hlophe HC2* para 2.
[482] This is interesting, because the landowner and applicant in *Changing Tides* and *Hlophe* was one and the same private developer, Changing Tides.
[483] *Hlophe HC2* para 16.
[484] *Hlophe HC2* para 12.
[485] *Hlophe HC2* para 16-17.
[486] *Hlophe HC2* para 18.
[487] *Hlophe HC2* para 3.

willing to accept another suspension, despite that fact that the requested suspension was due to its success in a previous matter.[488]

In its decision, the High Court discussed the blameworthiness of the municipality.[489] It did not consider the impact of the *Blue Moonlight* decision, namely that the municipality now has a heavier burden to carry and many competing interests to balance.[490] Rather, the court focused on the fact that the municipality had known since the *Blue Moonlight* decision about its duty to accommodate persons evicted by private landowners within its emergency housing programme.[491] The municipality, therefore, had time to prepare for the provision of alternative accommodation to the unlawful occupiers.[492]

In response to the municipality's report on its inability to provide alternative accommodation, the court stated that municipality "was not asked to share its various problems with the court."[493] This is a peculiar response to the municipality's report on its available resources since it disregards the internal limitation to its duty as provided for in section 26(2) of the Constitution. However, this disregard might be because the court was of the view that the municipality had resources available. The occupiers relied on a predicted R 4.126 billion surplus, in the municipality's medium-term budget for 2012/2013, to argue that the municipality had the required resources.[494] Yet, even if this surplus were available,[495] this amount still had to be used to address the housing emergencies of all those living in emergency housing situations within the municipality's jurisdiction.[496] Moreover, available

---

[488] *Hlophe HC2* para 4.

[489] *Hlophe HC2* para 21. On the blameworthiness of the state, see Chapter 3:6.3, Chapter 4:5.2, Chapter 5:3.1.2, Chapter 6:3 and Chapter 7:2.1.2.

[490] *Hlophe HC2* para 13.

[491] *Hlophe HC2* para 5-6. This is with reference to the SCA decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) since that decision was binding on the high court.

[492] *Hlophe HC2* para 10.

[493] *Hlophe HC2* para 21.

[494] See, affidavit by Philani Hlophe made in terms of *Hlophe HC2* para 21.6 and annexure "G" attached thereto. Accessible on SERI's website, see *Hlophe v City of Johannesburg Metropolitan Municipality (Affidavit by Philani Hlophe)* 2013 (4) SA 212 (GSJ).

[495] In *Blue Moonlight*, the municipality argued that the surplus was merely a prediction, but that in fact it was running on a budget deficit, see the discussion of *Blue Moonlight* in Chapter 2:3.1.1.

[496] See the discussion in Chapter 6:4.2 and Chapter 7:2.1.3.

funding does not equate available accommodation, since it takes time to acquire suitable buildings and to ensure that they are habitable.[497]

In this respect, however, the court was not satisfied with the steps already taken by the municipality.[498] While the court did acknowledge that there are arguments against using tax revenue to house even non-South Africans[499] and that an alternative accommodation might amount to queue jumping,[500] it refused to take these considerations into account on the basis that it is bound by the Constitutional Court.[501]

In its order, the High Court required the municipality to report extensively on the steps it had taken and would still take to provide those occupying bad buildings in the inner city, including the unlawful occupiers in the current matter, with alternative accommodation.[502] The members of the municipality cited in the application were to sign the report. They were personally to ensure that this report was submitted and that temporary alternative accommodation was provided to the unlawful occupiers.[503] Failure to do so would mean that they would be guilty of contempt of court and possibly also liable for constitutional damages.[504]

This decision was appealed against to the Supreme Court of Appeal by the municipality and the cited officials. The premise of the appeal was that the officials could not be held liable in their personal capacities for submitting the report and for ensuring that the unlawful occupiers were provided with alternative accommodation.[505] This argument was rejected by the court on the basis that the order simply required the officials to perform their duties.[506] Holding officials liable for the performance of their duties promotes the accountability of government.[507] The court did not take into account the fact that the performance of these

---

[497] See Chapter 3:6.3.
[498] *Hlophe HC2* para 21.
[499] For recommendations regarding the eviction of non-South Africans, see Chapter 7:3.1.1.
[500] For more on jumping the queue, see Chapter 6:4.1.
[501] *Hlophe HC2* para 24-25.
[502] *Hlophe HC2* order.
[503] *Hlophe HC2* order.
[504] *Hlophe HC2* order.
[505] *Hlophe* para 3.
[506] *Hlophe* para 24.
[507] *Hlophe* para 25.

duties was constitutionally limited to the extent that the municipality possessed the required resources.[508]

In respect of what the officials can be held liable for, the court found that the municipality could not be ordered to report in the manner required by the High Court.[509] Hence, the officials could not be held liable for ensuring that such a report is submitted. The court's dismissal of the order to report was based on the fact that it amounted to the court dictating how the municipality could or should comply with its constitutional obligations.[510] This violated the separation of powers doctrine.[511] This finding is interesting, considering that the same court in *Changing Tides* found that the municipality should use specific buildings to house the unlawful occupiers and this was not regarded a violation of the separation of powers doctrine.[512]

In respect of holding the officials liable to ensure the provision of alternative accommodation, in theory the court seemed to find that it would be possible. Yet, it was not necessary to order such in this instance. By the time that the matter was decided, the municipality had offered accommodation to the unlawful occupiers before the court by September 2015.[513] Despite this offer, alternative accommodation was only provided in January 2016 following contempt of court proceedings against the mayor.[514]

The decision was evidently based primarily on precedent and the court's dissatisfaction with the progress of the municipality. This dissatisfaction seems to originate in *Blue Moonlight* and increase in *Changing Tides*. However, the court did not investigate whether this slow progress can be justified by the internal limitations of section 26(2) of the Constitution.

---

[508] S 26(2) of the Constitution.

[509] *Hlophe* para 28.

[510] *Hlophe* para 28.

[511] *Hlophe* para 28.

[512] See the discussion of *Changing Tides* in Chapter 2:3.1.2.1.

[513] *Hlophe* para 13.

[514] These cases were not reported and reliance is placed on the discussion on SERI's website. See, Socio-Economic Rights Institute of South Africa *Hlophe and Others v City of Johannesburg* (2016) http://www.seri-sa.org/index.php/what-2/housing-and-evictions?id=196:hlophe-and-others-v-city-of-johannesburg-and-others-hlophe 22-06-2016.

Instead, it found that municipal officials could be held accountable in their personal capacities, clearly showing its frustration with them.[515]

3.2 Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd

Contrary to the three cases discussed in the previous section, the case discussed here relates to an eviction due to the erection and occupation of informal structures on vacant, privately owned land. *Skurweplaas* involved a farm, called Mooiplaats, which had been subdivided into four parts.[516] Two of the parts, called "Skurweplaas" and "portion 15" respectively, were owned by PPC Aggregate Quarries (PPC). It used the land to mine dolomite.[517] The third part, portion 25, was owned by Golden Thread Ltd (Golden Thread)[518] and the fourth was owned by the municipality. The municipality had expropriated the land to be used as an informal settlement, called Itireleng.[519]

The informal settlement grew and became overcrowded.[520] As a result, a number of the occupiers of Itireleng moved onto portion 15 without the consent of PPC, the landowner. In response, PPC obtained an eviction order against the unlawful occupiers. Upon execution of the eviction order, the evictees invaded both portion 25 (owned by Golden Thread) and Skurweplaas (owned by PPC). More people kept moving onto the property from elsewhere.[521]

---

[515] For more on the blameworthiness of the state, see Chapter 3:6.3, Chapter 4:5.2, Chapter 5:3.1.2, Chapter 6:3 and Chapter 7:2.1.2.

[516] The high court decision is also discussed since it is the case in which the court orders the state to provide alternative accommodation. See, *PPC Aggregate Quarries (Pty) Ltd v People Who Intend Invading The Remaining Extent Of The Farm Skurweplaas 353, J.R. Tshwane, Gauteng* (12289/2010) [2010] ZAGPPHC 606 (hereinafter "*Skurweplaas HC*").

[517] Dolomite stone dissolves in water and can therefore cause the land to subside, also known as sinkholes. SABC *Almost a Quarter of Gauteng Built on Dolomitic Land* (2011) http://www.sabc.co.za/news/a/4948a580485a10fda0a1aa0e3505e7d1/Almost-a-quarter-of-Gauteng-built-on-dolomitic-land-20111609 19-07-2016.

[518] The landowner of this portion had also evicted occupiers from its land. See, *Golden Thread Limited v People Who Intend Invading Portion R25 of the farm Mooiplaats 355JR Tshwane, Gauteng* (3492/2010) [2010] ZAGPPHC 262 (hereinafter "*Mooiplaats HC*").

[519] *Skurweplaas HC* para 6; *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (Appellant's Heads of Argument)* 2012 (4) BCLR 382 (CC) (hereinafter "*Skurweplaas (Appl. HoA)*") para 15.

[520] *Skurweplaas (Appl HoA)* para 17.

[521] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (First Respondent's Heads of Argument)* 2012 (4) BCLR 382 (CC) (hereinafter "*Skurweplaas (1st Resp. HoA*") para 11. Such as from backyard dwellings.

PPC's initial attempt to secure Skurweplaas against further invasion, by employing security guards, failed due to the intimidation of the guards by the unlawful occupiers.[522] In another attempt to prevent the unlawful occupation of Skurweplaas, PPC obtained an interim interdict against future land invasion, as well as an interim eviction order against those who had already invaded the land.[523] Again, this did not affect the existing and continued invasion and unlawful occupation of the property. In fact, by the time the Constitutional Court decision was heard the number of unlawful occupiers had more than doubled from 50 families to over a hundred families. Hence, half of the occupiers were there in contempt of the interdict and half in contempt of the eviction order.[524]

On the return date, the interim order was extended to allow the municipality to report on its ability to provide alternative accommodation and the unlawful occupiers to respond to the application.[525] The municipality reported that it could accommodate the unlawful occupiers in its short-term housing programme that commenced in the subsequent financial year. It had applied for funding from the national authority to purchase land for alternative accommodation, but the outcome of the application was not indicated.[526] Disregarding the municipality's report on when it would have resources available, the High Court ordered it to provide the unlawful occupiers with alternative accommodation within just over two months. Furthermore, it ordered the eviction of the unlawful occupiers after the two months, regardless of whether the municipality complied with the alternative accommodation order.[527]

The order was founded on sections 9 and 26 of the Constitution.[528] Justification for relying on section 9 was that continued occupation would amount to the individual landowners having to carry the state's housing duty. This would constitute an unfair discrimination, since other private parties do not have a similar duty.[529] *Modderklip* was given as authority for this finding, despite the Constitutional Court in *Modderklip* not relying on section 9.[530] No

[522] *Skurweplaas (1st Resp HoA)* para 12.
[523] *Skurweplaas (1st Resp HoA)* para 13.
[524] *Skurweplaas (1st Resp HoA)* para 14.
[525] *Skurweplaas HC* para 3.
[526] *Skurweplaas (1st Resp HoA)* para 17-18.
[527] *Skurweplaas HC* para 4; *Skurweplaas (1st Resp HoA)* para 19.
[528] *Skurweplaas HC* para 9.
[529] *Skurweplaas HC* para 10.
[530] *Skurweplaas HC* para 10.

explanation was given as to why section 26 justified the granting of an alternative accommodation order in the face of the municipality's apparent lack of resources. In fact, nothing further was mentioned about this duty.

In response, the unlawful occupiers applied for leave to appeal against the High Court order. Leave to appeal was denied by both the High Court and the Supreme Court of Appeal, but was allowed by the Constitutional Court.[531] Accordingly, the unlawful occupiers appealed to the Constitutional Court. The relief sought was that the eviction must be made conditional upon the provision of alternative accommodation by the municipality, to avoid the risk of becoming homeless once evicted.[532]

In support of this argument, the unlawful occupiers contended that precedent has created the principle that evictions, which lead to homelessness, are usually not just and equitable. This argument was primarily based on the oft-quoted statement in *PE Municipality* regarding relatively settled occupiers.[533] In response to this argument, PPC argued that this statement was not applicable to the current matter, as the occupiers had been in occupation of the property for shorter than six months. They were not "relatively settled".[534] Moreover, in terms of PIE, a court is not required to consider whether alternative accommodation is available if the occupation was less than six months.[535]

Nonetheless, the court found that the *PE Municipality* statement still applied to the current set of facts, since the Constitutional Court, in *PE Municipality*, found that "PIE does not envisage any set formula connecting time to stability".[536] No attention was paid to the fact that this statement was made in a case where persons were in occupation for up to eight years.[537] In addition, PPC questioned whether the unlawful occupiers would, in fact, become homeless once evicted. It argued that the fact that their occupation had been short means that

---

[531] *Skurweplaas (1st Resp HoA)* para 21.

[532] *Skurweplaas* para 7.

[533] See, *Skurweplaas (Appl HoA)* fn 270. The quote reads, "[c]ourts should generally be reluctant… to grant an eviction order against relatively settled occupiers unless a reasonable alternative was available". See, *PE Municipality* para 28.

[534] *Skurweplaas (1st Resp HoA)* para 3.1, 26-27.

[535] This is only applicable to evictions sought by private entities, see s 4(6) of PIE.

[536] *PE Municipality* para 27 as quoted in *Skurweplaas (Appl HoA)* para 31-35.

[537] See discussion of *PE Municipality* in Chapter 2:2.2.

they might still be able to return whence they came.[538] Some occupiers had also admitted that they could afford accommodation elsewhere.[539]

A number of other arguments were made in support of the appeal. For one, making the eviction conditional upon the provision of alternative accommodation would prevent further eviction matters.[540] If they were evicted without alternative accommodation, the unlawful occupiers argued, they would just invade another property.[541] This would create uncertainty for other landowners in the area because there would be the constant threat that their land would be invaded.[542] However, the fact that more people kept moving onto Skurweplaas (and that these occupiers were not limited to those evicted from portion 15) suggests that provision of alternative accommodation to this group of persons might not avert the threat of land invasion.[543] The argument that once evicted the unlawful occupiers would invade other land relates to the third lesson taught by the decisions that preceded alternative accommodation orders – a lack of alternative accommodation can result in the infringement of other human rights. In this instance, the right infringed upon is the right of the landowner, as well as other landowners in the area, to property.

Another argument raised in support of the appeal is that, if unlawful occupiers face homelessness, their rights would outweigh that of the landowner.[544] This is especially the case where there is no evidence that owner is to use the property, as was alleged in this matter.[545] Hence, if alternative accommodation is not provided, the occupiers should not be evicted. In support of this argument, reliance was placed on an interpretation of *Modderklip* by Wilson.[546] However, Wilson applies the reasoning of the Supreme Court of Appeal decision, which was not confirmed in the Constitutional Court decision.[547] Moreover, the allegation that the landowner did not intend to use the land is problematic, since the land is dolomitic and

---

[538] *Skurweplaas (1st Resp HoA)* para 28.

[539] *Skurweplaas (1st Resp HoA)* para 28. For more on lack of alternative accommodation and the argument regarding returning whence they came, see Chapter 7:3.1.1.

[540] *Skurweplaas (Appl HoA)* para 36.

[541] *Skurweplaas (Appl HoA)* para 78.

[542] *Skurweplaas (Appl HoA)* para 3.

[543] *Skurweplaas (1st Resp HoA)* para 11.

[544] *Skurweplaas (Appl HoA)* para 5.

[545] *Skurweplaas* para 12.

[546] *Skurweplaas (Appl HoA)* para 54-55. The article is S Wilson "Breaking the tie: evictions from private land, homelessness and a new normality" (2009) 126 *South African Law Journal* 270.

[547] Wilson (2009) *SALJ* 278.

the business of PPC is to mine dolomite.[548] This second argument also relates to the third lesson taught by the previous Constitutional Court decisions: that a lack of alternative accommodation can result in the infringement of other human rights. In this instance, the right infringed upon is the right of the unlawful occupiers to access to adequate housing.

Yet another argument in favour of the appeal seems to be that the short-term housing programme of the municipality was unreasonable and, therefore, not constitutional. The unlawful occupiers argued that the municipality did have a programme to provide accommodation to those living in informal settlements in the area. For no apparent reason, the informal settlement of Itireleng was not included in the plan.[549] While this argument might succeed, it would not necessarily translate to an alternative accommodation order. This is because, first, not all of the unlawful occupiers were from Itireleng. Second, a more reasonable outcome would be that the municipality must amend its housing programme to include Itireleng and not place the burden on the court to decide how and when accommodation must be provided.

In respect of the argument relating to its short-term housing duty, as in *Blue Moonlight*, the municipality argued that it did not have a duty to use its own resources in the provision of emergency housing.[550] It also asserted that it would be unable to provide alternative accommodation within the given timeframe.[551] The provincial authority, which was joined to the matter, disagreed with the argument that the municipality should not and could not provide accommodation from its own resources.[552] Nevertheless, it requested the court to postpone the matter to allow the municipality to comply with the EHP, something it had failed to do.[553] These arguments seem to relate to the principle of co-operative government.[554]

Unfortunately, these arguments were not really addressed by the Constitutional Court. The municipality's argument that it does not have the duty to provide alternative accommodation

---

[548] *Skurweplaas (1st Resp HoA)* para 7.

[549] *Skurweplaas (Appl HoA)* para 79-83.

[550] *Skurweplaas* para 6. *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (Second Respondent's Heads of Argument)* 2012 (4) BCLR 382 (CC) (hereinafter "*Skurweplaas (2nd Resp. HoA)*") para 3.

[551] *Skurweplaas (2nd Resp HoA)* para 18.

[552] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (Fourth Respondent's Heads of Argument)* 2012 (4) BCLR 382 (CC) (hereinafter "*Skurweplaas (4th Resp. HoA)*") para 36-40.

[553] *Skurweplaas (4th Resp HoA)* para 41-48.

[554] On co-operative government see Chapter 1:3.1.3 and 4.

from its own resources was not considered because the municipality did not appeal against the High Court decision.[555] The Constitutional Court upheld the appeal by the unlawful occupiers, thereby making the eviction conditional upon the provision of alternative accommodation by the municipality.[556] The municipality was ordered to gather information regarding which unlawful occupiers face homelessness once evicted. Alternative accommodation was then to be provided to those who face homelessness within five months from the order.[557] The court's basis for the order seems to be that it believed the municipality would comply with the alternative accommodation order and, therefore, it did not really make a difference to the original order to make the eviction conditional upon this compliance.[558]

3.3 Precedent value of the cases

A possible argument in respect of these cases is that they create precedent for placing a duty on the state to provide alternative accommodation in eviction matters. Since the orders were handed down by the Supreme Court of Appeal and the Constitutional Court, all other courts are bound by these decisions.[559] However, these cases cannot be used as precedent that the state must immediately provide alternative accommodation immediately to all unlawful occupiers who face homelessness because of eviction. The reason for this is twofold. First, some of these cases involved an appeal based on other grounds and did not involve the actual granting of an alternative accommodation order. Second, the cases in which the Constitutional Court or the Supreme Court of Appeal granted alternative accommodation orders are based on very specific facts.

With regard to the first reason, the alternative accommodation orders of *Hlophe* and *Skurweplaas* were made by the High Court. Whether the alternative accommodation orders themselves were constitutionally sound was not appealed against to the Supreme Court of Appeal or the Constitutional Court. Hence, these cases can only act as precedent in the relevant jurisdiction of the High Courts and only to the effect that the facts are similar.

---

[555] *Skurweplaas* para 6.
[556] *Skurweplaas* para 16.
[557] *Skurweplaas* para 14, 16.
[558] *Skurweplaas* para 12.
[559] On the hierarchy of the courts, see Chapter 5:2.3.

In respect of the second reason, the alternative accommodation orders made by the Constitutional Court and the Supreme Court of Appeal in *Blue Moonlight* and *Changing Tides* were based on very specific facts. Both of the evictions were from bad buildings. The buildings posed a health and safety risk, which meant that the eviction could not be denied, as was the case in *PE Municipality.* In both of these matters, the group to be evicted was large, which posed a risk of social disorder or the subsequent unlawful occupation of other private land. Moreover, in both of these decisions, it was argued that the state had the available resources to provide alternative accommodation. Hence, it is not a precedent for disregarding whether the state has available resources. Instead, it might be used as precedent for placing an onus on the state to prove that it lacks the required resources.[560] In addition, these orders were both made against the City of Johannesburg during a time when the court was displeased with the municipality's fulfilment of its short-term housing duty. This suggests that a court might not issue such an order if the municipality acted reasonably and was not blameworthy.[561]

In seeming contradiction to this conclusion, the Constitutional Court in *Occupiers of Erven 87 and 88 Berea v De Wet NO and Another*,[562] interpreted the *Blue Moonlight* decision to place a duty on the state to provide alternative accommodation where an eviction would leave unlawful occupiers homeless. Nevertheless, this statement can be considered *obiter*. The matter involved an application for the rescission of an eviction order by consent on the basis that the consent was not valid. [563]

Moreover, even if this case is considered binding precedent, a court could still find that an eviction order with immediate effect should not be granted because the state does not have the available resources to provide alternative accommodation. This does not order that the unlawful occupiers be evicted without alternative accommodation. It might find that such an order would not be just and equitable. Rather, it means that the solution to the problem might not lie in an alternative accommodation order with immediate effect and might deny or delay the eviction of the unlawful occupiers.

---

[560] For a discussion on the burden of proof in eviction matters, see Chapter 7:3.2.

[561] See Chapter 7:2.1.2.

[562] *Occupiers of Erven 87 and 88 Berea v De Wet NO and Another* (CCT108/16) [2017] ZACC 18 (hereinafter *Occupiers of Erven 87 and 88 Berea*").

[563] Moreover, the court found that any court hearing an eviction matter would have to consider all relevant circumstances and decide whether an eviction would be just and equitable, despite an agreement to evict.

3.4 Possible grounds for alternative accommodation orders

In an eviction matter, the court is required to consider all relevant circumstances and grant an order that is just and equitable.[564] One of the most important relevant circumstances to be considered seems to be whether the unlawful occupiers have alternative accommodation.[565] As learnt from *PE Municipality* and *Skurweplaas*, courts are reluctant to grant an eviction order that would leave the unlawful occupiers homeless.[566] In matters where unlawful occupiers were unable to secure their own alternative accommodation, courts have looked to the state to provide alternative accommodation.[567]

A court can only order the state to provide alternative accommodation if there is a valid legal ground for placing this duty on the state.[568] The state has a duty to fulfil the rights within the bill of rights.[569] It must implement positive measures to ensure the realisation of rights,[570] including the right of access to adequate housing.[571] This duty on the state is confirmed by section 26(2) of the Constitution.[572] The lesson learnt from *Grootboom* is that this duty includes a positive short-term housing obligation toward unlawful occupiers. If in terms of this duty, the state has a duty to provide alternative accommodation to the unlawful occupiers immediately, a court can require the state to fulfil the duty. Accordingly, they would not face homelessness and the eviction is likely to be just and equitable.[573]

If for some reason,[574] the state does not have an obligation, in terms of its short-term housing duty, to provide alternative accommodation to the unlawful occupiers immediately, they might be left homeless if evicted. Under such circumstances, an eviction might not be just

---

[564] S 172(1)(b) read with s 26(3) of the Constitution.

[565] *PE Municipality* (hereinafter "*PE Municipality*"); *Olivia Road* (hereinafter "*Olivia Road*"); *Blue Moonlight* (hereinafter "*Blue Moonlight*"); *Skurweplaas* (hereinafter "*Skurweplaas*"); *Changing Tides* (hereinafter "*Changing Tides*"); *Hlophe* (hereinafter "*Hlophe*"). See also, Muller (2014) *SAJHR* 42; Strydom & Viljoen (2014) *PER/PELJ* 1211.

[566] *PE Municipality* para 28; See, *Skurweplaas (Appl HoA)* fn 270.

[567] *PE Municipality*; *Olivia Road*; *Blue Moonlight*; *Skurweplaas*; *Changing Tides*; "); *Hlophe.*

[568] As per the rule of law as formal protection, see Chapter 1:3.1.1.

[569] S 7(2) of the Constitution.

[570] Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-6.

[571] Since it is entrenched in the bill of rights, Chapter 2 of the Constitution.

[572] This section requires the state to ensure the realisation of the right of access to adequate housing in s 26(1) of the Constitution.

[573] As was found in *Blue Moonlight.*

[574] See discussion in Chapter 3.

and equitable toward the unlawful occupiers. However, the denial of an eviction might not be just and equitable toward the landowner.[575] To prevent an outcome that is not just and equitable, a court would want to make an alternative accommodation order against the state.[576] Since this discussion concerns situations where the state does not have an immediate short-term housing duty toward the unlawful occupiers, the court must find another ground for granting the order against the state.

The state has a duty to respect and protect human rights, under section 7(2) of the Constitution. In terms of this duty, the state must refrain from interfering with people's rights[577] and must prevent the interference of rights by other persons.[578] This duty might provide a ground, other than the state's housing duty, for granting an alternative accommodation order against the state. This is because a lack of alternative accommodation could result in the infringement of other rights. The cases discussed in this chapter suggest that a denial of an eviction could amount to the violation of the landowner's right to property,[579] equality[580] or of access to the court.[581] The granting of an eviction could amount to the violation of the unlawful occupiers' right not to be deprived of their existing access to housing.[582] Placing the duty on the state to prevent or mitigate the violation by compensating either of the parties[583] could be justified due to the state's duty to respect and protect human rights. As an alternative to compensation, a court could require the state to provide alternative accommodation to the unlawful occupiers.[584]

---

[575] See *Blue Moonlight* and *Changing Tides.*

[576] As was done in *Blue Moonlight* and *Changing Tides.*

[577] This relates to the duty to respect human rights, see Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-6.

[578] This relates to the duty to protect human rights. See, Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-6.

[579] See the discussion of *Blue Moonlight.*

[580] As was found in *Modderklip SCA.*

[581] As was found in *Modderklip.*

[582] Van der Walt highlights the fact that *Modderklip* suggests the possibility of holding the state liable in terms of its duty to protect. See, A Van der Walt "The state's duty to protect owners v the state's duty to provide housing: thoughts on the Modderklip case" (2005) 21 *South African Journal on Human Rights* 144 161. Van der Berg acknowledges that alternative accommodation might be sought under s 26(1) of the Constitution in S Van Der Berg "The need for a capabilities-based standard of review for the adjudication of state resource allocation decisions" (2015) 330 346.

[583] As was the case in *Modderklip.*

[584] Restitution in kind refers to the returning or replacement of things lost, instead of the payment of damages. See, P Visser & J Potgieter *Visser and Potgieter's Law of Damages* (2003) 165-166.

4 Conclusion

The aim of this chapter was to identify the possible grounds for alternative accommodation orders by examining Constitutional Court jurisprudence. The first part of the chapter identified three lessons taught by the decisions that preceded alternative accommodation orders. These lessons can be used to identify the possible grounds for alternative accommodation orders. The lessons are that the state's housing duty includes a duty to assist persons living in emergency housing situations; that the availability of alternative accommodation can affect whether an eviction is just and equitable; and that a lack of alternative accommodation can result in the infringement of other human rights. The second part of the chapter considered two Constitutional Court decisions that resulted in alternative accommodation orders: *Blue Moonlight* and *Skurweplaas.* Two Supreme Court of Appeal cases that heavily relied on the precedent of *Blue Moonlight* were also discussed.

Conclusions regarding two matters are reached in light of this chapter. One is that the cases, in which alternative accommodation orders were granted, do not create a precedent that places a duty on the state to provide alternative accommodation to unlawful occupiers in all eviction matters. The other conclusion relates to the possible grounds for alternative accommodation orders. The first possible ground for granting an alternative accommodation order against the state is based on the state's duty to fulfil human rights, specifically the unlawful occupiers' right of access to adequate housing. The second possible ground for an alternative accommodation order against the state is based on the state's duty to protect human rights, specifically the landowners' right to property, equality and of access to courts and the unlawful occupiers' right of access to adequate housing. The following two chapters consider when an alternative accommodation order based on these grounds would adhere to the existing legal framework.

CHAPTER THREE: THE STATE'S DUTY TO FULFIL HUMAN RIGHTS

1 Introduction

The previous chapter analysed the jurisprudence from the Constitutional Court to identify the possible grounds for alternative accommodation orders. Two possible grounds for requiring the state to provide alternative accommodation were identified. The first relates to the state's duty to fulfil the right of access to adequate housing (the state's housing duty) and the second relates to the state's duty to respect and protect human rights. In this chapter, the first possible ground for alternative accommodation orders is examined to determine when orders based on this ground would adhere to the existing legal framework.

An order requiring the state to provide alternative accommodation to unlawful occupiers facing eviction would adhere to the existing legal framework if the framework requires the state to comply with the order. In other words, an alternative accommodation order can be granted if justification for placing such a duty on the state can be found in the legal framework.[585] In determining whether an alternative accommodation is authorised, a court must apply the legislative provision or policy that gives effect to the relevant constitutional right. A court should not apply the constitutional right directly unless the constitutionality of the constitutional right is challenged.[586] Moreover, in applying the legal framework, a court must take cognisance of the fact that others are not before the court and their rights should not be prejudiced by its order.[587]

The following section sets out the existing legal framework for the first ground for alternative accommodation orders. The subsequent sections analyse this framework to determine when alternative accommodation orders in terms of these measures would adhere to the legal framework.

[585] This relates to the rule of law as formal protection. See Chapter 1:3.1.1.

[586] This relates to the principle of subsidiarity, see the discussion in Chapter 1:3.1.4.

[587] As required by the substantive and formal elements of rule of law. See Chapter 1:3.1.1.

2 The legal framework

The first ground for alternative accommodation orders is that the state's housing duty includes a duty to assist persons living in emergency housing situations. This section aims to identify the existing legal framework for this ground. This includes the relevant constitutional provisions, the legislation and policies giving effect to these provisions, applicable common law rules and precedent in which these instruments were interpreted and applied. International law also plays a role in the existing legal framework.

2.1 Constitutional provisions

Since the first ground for alternative accommodation orders relates to the state's duty to fulfil the right of access to adequate housing, section 26(1) of the Constitution forms part of the existing legal framework. This provision affords everyone a right of access to adequate housing. The duty to fulfil this right is placed on the state in terms of section 7(2) and section 26(2) of the Constitution. Section 7(2) generally requires the state to respect, protect, promote and fulfil human rights. Section 26(2) provides that the state must implement reasonable legislative and other measures to ensure the realisation of the right of access to adequate housing, specifically.[588] The state needs only to fulfil its housing duty progressively, to the extent allowed by its available resources.[589]

It would be unnecessarily vague to engage with the question whether the state's measures for realising the right of access to adequate housing are reasonable. This is a contextual question that deserves constant scrutiny. For purposes of this chapter, instead, the reasonableness of the measures is assumed. The existing measures forming part of the legal framework are then explored to establish when an alternative accommodation order would adhere to these measures. The assumption used here should not be taken to mean that those measures are necessarily always reasonable. Their reasonableness can be challenged in court. The point here, however, is to acknowledge the paradigm in which practical decisions need to be made.

[588] Similarly, s 25(5) of the Constitution requires the state to "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.

[589] S 26(2) of the Constitution.

To reiterate, whether the measures of the state are reasonable may differ depending on the relevant circumstances of a specific matter. The Constitutional Court's analysis of the state's housing programme, in *Grootboom*, and the criteria it provides for a reasonable housing programme indicate the measures that would be considered reasonable.[590] Should the reasonableness of the measures be challenged successfully, the existing measures and legal framework could change. Until such time, the existing measures are analysed.[591]

2.2 Legislation

One of the legislative measures, adopted by the state to give effect to sections 26(1) and (2) of the Constitution, is the Housing Act 107 of 1997.[592] Since it was adopted to give effect to these rights, the Housing Act should be applied in matters relating to the state's fulfilment of it housing duty and not section 26 directly. It provides general principles for fulfilling the state's housing duty and defines the specific roles of the national, provincial and local spheres of government in fulfilling this duty.[593] Section 4 of the Housing Act requires the Minister of Human Settlements to adopt a policy called "the National Housing Code" (the Code).[594] The Code should set out the national housing policy[595] and shall bind provincial and local government.[596] Such a code was adopted in 2000 and revised in 2009.[597]

---

[590] *Grootboom* para 39-44. The court also found that the municipality's short-term housing programme would be reasonable if implemented, see para 99.

[591] For more on the reasonableness review in terms of s 26(2) of the Constitution, see Chapter 4. For more on the reasonableness review in terms of s 26(2) of the Constitution, see Liebenberg *Socio-Economic Rights* Chapter 4.

[592] National Housing Act 107 of 1997; Department of Human Settlements *National Housing Code* (2009) 9. See also, Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 13.

[593] Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 13-14; Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 14; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 85. For an explanation of the specific roles of the spheres of government in fulfilling its housing duty, see Chapter 5:4.

[594] S 4(1) of the Housing Act. See also, Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 14,72.

[595] S 4(2)(a) of the Housing Act.

[596] S 4(6) of the Housing Act.

[597] Department of Human Settlements *National Housing Code* (2009). See also, Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 21.

2.3 Policy

The Code contains the state's national housing policy and programmes.[598] These programmes are aimed at addressing different types and levels of need.[599] The different types of housing assistance provided include serviced sites without dwellings, serviced sites with dwellings and rental housing. Contribution by the beneficiaries is required depending on their ability.[600] A specialised Upgrading of Informal Settlements Programme aims to provide serviced sites for persons living in informal settlements.[601]

Another specialised programme contained in the Code, the Emergency Housing Programme (EHP),[602] aims to address emergency housing situations, such as situations where persons are facing homelessness because of an eviction.[603] The EHP was adopted in compliance with *Government of the Republic of South Africa v Grootboom*[604] (hereinafter "*Grootboom*").[605] In this matter, the state's constitutional housing duty was interpreted to include a duty to adopt a programme, which focused on short-term housing delivery to those most in need.[606] It stipulated that a reasonable housing programme must be balanced and flexible. A reasonable programme, which is balanced and flexible, purportedly includes catering for long, medium and short-term housing needs.[607] Short-term housing programmes must cater for those who have "no roof over their heads", are "living in intolerable conditions" or are at risk of losing their homes.[608]

---

[598] Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 72.

[599] As is evident from the several different programmes contained in the Code. See, Department of Human Settlements *National Housing Code* (2009) 13-50.

[600] See, Department of Human Settlements *National Housing Code* (2009) 13-50.

[601] Upgrading of Informal Settlements Programme. See, Department of Human Settlements *National Housing Code* (2009) 16-17. See further, Pienaar *Land Reform* 678-681.

[602] See, Department of Human Settlements *National Housing Code* (2009) 21-22. For the full programme, see Department of Human Settlements *EHP* (2009).

[603] Department of Human Settlements *EHP* (2009) Part A 2.3.1.(e).

[604] 2001 (1) SA 46 (CC).

[605] Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 44.

[606] See the discussion on *Grootboom* in Chapter 2:2.1.

[607] See the discussion on *Grootboom* in Chapter 2:2.1. See also, *Modderklip* para 49; Kruuse 'The art of the possible' *SALJ* 623-4; Chenwi (2008) *Harv L Rev* 119-120.

[608] *Grootboom* para 52.

As a result, the state was ordered to adopt and implement a short-term housing programme as part of its national housing policy.[609] This programme was to be implemented by the provincial and local government, who in turn, were required to adopt and implement their own short-term housing programmes.[610] Since the EHP sets out the measures adopted by the state to address its housing duty toward persons facing eviction,[611] it is relevant to consider this programme when determining when alternative accommodation orders adhere to the existing legal framework.[612]

The EHP, contained in the Housing Code, is considered "binding" or "executive" policy since it is given binding effect by the Housing Act.[613] While its inclusion in the legal framework to be adhered to by the court is controversial, it can be justified. First, in *Nokotyana v Ekurhuleni Metropolitan Municipality*[614] the Constitutional Court acknowledged that the principle of subsidiarity applies to the EHP.[615] Second, provincial and municipal governments are bound by the EHP in terms of the Housing Act.[616] An alternative accommodation order against these spheres of government would not be in line with the rule of law if it does not adhere to the EHP.[617] Third, adherence to the EHP creates legal certainty and equality before the law.[618] If a court is of the opinion that the EHP is unconstitutional, it should order that it be brought in line with the Constitution.[619] The court should not make isolated orders that conflict with the EHP.[620] If it does, the result would be that the law is applied inconsistently and an unconstitutional application of the law is allowed.[621] Fourth, the

[609] See the discussion on *Grootboom* in Chapter 2:2.1.

[610] *Grootboom* para 68, 99. See also, Currie & De Waal *The Bill of Rights Handbook* 574-580.

[611] Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 44.

[612] Ebrahim argues that the state's housing waiting list also forms part of the housing programme. See, Ebrahim (2015) *SAPR/SAPL* 119.

[613] S 4 of the National Housing Act. See the discussion on binding policy in Chapter 1:3.1.4.

[614] 2010 (4) BCLR 312 (CC).

[615] *Nokotyana v Ekurhuleni Metropolitan Municipality* para 47-49.

[616] S 4 of the National Housing Act.

[617] This relates to the formal protection of the rule of law, see Chapter 1:3.1.1.

[618] Certainty and equality before the law are norms of the rule of law, see Chapter 1:3.1.1. For a discussion on how adherence to binding policy creates certainty, see Chapter 1:3.2.1.

[619] That short-term housing policies should be tested against the Constitution is evident from the decision in *Blue Moonlight.* See the discussion of this case in Chapter 2:3.1.1.

[620] As argued by the municipality in *Fischer v Unlawful Occupiers, Erf 150, Philippi (Municipality's Head of Argument)* (9443/14) 17-19.

[621] This would create a parallel system of laws. See Chapter 1:3.1.4.

EHP is a measure taken by the state in terms of section 26(2) of the Constitution.[622] *Grootboom* found that such measures should be respected unless they are found to be unreasonable.[623] Hence, a court should apply these measures, unless it is of the opinion that they are unreasonable. The reasonableness of the EHP has not been questioned.[624] If a court simply creates and applies its own notion of the state's duty in emergency housing situations, this could amount to an interference with the state's functions and a violation of the separation of powers doctrine.[625]

Several cases have interpreted section 26(2) of the Constitution, as well as the Housing Act and the EHP. These cases also form part of the existing legal framework in respect of the first ground for alternative accommodation orders. Some cases have higher precedent value because they have wider jurisdiction.[626]

2.4 The role of international law instruments

International law does not bind courts as such, but courts must be guided by international law when interpreting the law. Section 39(1) of the Constitution requires courts to consider foreign law when interpreting human rights. Further, section 233 of the Constitution provides that the court's interpretation of legislation must preferably be in line with international law. Hence, international law plays an important role in the interpretation of the constitutional and legislative provisions above.

Several international law treatises and conventions are relevant to the state's duty to fulfil the right of access to adequate housing and the interpretation of this right, as well as the legislation and policies that give effect to the right.[627] The international law instrument most

---

[622] S 26(2) of the Constitution requires that the state take measures that are reasonable to ensure the realisation of the right of access to adequate housing.

[623] See the discussion of *Grootboom* in Chapter 2:2.1.

[624] The reasonableness or constitutionality of the EHP has not been tested. See, Liebenberg *Socio-Economic Rights* 406.

[625] On the separation of powers doctrine, see Chapter 1:3.1.2 and Chapter 5:3.

[626] See Chapter 5:2.3.

[627] These include the , which requires states (in art 5) to guarantee the enjoyment of the right to housing; ; , which (in art 14) requires states to give rural women the right to adequate living conditions; , which (in art 27) requires states to assist parents in implementing the right of the child to an adequate standard of living; , which includes the right to property, to the best possible mental and physical health and the protection of the family; , which requires states to assist parents in securing the requisite living conditions for children; , which requires states to grant women access to adequate housing. See, 671-672. These include the International Convention on

relevant to the right of access to adequate housing is the International Covenant on Economic, Social and Cultural Rights (the ICESCR). It was signed in 1994 but only ratified in 2015.[628]

Article 11 of the ICESCR requires states to ensure the realisation of everyone's right to adequate living conditions and the continuous improvement thereof, including the right to adequate housing. Article 2.1 requires that states take steps to achieve the full realisation of the rights entrenched in the ICESCR, progressively, to the maximum of their available resources. This provision is similar to the limitations found in section 26(2) of the Constitution. A difference between article 11 of the ICESCR and section 26(1) of the Constitution is that article 11 entrenches a right to adequate housing, whereas section 26(1) entrenches a right of *access* to adequate housing. The significance of this difference is discussed below.[629] Another difference is that the ICESCR requires that states realise rights to the *maximum* of their available resources. This implies that the phrase "within its available resources" does not only signify a maximum benchmark but also a minimum.

Adequate housing, as required in terms of the ICESCR right to adequate housing, requires legal tenure security; available services, infrastructure, facilities and materials; affordability; habitability; accessibility; proximity to schools, jobs and other essential amenities; and cultural adequacy.[630] This interpretation can provide guidance on the interpretation of section 26(1) of the Constitution.[631]

---

the Elimination of all Forms of Racial Discrimination of 1965, which requires states (in art 5) to guarantee the enjoyment of the right to housing; ICESCR; Convention on the Elimination of all Forms of Discrimination against Women of 1979, which (in art 14) requires states to give rural women the right to adequate living conditions; Convention on the Rights of the Child of 1989, which (in art 27) requires states to assist parents in implementing the right of the child to an adequate standard of living; African Charter on Human and Peoples' Rights of 1981, which includes the right to property, to the best possible mental and physical health and the protection of the family; African Charter on the Rights and Welfare of the Child of 1990, which requires states to assist parents in securing the requisite living conditions for children; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2000, which requires states to grant women access to adequate housing. See, Pienaar *Land Reform* 671-672.

[628] ESCR-Net *The Government of South Africa Ratifies the ICESCR* (2015) https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr 14-03-2016. ESCR-Net *The Government of South Africa Ratifies the ICESCR* (2015).

[629] See 6.1 below for an explanation of this difference between these two rights as interpreted by the Constitutional Court. This is also discussed in Pienaar *Land Reform* 674-675.

[630] United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing (Art 11.1 of the Covenant, UN Doc E/1992/23) General Comment No 4* (1991) para 8(a)-(f). For a discussion of these characteristics, see G Muller "Proposing a way to develop the substantive content of the right of access to

The remainder of this chapter is broken down into four parts and discusses the state's duties in terms of section 26(2) of the Constitution, as interpreted by the Housing Act, the EHP and case law. The first part considers what is meant by the phrase that the *state* must take measures to fulfil the right. The second and third parts consider the measures to be taken. These parts focus on which persons are to benefit from the measures and the standards of the benefits to be received. The fourth part analyses the internal limitations, in section 26(2), that the realisation of the right need only be ensured progressively and within the state's available resources.

3 Duty on the state

Section 26(2) of the Constitution places the duty on the state to fulfil the right of access to adequate housing.[632] This seems redundant since section 7(2) of the Constitution already requires the state to fulfil the rights contained in the Bill of Rights.[633] However, the express statement that the housing duty falls on the state suggests that private entities do not have an equivalent constitutional duty.[634]

While section 26(2) of the Constitution does not specify which branch or sphere of government has the duty to provide housing,[635] the EHP is more specific regarding the duty to provide emergency housing.[636] In terms of the EHP, municipalities must identify emergency housing situations within its jurisdiction. Once an emergency housing situation is identified, the municipality must draft a plan to address the situation.[637] If it lacks the required resources, it must apply to the provincial authority for funding.[638] The provincial authority must assist the municipality as far as possible.[639] The provincial authority must set aside money in its

---

adequate housing: an alternative to the reasonableness review model" (2015) 30 *Southern African Public Law* 71 82-93.

[631] Muller (2015) *SAPR/SAPL* 82.

[632] S 26(1) of the Constitution.

[633] This duty has a positive element. See, *Glenister v President of the Republic of South Africa* para 105; Davis (2012) *PER/PELJ* 3.

[634] However, the state can delegate the duty to private entities. See the discussion in Chapter 4:3.1.

[635] Schedule 4 does specify that housing falls within the powers of the national and provincial governments, see Chapter 5:4.

[636] Department of Human Settlements *EHP* (2009)Part A 2.6.

[637] Department of Human Settlements *EHP* (2009) Part A 2.6.1.

[638] Department of Human Settlements *EHP* (2009) Part A 2.6.1.

[639] Department of Human Settlements *EHP* (2009) Part A 2.6.2.

yearly budget for emergency housing situations. It can also reprioritise money under certain circumstances.[640] In addition, the provincial authority can apply for assistance from the national authority.[641]

Whether the EHP requires the municipality to use its own resources has been a topic of contention in courts.[642] Municipalities have argued that they are not required to use their own resources to provide emergency housing, but need only apply to the provincial authority for the requisite funding.[643] In contrast, the "suggestions on how to undertake emergency housing projects" in the EHP stipulate that the municipality should first assess whether it would be able to provide emergency assistance from its own resources, before applying for funding from the provincial authority.[644] The court has interpreted this to mean that the municipality has a duty to provide alternative accommodation from its own resources in emergency housing situations.[645] Whether it is within the court's power to question the municipality's report of a lack of required resources, as it did in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[646] (hereinafter *Blue Moonlight*),[647] is considered below.[648] Nonetheless, where it is found that the municipality does not have the available resources, the provincial government should be joined to the matter rather than postponing the matter until the municipality has the available resources.[649]

To determine whether a municipality has the resources to assist everyone requiring relief in terms of the EHP, one must determine who can benefit from this programme. Only then can the magnitude of the state's responsibility and the cost of complying with its responsibility be gauged. The following section examines the EHP to determine who can benefit from this programme.

---

[640] Department of Human Settlements *EHP* (2009) Part A 2.6.2.

[641] Department of Human Settlements *EHP* (2009) Part B 3.4.1.

[642] This was the case in *Blue Moonlight* and *Skurweplaas*.

[643] See, for example, *Blue Moonlight* para 65; *Skurweplaas (2nd Resp HoA)* para 14.

[644] Department of Human Settlements *EHP* (2009) Part B 3.1. See *Blue Moonlight* para 66.

[645] See, *Blue Moonlight* para 66. See also, *Blue Moonlight* and *Skurweplaas* in Chapter 2:3.1.1 and 3.2 respectively. That the duty placed primarily on the municipalities is also evident from *Grootboom*; *PE Municipality*; *Olivia Road*; *Hlophe; Joe Slovo*. Van Wyk confirms this interpretation by the court in Van Wyk (2011) *PER/PELJ* 51; Wilson (2011) *Urban Forum* 271.

[646] 2012 (2) SA 104 (CC).

[647] See discussion of *Blue Moonlight* in Chapter 2:3.1.1.

[648] Chapter 3:6.3.

[649] See further discussion in Chapter 3: 6.3, Chapter 5:4.5 and Chapter 7:3.1.2

4 Beneficiaries of the short-term programme

The EHP caters for a range of housing emergencies.[650] It generally describes the situations it caters for as "emergency situations of exceptional housing need".[651] A list of such situations is also provided.[652] The list includes persons who have lost their homes due to a natural or industrial disaster or live in conditions that are prone to disasters, like fire or flood.[653] Persons living in the way of established or proposed engineering services, such as services for water, power or roads, including property reserved for this purpose, are included.[654] Further included are those persons who are evicted or whose homes are demolished, as well as those persons who face such fates.[655] Persons who are displaced due to civil conflict are also included.[656] Lastly, two broad catchall categories of persons are mentioned: those living in conditions that threaten their lives, health or safety and those who have an exceptional housing need "that can reasonably be addressed only by resettlement or other appropriate assistance, in terms of this Programme".[657]

This list expressly includes persons facing eviction and, hence, confirms the duty of the state to provide alternative accommodation to persons who would be homeless once evicted. However, all persons who live in one of the mentioned emergency housing situations are not automatically included in the state's short-term housing programme, but must first meet certain qualifications.[658] The most important qualification is that the housing emergency should not have been caused by the person requiring assistance, but should exist due to circumstances outside of his control.[659] For a person to qualify for assistance he must also lack the resources to address the housing emergency himself.[660] The qualifications set by the EHP are less strict than those set in terms of the state's longer-term housing programmes.[661]

---

[650] Department of Human Settlements *EHP* (2009) Part A 2.3.1.
[651] Department of Human Settlements *EHP* (2009) Part A 2.3.1.
[652] Department of Human Settlements *EHP* (2009) Part A 2.3.1.
[653] Also a declared state of disaster, see Department of Human Settlements *EHP* (2009) Part A 2.3.1(a)-(c).
[654] Department of Human Settlements *EHP* (2009) Part A 2.3.1(d).
[655] Department of Human Settlements *EHP* (2009) Part A 2.3.1(e)-(f).
[656] Department of Human Settlements *EHP* (2009) Part A 2.3.1(g).
[657] Department of Human Settlements *EHP* (2009) Part A 2.3.1(h)-(i).
[658] Department of Human Settlements *EHP* (2009) Part A 2.3.1, 2.4.
[659] Department of Human Settlements *EHP* (2009) Part A 2.3.1.
[660] Department of Human Settlements *EHP* (2009) Part A 2.4.
[661] Department of Human Settlements *EHP* (2009) Part A 2.4.

Unlike the state's longer-term programmes, the EHP includes persons who have a higher monthly income, have no dependents and have previously owned a home or received housing assistance. Illegal immigrants are also included, but only those who meet the conditions set by the Department of Home Affairs on an ad hoc basis.[662]

Most of the cases discussed in the previous chapter involve persons who face eviction.[663] Hence, they would be considered to be living in emergency housing situations under the EHP.[664] However, not all of the additional qualifications had been considered in the cases where alternative accommodation orders were granted. In none of the cases did the court consider the fact the EHP does not cater for all illegal immigrants, but only those who comply with the conditions set by the Department of Home Affairs.[665]

In *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[666] (hereinafter "*Changing Tides*"), the court justified its disregard of the additional qualification because continued occupation threatened the health and safety of the unlawful occupiers. It found that the municipality could apply these qualifications once everyone had been taken to safety.[667] However, a similar concession was not made in *City of Johannesburg Metropolitan Municipality v Hlophe*[668] (hereinafter "*Hlophe*"), where the court ordered that the municipality provides all of the occupiers with alternative accommodation that afforded them safety against further eviction. This might be due to the municipality's failure to take up the opportunity to apply the qualifications within the time it was afforded to do so.[669]

In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[670] (hereinafter "*Modderklip*"), a third of the 40 000 people were deemed to be illegal immigrants.[671] Accordingly, if an alternative accommodation order was to be issued in terms of section 26(2) of the Constitution, the Department of Home Affairs would have had the authority to

---

[662] Department of Human Settlements *EHP* (2009) Part A 2.4.
[663] *PE Municipality, Modderklip, Olivia Road, Blue Moonlight, Changing Tides, Hlophe* and *Skurweplaas.*
[664] Department of Human Settlements *EHP* (2009) Part A 2.3.1(e)-(f).
[665] Department of Human Settlements *EHP* (2009) Part A 2.4.
[666] 2012 (6) SA 294 (SCA).
[667] See the discussion of *Changing Tides* in Chapter 2:3.1.2.1.
[668] [2015] 2 All SA 251 (SCA).
[669] See the discussion of *Hlophe* in Chapter 2:3.1.2.2.
[670] 2005 (5) SA 3 (CC).
[671] See the discussion of *Modderklip* in Chapter 2:2.3.

set conditions for the inclusion of the illegal immigrants in the order.[672] Moreover, due to the size of the group, it would have been difficult to prove that all of them lacked the resources to get alternative accommodation. These complications might have contributed to the fact that the court did not found the duty to prevent the unlawful occupiers from becoming homeless on the state's housing duty, but rather on the landowner's right of access to the court.[673]

It is arguable that both case law and the EHP can be criticised for casting the net too wide in including people facing eviction in the definition of living in emergency housing situations.[674] Unlawful occupiers do not seem to fit within that category of persons who require housing due to an emergency as comfortably as persons who have lost their homes due to a flood or a fire. Yet, a closer examination illustrates the link. Just as those who lost their homes due to natural disasters have nowhere to live, evictees who face homelessness have nowhere to live. To differentiate between them might amount to unfair discrimination.

What needs to be established is just how far this net is cast and to what extent parameters can be identified. This is where the additional qualifications, set by the EHP, are useful. The EHP only caters for persons who were not responsible for their housing emergency.[675] In respect of flood or fire victims, the emergency is usually not deliberately caused by the people who lose their homes.[676] In the same way, people might live on the street because of circumstances beyond their control. However, some situations can be identified where persons caused their own emergency housing situation. Two such situations are discussed here. The first situation establishes itself when a lawful occupier does something intentionally, knowing that his actions will cause his lawful occupation to be terminated. The second situation establishes itself when a person unlawfully occupies land with the sole purpose of triggering the state's short-term housing duty.

The court's approach to the first scenario is clear from *City of Cape Town v Daniels.*[677] In this case, a woman was evicted by the City of Cape Town (the municipality) from council

---

[672] Since the EHP would have applied, see Department of Human Settlements *EHP* (2009) Part A 2.4.

[673] S 34 of the Constitution. See the discussion of *Modderklip* in Chapter 2:2.3.

[674] See, Liebenberg *Socio-Economic Rights* 404-405.

[675] Department of Human Settlements *EHP* (2009) Part A 2.3.1.

[676] Cf. *Schubart Park.* See, Currie & De Waal *The Bill of Rights Handbook* 183 on how "victim responsibility" is generally taken into account when deciding on a remedy for a violation of a right.

[677] *City of Cape Town v Daniels* (5090/2011) [2011] ZAWCHC 340 (hereinafter ("*Daniels*").

housing.[678] One of the reasons for her eviction was that her house was being used for drug dealing.[679] She was participating in and/or allowing the drug dealing, knowing that her actions might cause her lawful occupation to be terminated.[680] The municipality obtained an order for her eviction, without the court considering whether the state can provide her with alternative accommodation.[681] This suggests that the court did not consider her to fall under the state's EHP.

The court took a similar approach in *SOHCO Property Investments (Company Incorporated under Section 21) v Ramdass*.[682] The occupiers of a block of flats deliberately withheld their rental payments.[683] This was done as part of a rent boycott and not because any of them could not afford the rental.[684] The court ordered the eviction of the unlawful occupiers and stated: "such conduct amounts to the kind of self-help that is inimical to our legal order."[685] It did not consider whether the occupiers would be able to afford alternative accommodation elsewhere, despite some of the occupiers arguing that they would not be able to afford such.[686]

The second scenario, where persons can be considered responsible for their emergency housing situation, occurs when they unlawfully occupy land to force the state to provide them with housing. If they succeed in their endeavour, this would amount to so-called "queue jumping" since they would be prioritised above others in benefitting from the state's housing programme. In *Port Elizabeth Municipality v Various Occupiers*[687] (hereinafter "*PE Municipality*"), the state argued that the provision of alternative accommodation would amount to such queue jumping. The court rejected this on the basis that there was no intention on the part of the unlawful occupiers to gain priority.[688] This suggests that an intention to jump the queue might bar a person from benefiting under the EHP.

---

[678] Housing provided by the government.

[679] *Daniels* para 8.

[680] She had received a letter of warning in this regard, see *Daniels* para 7-9.

[681] *Daniels* para 20, 24.

[682] *SOHCO Property Investments (Company Incorporated under Section 21) v Ramdass* (14264/10) [2013] ZAKZDHC 4 (hereinafter "*SOHCO*").

[683] *SOHCO* para 24.

[684] *SOHCO* para 29.

[685] *SOHCO* para 14.

[686] *SOHCO* para 25.

[687] 2005 (1) SA 217 (CC).

[688] See discussion of *PE Municipality* in Chapter 2:2.2.

What is not apparent from this finding is why the court looks at the intention of the unlawful occupiers in deciding whether an alternative accommodation order would amount to queue jumping. It might create more certainty and be more rational if the finding was based on the actual effect of such an order, that is, whether the effect of the alternative accommodation order would be to prioritise the unlawful occupiers above others living in emergency housing situations.[689] A court should not prioritise unlawful occupiers simply because they are before the court.[690]

While the reasoning of the court, in *PE Municipality*, may be faulted, it does indicate that the court values the reason for the unlawful occupation. This is in line with section 6(3) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which requires the court to consider the reason for the occupation as a relevant circumstance in deciding whether an eviction would be just and equitable. Where the intention of the unlawful occupiers is to gain priority, courts are less likely to support their receiving alternative accommodation from the state.[691]

In *City of Cape Town v Persons who are presently unlawfully occupying erf 1800, Capricorn: Vrygrond Development*[692] (hereinafter "*Vrygrond Development*"), the High Court granted an eviction order against persons who had deliberately invaded land earmarked for housing.[693] It did not consider whether the municipality could or should provide them with alternative accommodation. Hence, it did not consider the unlawful occupiers to be living in emergency housing situations and in line to be accommodated under the municipality's short-term housing programme. It justified this approach by stating:[694]

---

[689] See, *Blue Moonlight (Appl HoA)* (hereinafter "*Blue Moonlight Appl. HoA*") para 29.

[690] See Chapter 5 for an analysis on when an alternative accommodation order will be just.

[691] *PE Municipality* para 5, 55; *Grootboom* para 29; *Modderklip SCA* para 25; *Modderklip* para 43-44. See also, *Grobler* para 204; *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA) (hereinafter "*Shorts Retreat*") para 8. In addition, see, Wilson (2009) *SALJ* p 288, fn 69.

[692] *City of Cape Town v Persons Who Are Presently Unlawfully Occupying Erf 1800, Capricorn: Vrygrond Development* 2 All SA 438 (C).

[693] *Vrygrond Development* 31-32. This kind of land invasion is given as an example by the unlawful occupiers as a situation where the unlawful occupiers' rights would not outweigh landowners' rights in *Skurweplaas (Appl HoA)* para 56-58.

[694] *Vrygrond Development* 26. Nevertheless, if unlawful occupiers had peacefully occupied the land for many years it might affect whether their eviction without alternative accommodation will be just and equitable. In the duration of occupation, see 3.5.

> "In my view, the most compelling factor weighing in applicant's favour is simply that it is, in my view, imperative that land invasions are denounced and rejected as an appropriate way to enforce one's constitutional right to access to adequate housing."

This relates to the second type of situation that can be identified where persons caused their own emergency housing situation – when a person unlawfully occupies land with the sole purpose of triggering the state's short-term housing duty.

It might not be easy to determine whether an unlawful occupier was motivated by greed or need.[695] In both *Vrygrond Development* and *Modderklip,* the unlawful occupiers were seen as motivated by greed.[696] Yet, the fact that some of them could not afford accommodation elsewhere shows that they were also in need.[697] In both *Grootboom* and *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd*[698] (hereinafter "*Skurweplaas*"), land was unlawfully occupied out of frustration for waiting in the queue for a very long time. Nevertheless, in these cases, the occupiers were seen as motivated by need.[699] It is unclear when a court would consider a group of occupiers as either needy or greedy. It is a fact that an unlawful occupier who cannot afford alternative accommodation is needy.[700] If he unlawfully occupied land out of frustration with the slow progression in housing provision, he might also be considered greedy.[701] He created the emergency housing situation. However, he was possibly already living in an emergency housing situation before the unlawful occupation.[702] While unlawful occupation due to frustration with the state is not ideal, it is often the only way these occupiers can force the municipality to take notice of them.[703]

It is submitted that an unlawful occupier, however greedy, must be considered needy if he cannot secure alternative accommodation. If the matter is dealt with speedily, a person who acted out of greed might be able to return to his previous home or secure accommodation

---

[695] In *Skurweplaas (Appl HoA)* para 56, the appellant distinguishes between forced and unforced land invasions. An unforced land invasion being one where need drove the persons to invade the land. On the idea that unlawful occupation can be forced, see Chenwi (2008) *Harv L Rev* 111. See also, Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 87.

[696] See the discussion of *Vrygrand Development* above and of *Modderklip* in Chapter 2:2.3.

[697] See the discussion of *Vrygrand Development* above and of *Modderklip* in Chapter 2:2.3.

[698] 2012 (4) BCLR 382 (CC).

[699] See the discussions of *Grootboom* and *Skurweplaas* in Chapter 2:2.1 and 3.2 respectively.

[700] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 87.

[701] Based on *Vrygrond Development* and *Modderklip*.

[702] In both *Modderklip* and *Skurweplaas*, for example, some of the unlawful occupiers had previously been evicted from land. See the discussion of *Modderklip* and *Skurweplaas* in Chapter 2:2.3 and 3.2 respectively.

[703] Since an eviction matter would go to court.

elsewhere. As is explained below, this does not necessarily mean that the municipality must provide them with alternative accommodation immediately.[704]

In terms of the Constitutional Court's statement in *Occupiers of Erven 87 and 88 Berea*, the EHP's exclusion of blameworthy persons might not be in line with the Constitution. In this decision, the court interpreted *Blue Moonlight* to place a duty on municipalities to provide alternative accommodation whenever people are left homeless due to an eviction. This statement does not allow exclusion based on the blameworthiness of the unlawful occupiers. As explained, this statement can be considered *obiter* and non-binding. Moreover, the decision, in *Blue Moonlight*, was based on very specific facts where the unlawful occupiers were not considered blameworthy. An argument can be made that the "rule" taken from *Blue Moonlight* is not absolute and there can be exceptions, such as that the unlawful occupiers were blameworthy. Nevertheless, this decision does indicate that the Constitutional Court might find the EHP to be unconstitutional if challenged. Moreover, it suggests that extent of the blameworthiness must be compelling enough to support an eviction without alternative accommodation.

Another class of persons that might be excluded as beneficiaries under a municipality's general emergency housing programme is people who are catered for under other programmes. They might fall under the EHP,[705] but since there is a specific programme for them, they might not be able to seek assistance in terms of the municipality's general emergency housing programme. Examples of such programmes are the City Regeneration Programme in *Blue Moonlight*[706] or the Upgrading of Informal Settlements Programme[707] as implemented in *Skurweplaas.*[708] It is submitted that, while these programmes can help alleviate the plight of those living in emergency housing situations, they cannot be excluded from the EHP if they are genuinely living in an emergency housing situation.

---

[704] Chapter 3:6.

[705] This is not acknowledged in the policy. See, City of Cape Town *Street People Policy (Policy Number 12398B)* (2013) 10-11.

[706] City of Johannesburg *Inner City Regeneration* (2003). See discussion of the programme in Chapter 2:3.1.

[707] See, Department of Human Settlements *National Housing Code* (2009) 16-17.

[708] See the discussion of *Skurweplaas* in Chapter 2:3.2.

Another specialised programme is the City of Cape Town's programme; which caters specifically for street people.[709] The purpose of the programme is to address health and substance abuse problems and to develop skills for employment to assist the street person to secure accommodation.[710] During this time, they might be provided with accommodation if they meet certain requirements.[711] However, it is arguable whether, if such persons would be considered living in emergency housing situations, this programme would meet the requirements of the EHP. Hence, persons living in emergency housing situations, who qualify in terms of this programme, should still not be excluded from the EHP.

From the above, it can be concluded that the state's short-term housing programme caters for unlawful occupiers facing homelessness because of eviction. However, it excludes certain persons, like those who deliberately caused the unlawfulness of their occupation. Arguably, it also excludes persons who are catered for under other specialised programmes. However, it is submitted that this should not be the case if they live in an emergency housing situation and the other programmes do not comply with the EHP.

5 Standards under short-term emergency programme

In *Grootboom*, the court described the relief, to be provided in terms of the short-term emergency housing programme, as "temporary relief".[712] Such relief may be "short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the [Housing] Act."[713] Two questions emerge from this. One, what are suitable emergency accommodation standards? Two, just what is meant by "temporary" accommodation? This section aims to answer these two questions by considering the provisions of the EHP, as well as relevant case law.

---

[709] Defined in terms of the policy as: "[p]eople, who for any reason, use the outdoors as a place of abode for a lengthy period of time....The term, 'street' includes all areas e.g. open spaces, river banks etc."
See, City of Cape Town *Street People Policy* (2013) 6.

[710] Community Law Centre & Socio-Economic Rights Institute of South Africa *Jumping the Queue* (2013) 7; Herron Brett *City of Cape Town's New Reintegration and Rehabilitation Programme for Street People to be Piloted in Ward 57* (2011) http://www.brettherron.co.za/213/news/ward57-news/city-of-cape-towns-new-reintegration-and-rehabilitation-programme-for-street-people-to-be-piloted-in-ward-57/ 28-07-2016.

[711] Herron Brett *City of Cape Town's New Reintegration and Rehabilitation Programme for Street People to be Piloted in Ward 57* (2011).

[712] *Grootboom* para 52.

[713] *Grootboom* para 52.

5.1 Suitable emergency accommodation standards

In respect of the first question, the court in *Grootboom* found that for emergency accommodation to be suitable it must at least include land, basic services and a dwelling.[714] In response, the EHP sets certain standards for emergency accommodation.[715] It requires lower standards than the standards for non-emergency housing.[716] Moreover, these standards are described as mere "guidelines" and are non-prescriptive.[717] The EHP suggests that dwellings should have minimum floor coverage of at least $24m^2$,[718] as opposed to the $40m^2$ required for non-emergency housing.[719] In terms of the EHP, water and sanitation facilities are to be supplied in the form of maximum one water point for every 25 units and one toilet per five units.[720] The non-emergency housing standards require that at most each unit must have its own water point and toilet.[721] Under the EHP, electricity need only be provided under special circumstances and then only in the form of high-mast lighting (street lamps).[722] Non-emergency housing standards include street lamps, as well as "a ready board electrical installation" per unit.[723] Both standards require only gravel roads.[724]

---

[714] *Grootboom* para 35. See also, *Olivia Road SCA* (hereinafter "*Olivia Road SCA*") order. See also, Chenwi (2008) *Harv L Rev* 115.

[715] Department of Human Settlements *EHP* (2009) Part B 2.5. The service standards set are "maximum" standards, whereas the shelter standards are "minimum" standards. Van Wyk interprets *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) to mean that the standards of the EHP should be used in eviction matters. See, J Van Wyk "The complexities of providing emergency housing assistance in South Africa" (2007) *Journal of South African Law* 35 54. Wilson also argues that these standards would generally be followed by the court, see S Wilson "Curing the poor: state housing policy in Johannesburg after Blue Moonlight" (2014) 5 *Constitutional Court Review* 280 285.

[716] As set out in the Department of Human Settlements *Technical guidelines: National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed Through National Housing Programmes* .

[717] Department of Human Settlements *EHP* (2009) Part B 1.

[718] Department of Human Settlements *EHP* (2009) Part B 2.5.C.

[719]Department of Human Settlements *National Norms and Standards* (2009) para 2.1.7.

[720] Department of Human Settlements *EHP* (2009) Part B 2.5.A. The EHP mentions units in terms of "families", whereas the National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through National Housing Programmes refers to "stands". See, Department of Human Settlements *National Norms and Standards* (2009) para 2.1.7. For ease of reference these are broadly referred to as stands. Based on the similar types of housing prescribed (albeit of different standards) it is inferred that the EHP envisioned one family per stand.

[721] Department of Human Settlements *National Norms and Standards* (2009) para 2.1.7.

[722] Department of Human Settlements *EHP* (2009) Part B 2.5.A.

[723] Department of Human Settlements *National Norms and Standards* (2009) para 2.1.7.

[724] Department of Human Settlements *EHP* (2009) Part B 2.5.A; Department of Human Settlements *National Norms and Standards* (2009) para 2.1.7.

The court has not always required the accommodation to be provided to meet the housing standards of the EHP.[725] This makes sense since these standards are very difficult to meet immediately and are only guidelines.[726] Forms of alternative housing that the court has accepted as suitable, although strictly they do not follow EHP standards, include vacant land without dwellings (where the ground has been prepared, dirt roads established and services provided, in other words, site-and-service plots).[727] In *PE Municipality*, the court considered the state-owned overcrowded and crime-ridden land without the provision of dwellings for alternative accommodation,[728] whereas in *Changing Tides* the court indicated that communal dwellings with dormitory-style sleeping quarters might be acceptable alternative accommodation.[729] The court, in *Mtshali v Tayengwa*[730] found alternative accommodation acceptable where the employed unlawful occupiers were required to pay rent at R10 per day.[731]

In *City of Johannesburg v Dladla*[732] (hereinafter "*Dladla*"), the beneficiaries of temporary accommodation, in terms of an alternative accommodation order, approached the court on the basis that the accommodation provided violated their human rights.[733] The occupiers were those evicted in *Blue Moonlight*.[734] Due to the limited resources of the municipality, it collaborated with a non-profit organisation that provides shelter to homeless persons.[735] The accommodation was dormitory-style and subject to certain rules.[736] Some of these rules

---

[725] J Dugard "Beyond Blue Moonlight: the implications of judicial Avoidance in relation to the provision of alternative housing" (2014) 5 *Constitutional Court Review* 265 278.

[726] Van Wyk (2007) *JS Afr L* 54-55. See also, Liebenberg *Socio-Economic Rights* 404.

[727] See, *MEC For Department of Human Settlements, Gauteng Province v Molema* (44773/13) [2013] ZAGPPHC 438 para 15.

[728] *PE Municipality* para 2.

[729] *Changing Tides* para 47.

[730] *Mtshali v Tayengwa* (02312/2013) [2013] ZAGPJHC 219.

[731] *Mtshali v Tayengwa* para 22. In *Olivia Road* para 59 the engagement agreement allowed for the payment of rent. See also, *Hlophe HC2* para 15.

[732] *City of Johannesburg v Dladla* (403/2015) [2016] ZASCA 66. The *a-quo* decision is *Dladla v City of Johannesburg Metropolitan Municipality* 2014 (6) SA 516 (GJ) (hereinafter "*Dladla HC*". It is this case that the municipality in *Changing Tides* referred to when it argued that it could not provide the land offered since the suitability thereof was being challenged in court. See the discussion of *Changing Tides* in Chapter 2:3.1.2.1.

[733] *Dladla HC* para 8.

[734] *Dladla* para 3. See also, Wilson (2014) *CCR* 287.

[735] *Dladla* para 3-5. The organisation was called the Metropolitan Evangelical Services. See, MES *Our Programmes and Services* http://www.mes.org.za/index.php/2015-11-17-13-25-02/mes-johannesburg 29-07-2016.

[736] *Dladla* para 6, 10. See also, Wilson (2014) *CCR* 282.

included gender separation (regardless of marital status)[737] and being locked out during the day (to force the people to seek employment).[738] The residents were not satisfied with these rules and challenged their constitutionality on the basis that it infringed their rights to human dignity, freedom and security of person and privacy.[739] The High Court agreed with these allegations and interdicted the shelter from enforcing these rules.[740]

The municipality appealed to the Supreme Court of Appeal. In this decision, the court considered the practical implications of the High Court order. Due to the finding that the gender separation rule was not enforceable against spouses and life partners, yet still enforceable against the other occupiers, several beds could not be used.[741] Moreover, there was only one married couple in the group and one female child, who stayed with her mother.[742] Even before the application was launched, the married couple had been given leave to occupy a four-bed dormitory.[743]

The Supreme Court of Appeal acknowledged that all persons have a right to freedom of movement and that spouses have a right to live together,[744] but that, like all other rights, these rights are subject to limitation.[745] Admittedly, it is harsh to say that occupiers of emergency accommodation must accept accommodation of a lower standard. However, the court justified this harshness by the fact that lower standards allow more people to be accommodated within the municipality's limited resources.[746] Accordingly, the appeal was upheld.[747] Since the High Court decision was celebrated by some scholars, the Supreme Court of Appeal decision is bound to receive criticism.[748]

---

[737] *Dladla* para 10.
[738] *Dladla* para 8. See also, Wilson (2014) *CCR* 290.
[739] *Dladla HC* para 2.
[740] *Dladla HC* para 40, 42, 48.
[741] *Dladla* para 4.
[742] *Dladla* para 12.
[743] *Dladla* para 11.
[744] *Dladla* para 16.
[745] S 36 of the Constitution. See, *Dladla* para 18.
[746] *Dladla* para 20. The court quotes from the decision in *City of Cape Town v Hoosain NO and Others* (10334/2011) [2012] ZAWCHC 180 para 14.
[747] *Dladla* para 25.
[748] Wilson (2014) *CCR* 294-295; J Dugard "Beyond Blue Moonlight: the implications of judicial Avoidance in relation to the provision of alternative housing" 265 272-273.

While the above indicates that courts are willing to accept the alternative accommodation that falls short of the EHP standards, courts have also ordered alternative accommodation that exceeds these standards. One such higher standard that is often required by courts in eviction matters is that that the emergency accommodation must be close to the schools and jobs of the unlawful occupiers.[749] Another is the provision of tarred roads and pre-paid electricity.[750]

As explained, the EHP only requires the provision of electricity in exceptional circumstances and then only in the form of high-mast lighting.[751] Neither the EHP nor the National Standards requires that roads be tarred.[752] Nevertheless, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,[753] the court required the municipality to meet these standards in providing alternative accommodation to the unlawful occupiers.[754] It is not clear from the judgment why such high standards were required. The high standards set by the court were unattainable and the municipality consequently applied to have the eviction order rescinded.[755] There does not seem to be justification for these high standards. For most of the occupiers, the emergency housing was to be temporary, until the occupiers could move into the homes being built for them in terms of the N2 Gateway Project.[756]

It is clear from the above that the court has not been consistent with the requisite standard of alternative accommodation. It has required the provision of alternative accommodation that is both of a lower end of a higher standard than what is required by the EHP. Where the standards required in terms of an alternative accommodation order are too high for the municipality to meet, the alternative accommodation order does not adhere to the existing legal framework. This is because it disregards the internal limitation within section 26(2) of the Constitution regarding the limited resources of the state. Since the provisions regarding the standard of housing in the EHP are described as non-prescriptive,[757] neither an order

[749] *Blue Moonlight* para 104; *Changing Tides* para 56; *Hlophe HC1* order. See also, Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 40.

[750] *Joe Slovo* para 7.

[751] Department of Human Settlements *EHP* (2009) Part B 2.5.A.

[752] Both require gravel roads. See Department of Human Settlements *EHP* (2009) Part B 2.5.A; Department of Human Settlements *National Norms and Standards* (2009) 2.1.7.

[753] 2010 (3) SA 454 (CC) (hereinafter "*Joe Slovo*").

[754] *Joe Slovo* para 7.

[755] See, *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes* 2011 (7) BCLR 723 (CC).

[756] *Joe Slovo* para 173.

[757] Department of Human Settlements *EHP* (2009) Part B 1.

requiring a lower nor a higher standard of housing would violate the principle of subsidiarity. It is sensible that a court orders the provision of accommodation of a lower standard so that more persons can be accommodated within the state's available resources. Nevertheless, the need for such an order indicates that the standards of the guidelines in the EHP are too high and might have to be amended.[758]

5.2 Definition of temporary accommodation

Part of the initial relief sought, in *Dladla*, was an interdict restraining the municipality from evicting the occupiers from the temporary accommodation without a court order.[759] The municipality had reserved the right to evict the occupiers after six months' occupation without first obtaining a court order.[760] However, the court did not decide on the matter, since the municipality later acknowledged that it could not forcibly evict unlawful occupiers without a court order.[761] This suggests that a municipality might stipulate a reasonably short time for the accommodation, but that it would need to follow PIE if the occupiers are unwilling to move. Hence, despite the accommodation being "temporary", it would be very difficult to end the accommodation, unless the occupiers' circumstances have changed.

The court, in *Dladla*, did not comment on the fact that the municipality evidently regarded the occupation as temporary and did not find that the municipality would not be allowed to apply for their eviction. This differs from the approach in *Hlophe* where the court's alternative accommodation order included a condition that the accommodation provided must be secure against further eviction, pending the provision of permanent housing.[762] This latter decision seems to be in line with the EHP, which stipulates that the accommodation provided should be upgradable, wherever possible, to meet the non-emergency housing standards.[763] This will assist the state to meet its medium and long-term housing goals.[764]

---

[758] Van Wyk (2007) *JS Afr L* 54-55. See also, Liebenberg *Socio-Economic Rights* 404.

[759] *Dladla HC* para 8.

[760] *Dladla HC* para 27.

[761] *Dladla HC* para 44.

[762] *Hlophe HC1* 6-7. See also, *PE Municipality* para 55.

[763] Department of Human Settlements *EHP* (2009) Part A 2.2. If it is not upgradable, then permanent housing should be prepared elsewhere.

[764] Department of Human Settlements *EHP* (2009) Part A 2.2. However, it should not be upgradable to permanent housing before the occupiers have reached the front of the long-term-housing queue.

Hence, in terms of both *Hlophe* and the EHP, "temporary" seems to refer to "until it can be upgraded". In this regard, it is not the *duration* of the accommodation that is temporary, but the *lower standard* of housing.[765] However, the EHP includes certain qualifications for including beneficiaries,[766] which are not always adhered to by courts granting alternative accommodation orders.[767] In *Hlophe* specifically, the court did not allow the municipality to exclude the unlawful occupiers who did not qualify in terms of the EHP.[768] This might have been due to the health and safety threat that continued occupation of the bad building held for the unlawful occupiers.[769] Should a court make an alternative accommodation order without allowing the municipality to apply its qualifications, the order must allow the municipality to apply these once temporary alternative accommodation has been provided. Otherwise, the order would not be in line with the EHP.[770] Accordingly, it should be allowed to evict those who do not qualify under the EHP from the emergency housing provided.

Furthermore, the emergency housing qualifications are lower than that of the permanent housing.[771] For example, emergency housing might be provided to illegal immigrants under certain circumstances, but illegal immigrants do not qualify for permanent housing.[772] For this reason, a court order would not be in line with the Code if it required that all beneficiaries under the alternative accommodation order must have security against eviction. Since temporary emergency housing means "until permanent housing is provided", the idea seems to be that the occupation of the emergency housing itself is temporary. Once those who qualify for permanent housing are provided with such, or their emergency housing is upgraded, those who do not qualify for permanent housing would probably face eviction. Hence, the duration of the alternative accommodation provided to those who do not qualify for permanent housing would be temporary. Where such persons are unwilling to move from

[765] This is also in accord with the decision in *PE Municipality* that alternative accommodation should be temporary, pending formal housing. See, *PE Municipality* para 28. This interpretation is supported by Wilson in Wilson (2014) *CCR* 285-286.

[766] Department of Human Settlements *EHP* (2009) Part A 2.3.1, 2.4.

[767] As was the case in *Hlophe* and *Skurweplaas*.

[768] See the discussion on *Hlophe* in Chapter 2:3.1.2.2.

[769] Since it was a "bad building". See the discussion on bad buildings in Chapter 2:3.1.

[770] As was the case in *Changing Tides.* See Chapter 2:3.1.2.1.

[771] See Chapter 3:5.1.

[772] Department of Human Settlements *National Housing Code* (2009).

the alternative accommodation, the municipality would most likely have to obtain an eviction order in terms of PIE.[773]

Based on both the experiences in *Grootboom* and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*,[774] it seems like this distinction between those who qualify for permanent housing and those who do not is purely academic. Years after both of those decisions, the unlawful occupiers were still awaiting the "upgrade" to permanent housing. The state is criticised for providing emergency housing of a low standard and then "forgetting" about the unlawful occupiers.[775]

From the discussion in this chapter thus far, the limitations on the state's housing duty keep emerging. The next section examines the effect of the internal limitations in section 26(2) of the Constitution on the court's ability to grant an alternative accommodation order. For an alternative accommodation order to adhere to the existing legal framework, it must take cognisance of these limitations.

6 Progressive fulfilment of measures within the state's available resources

The fact that the state is struggling to meet housing needs,[776] does not necessarily translate into a failure to fulfil its housing duty. The state's housing duty is limited, in that the right of access to adequate housing needs only be realised *progressively*, within the state's *available resources*.[777]

This section, firstly, explores whether the provision regarding progressive realisation absolves the state against demands for *immediate* realisation of the right of access to adequate housing. In other words, it considers whether those whose rights have not been realised can approach the court for an order forcing the state to provide them with housing immediately. Second, the chapter explores whether progressive realisation means ensuring basic

[773] See the discussion on *Dladla HC* above.

[774] 2008 (3) SA 208 (CC).

[775] See, M Swart "Left out in the cold - crafting constitutional remedies for the poorest of the poor" (2005) 21 *South African Journal on Human Rights* 215 216 and Wilson (2011) *Urban Forum* 279.

[776] See Chapter 1:2.

[777] S 26(2) of the Constitution.

accommodation for all, before implementing longer-term housing programmes. Third, the chapter investigates the court's power to question and interfere with the state's allocation of its available resources in realising the right of access to adequate housing.

6.1 No immediate realisation of short-term housing needs

In *Grootboom*,[778] the unlawful occupiers sought immediate fulfilment of their short-term housing needs. They approached the court for an order that the state must provide them with alternative accommodation immediately. It was argued that, although the state only needs to provide housing progressively, it still has to ensure at least minimum core realisation of the right of access to adequate housing. In other words, the state had to ensure that everyone has basic shelter.[779] This interpretation of the state's duty was based on the interpretation of the ICESCR,[780] which entrenches a similar duty for the progressive realisation of socio-economic rights, such as housing.[781]

This interpretation was rejected by the Constitutional Court.[782] It indicated that the wording of the ICESCR differs from section 26(1) of the Constitution. Section 26(1) involves a right of *access* to adequate housing, whereas the ICESCR entrenches the right to housing. The court found that it would be difficult to determine what would constitute a minimum core of access

[778] See the discussion of *Grootboom* in Chapter 2:2.1.

[779] I.e. housing that does not necessarily meet the standards of the Code. Housing under the state's short-term housing programme would constitute basic housing. A minimum core for s 27(1) of the Constitution (the right to health care, food, water and social security) was also argued for and rejected by the Constitutional Court in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

[780] In terms of s 39(1) of the Constitution courts are required to consider international law when interpreting constitutional rights. See, Chenwi (2008) *Harv L Rev* 109.

[781] This interpretation was made in United Nations Committee on Economic, Social and Cultural Rights *General Comment No 3* (1990) para 10. See *Grootboom* at 29. Interestingly, although South Africa had signed the ICESCR by the time *Grootboom* was heard (2001), it only ratified it in 2015. The effect of this ratification needs to still be seen. See, ESCR-Net *The Government of South Africa Ratifies the ICESCR* (2015). See, ESCR-Net *The Government of South Africa Ratifies the ICESCR* (2015). Currie and De Waal argues that ratification will have a "significant impact on the development of South Africa's socio-economic rights jurisprudence". See, Currie & De Waal *The Bill of Rights Handbook* See, Currie & De Waal *The Bill of Rights Handbook* 570. See also, Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-13.Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-13. Pieterse does not agree that ratification would significantly affect the Constitutional Court's approach in M Pieterse "Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience" (2004) 26 *Human Rights Quarterly* 882 903.

[782] See the discussion of *Grootboom* in Chapter 2:2.1.

to adequate housing.[783] Rather, the reasonableness measure prescribed in section 26(2) must be used to analyse the state's housing programme.[784]

This finding against a minimum core right to housing has been subjected to criticism.[785] The main critique is that section 26(1) gives a standalone right, both in a positive and negative sense.[786] The duty of the state in terms of section 26(2) is additional to the positive right in section 26(1) and applies only to full realisation of the right.[787] Hence, in terms of section 7(2) of the Constitution, the state has a duty to ensure minimum core fulfilment of the positive right in terms of section 26(1).[788] However, the argument that section 26(1) provides a standalone positive right was rejected by the Constitutional Court, which regards these two subsections as forming one right.[789]

The court's reluctance, in *Grootboom*, even to decide the standards to be met for the minimum core fulfilment of sections 26(1) and (2) has also been criticised. It is argued that, in the absence of a definition of the right of access to adequate housing, there can be no real reasonableness review.[790] Only once the court has defined the right, with reference to a minimum core, can it evaluate whether measures implemented by the state are reasonable.[791] Bilchitz argues that the court, in *Grootboom*, confused principle with policy. It should have

---

[783] *Grootboom* para 33.

[784] Currie & De Waal *The Bill of Rights Handbook* 585.

[785] Liebenberg *Socio-Economic Rights* 163; Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-27; Chenwi (2008) *Harv L Rev* 122; Pieterse (2004) *Human Rights Quarterly* 896; Muller (2015) *SAPR/SAPL* 76.

[786] C Steinberg "Can reasonableness protect the poor - a review of South Africa's socio-economic rights jurisprudence" (2006) 123 *South African Law Journal* 264 265.

[787] Steinberg (2006) *SALJ* 267, 268. This argument is based on United Nations Committee on Economic, Social and Cultural Rights *General Comment No 3* (1990). Steinberg does not support this argument.

[788] This was argued in *TAC* para 28. See, Liebenberg *Socio-Economic Rights* 149. See also, Steinberg (2006) *SALJ* 268.

[789] In *TAC* para 39 the court found that s 27(1) does not create a standalone right from s 27(2); relying on this matter the court in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 32-33 found that s 26(1) does not create a standalone positive right, but does constitute a standalone negative right against interference.

[790] See, D Bilchitz "Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* 1 10; M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 383 407; as referred to in Steinberg (2006) *SALJ* 268. See also, S Woolman & H Botha "Limitations" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 34 34-1 – 34-6, 34-16 – 34-29; Liebenberg *Socio-Economic Rights* 65, 175, 176, 180. In addition, the model of reasonableness review has also been criticised. For an explanation of such criticism, see Muller (2015) *SAPR/SAPL* 76-80.

[791] Bilchitz (2003) *SAJHR* 8-9, as referred to in Steinberg (2006) *SALJ* 268. See also, Liebenberg *Socio-Economic Rights* 142, 164.

said what the minimum core standard is (principle), not how it should be met (policy).[792] In counterargument, Steinberg comments that defining the content of a right is not within the functions of the court and that it would amount to a violation of the separation of powers doctrine.[793]

Although the court, in *Grootboom*, acknowledged that "there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation",[794] no subsequent court has expressly done so. Accordingly, this suggests there is currently no duty on the state to provide basic housing on demand.[795] However, the idea that the state has a duty to provide at least temporary housing to all evictees facing homelessness, challenges this suggestion. If this duty is based on the state's housing duty, it signifies a minimum core obligation on the state and, accordingly, housing on demand.

As explained, the Constitutional Court and Supreme Court of Appeal decisions, discussed in Chapter 2, do not create a precedent for the conclusion that such a duty exists.[796] The court in *Grootboom* specifically acknowledges that not all desperate people will be assisted immediately.[797] Moreover, even if these cases did create a minimum core obligation on the state, this obligation is not limited to evictees. Everyone lacking basic shelter should then be able to approach the court for an order forcing the state to provide him with accommodation.[798] Practically speaking, this would create an impossible duty on the state.[799] For this reason, even in terms of the ICESCR, a minimum core duty is still limited by the state's available resources.[800] This raises the question of whether the state's short-term

---

[792] D Bilchitz "Giving socio-economic rights teeth: the minimum core and its importance" (2002) 119 *South African Law Journal* 484 487, as referred to in C Steinberg "Can reasonableness protect the poor - a review of South Africa's socio-economic rights jurisprudence" (2006) 123 264 271.

[793] Steinberg (2006) *SALJ* 271. See also, Ngcobo (2011) *Stell LR* 46. Ngcobo argues that reasonableness review supports the separation of powers doctrine. On separation of powers see Chapter 5:3.

[794] *Grootboom* para 33.

[795] A Pope "The alternative accommodation conundrum: trends and patterns in eviction jurisprudence" (2011) 25 *Speculum Juris* 134 para 144; Liebenberg *Socio-Economic Rights* 203.

[796] Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-30.

[797] *Grootboom* para 68, referred to in Pillay (2002) *Law Democracy & Dev* 267.

[798] For more one this, see Chapter 6:4.2.

[799] This is confirmed by the CC in *TAC* para 34-35: "It is impossible to give everyone access even to a "core" service immediately", as referred to in Pieterse (2004) *Human Rights Quarterly* 898.

[800] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 3* (1990) para 10. Accordingly, a minimum core interpretation of s 26(1) would therefore still not mean housing on demand. Currie & De Waal *The Bill of Rights Handbook* 582-583. See also, Pieterse (2004) *Human Rights Quarterly* 898. Liebenberg refers to this limitation in favour of recognising a minimum core element to socio-economic

housing obligation places a duty on the state to ensure minimum core fulfilment of the right to all, before implementing further realisation of the right of access to adequate housing. The answer to this question is sought in the following section.

6.2 No prioritisation of short-term housing needs

It has been argued that minimum core realisation does not imply housing on demand, but prioritisation of basic needs where after the access to the right should be progressively increased.[801] Roux argues that all the state's available resources must be spent on realising basic needs.[802] A similar approach is taken by Bilchitz.[803]

Neither section 26(2) nor the EHP places a duty on the state to ensure minimum core fulfilment of its housing duty before spending resources on the further realisation of the right. In *Grootboom,* the court commended the state for its medium- and long-term programmes and did not order the state to refrain from implementing these in favour of short-term emergency programmes.[804] Moreover, the occupiers did not demand that the municipality ensures basic shelter before addressing other housing needs. They simply requested that the municipality also implements a programme to ensure basic shelter. This programme should prioritise persons in need and not just prioritise persons based on the duration that they have been on the municipality's housing list.[805] A dedicated budget should be allocated to the programme. There should be a focus on the rapid release of land, instead of adhering to the high housing standards prescribed for permanent housing.[806] This is confirmed by the fact that

rights. It ensures that an undue burden is not placed on the state, because the state would be able to prove that it lacks the requisite resources. See, Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-31.

[801] This is argued by Bilchitz (2003) *SAJHR* 15; T Roux "Understanding Grootboom - a response to Cass R Sunstein" (2001) 12 *Constitutional Forum* 41, 47 120; as referred to in Steinberg (2006) *SALJ* 268. See also, Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-27.

[802] Roux (2001) *Const F* 46, referred to in Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-27.

[803] Bilchitz (2002) *SALJ* 490; Bilchitz (2003) *SAJHR* 11. See also, Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-29.

[804] *Grootboom* para 64.

[805] Duration would be the consideration considered under the longer-term housing programmes.

[806] See discussion of standards in Chapter 3:5.1.

the court found the state's short-term housing programme must run parallel with the medium and long-term housing programmes of the municipality and not in their stead.[807]

This interpretation is consistent with the EHP. In terms of the EHP, the provincial authority should set aside money in its yearly budget for emergency housing situations.[808] There should be a separate budget for emergency housing.

In practice, it is evident that to neglect further realisation of socio-economic rights, in favour of minimum core realisation, would create disorder. Protests on insufficient service delivery allegedly occur on a daily basis,[809] with over 150 major service delivery protests occurring yearly.[810] These protests can become violent,[811] resulting in the destruction of property,[812] injury and even death.[813] Often, it is not that the protestors have no access to local services, but that they are unsatisfied with the standard of the existing access.[814] Access to services is part of the right of access to adequate housing.[815] Ensuring only minimum realisation of the right of access to housing might, therefore, be met with resistance.

---

[807] This is clear from the fact that the court did not prefer this programme over the existing programmes. The same argument can be made for tertiary vs primary health care. See, Liebenberg *Socio-Economic Rights* 143.

[808] Department of Human Settlements *EHP* (2009) Part A 2.6.2.

[809] During a question-and-answer session in the National Assembly one of the members of parliament asserted that there are 30 service delivery protests daily. See, YouTube *Plenary: National Assembly, 2pm 17 May 2016* (2016) https://www.youtube.com/watch?v=1fGzvZbR0Vk&feature=youtu.be&t=8164 30-07-2016. This number has not been confirmed. Yet, in a piece questioning this number, it was found that there are at least 3 protests a day (but these are not limited to service protests). See, Bhardwaj V at Africa Check *Are There 30 Service Delivery Protests a Day in South Africa?* (2016) https://africacheck.org/reports/are-there-30-service-delivery-protests-a-day-in-south-africa-2/ 30-07-2016.

[810] When considering the past three years. Mapumulo Z at City Press *Service Delivery Protests Intensifying in Run-Up to Elections* (2016) http://city-press.news24.com/News/service-delivery-protests-intensifying-in-run-up-to-elections-20160603 30-07-2016.

[811] According to Municipal IQ 84% of the protests in 2015 could be classified as violent. Municipal IQ *The Camera's Eye Can Be a Force for Good* (2016) http://www.municipaliq.co.za/index.php?site_page=article.php&id=90 30-07-2016. The Mail and Guardian challenges this statistic, stating that only 18% of service delivery protests are violent. De Wet P at Mail & Guardian *New Stats Show That Nine Out of 11 Protests a Day Are Peaceful* (2016) http://mg.co.za/tag/service-delivery-protests 30-07-2016.

[812] Bhardwaj V at Africa Check *Are There 30 Service Delivery Protests a Day in South Africa?* (2016).

[813] Times Live *Violent Service Delivery Protest Erupts in Emfuleni: DA* (2016) http://www.timeslive.co.za/local/2016/04/14/Violent-service-delivery-protest-erupts-in-Emfuleni-DA 30-07-2016.

[814] Allan K & Heese K at Municipal IQ *Understanding Why Service Delivery Protests Take Place and Who is to Blame* http://www.municipaliq.co.za/publications/articles/sunday_indep.pdf 30-07-2016.

[815] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 4* (1991) para 8(b).

Accordingly, short-term housing programmes should not be prioritised above longer-term housing programmes.[816] There should be a separate budget for short-term housing programmes and the state should implement these programmes in so far as its available resources allow. In the context of alternative accommodation orders, this means that a court should be cautious of requiring the state to reprioritise funds budgeted for longer-term housing programmes. Just how cautious the court should be is discussed in the following section.

6.3 No challenge to the fact of lacking resources

This section considers to what extent a court can challenge a municipality's report that it has insufficient funds to assist unlawful occupiers who are facing eviction. From the outset, a distinction must be made between three possible situations. One situation involves a municipality that has adopted and implemented a reasonable short-term housing programme and has budgeted accordingly, yet it still lacks sufficient resources to provide alternative accommodation. A second possible situation involves a municipality that has adopted a reasonable short-term housing programme and has budgeted accordingly but has not implemented it reasonably. A third possible situation involves a municipality that has failed to adopt a reasonable short-term housing programme at local level and to budget accordingly.

With regard to the first scenario, in terms of the EHP, municipalities must identify any emergency housing situation within their jurisdictions and prepare a plan to address the situation.[817] It must budget separately for such eventualities and if its resources are insufficient, it must apply to the provincial authority for funding.[818] The provincial authority must set aside money in its yearly budget for emergency housing situations.[819] The provincial authority can also apply for assistance from the national authority.[820] Hence, if the municipality implemented a reasonable short-term housing programme, budgeted accordingly

[816] See also, S Liebenberg "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002) 6 *Law Democracy & Development* 159 176; T Roux "Legitimating transformation: political resource allocation in the South African Constitutional Court" (2003) 10 *Democratization* 97; Swart (2005) *SAJHR* 221; Pieterse (2004) *Human Rights Quarterly* 896.

[817] Department of Human Settlements *EHP* (2009) Part B 3.1.

[818] Department of Human Settlements *EHP* (2009) Part B 3.1.

[819] Department of Human Settlements *EHP* (2009) Part A 2.6.2.

[820] Department of Human Settlements *EHP* (2009) Part B 3.4.1.

and still reports it lacks the available resources[821] it should not be required to provide alternative accommodation in terms of the EHP immediately.[822] Nevertheless, the court could require the municipality to apply to the provincial government for funding if it had failed to do so.

In *Brookway Property 30 (Pty) Ltd v People Who Intend Invading Portion 150 of the Farm Zandfontein 317 J.R., Portion 124*[823] (hereinafter "*Brookway*"), the High Court accepted the municipality's report that it lacked the resources to accommodate the unlawful occupiers immediately.[824] It found, however, that this does not translate into a lack of available resources overall. The EHP provides a procedure for applying to the provincial authority if the municipality cannot afford emergency housing.[825] In failing to implement this procedure, the municipality had not exhausted all of its options and had not implemented the national short-term housing programme properly.[826] Accordingly, the court ordered the municipality to apply to the provincial authority for assistance.[827]

If both the provincial and national governments have adopted and implemented a reasonable short-term housing programme and budget and report that they do not have the resources to provide alternative accommodation a court should accept such a report. In such situations, the state would not have an immediate short-term housing duty toward the unlawful occupiers and an alternative accommodation order with effect within the specific budget cycle cannot be made.

The second possible situation is where a municipality has adopted a reasonable short-term housing programme and has budgeted accordingly but has not implemented it reasonably. This means that funding has been set aside for emergency housing. In this situation, a court

---

[821] A lack of resources either means that there is no money in the budget to provide housing that complies with the standard.

[822] Pope (2011) *Speculum Juris* 140. *Ives v Rajah* is an example of a High Court decision where the court accepted the municipality's report on the fulfilment of its housing duty. In *Odvest 182 Pty (Ltd) v Occupiers of Portion 26 (Portion of Portion 3) of Farm Klein Bottelary No 17, Botfontein Road* (19695/2012) [2016] ZAWCHC 133 para 107, the High Court granted an alternative accommodation order despite there being no challenge to the municipality's short-term housing programme. This order is not in line with the existing legal framework.

[823] (33786/2010) [2010] ZAGPPHC 129.

[824] *Brookway* para 44.

[825] *Brookway* para 35, 37.

[826] *Brookway* para 36-38.

[827] *Brookway* para 44.

can either order the state to implement its programme, as it should have in the first place, or it can issue an alternative accommodation order. For an alternative accommodation order to adhere to existing legal framework, a court would have to consider whether the municipality could assist the unlawful occupiers within the available resources. If the municipality's funding within its short-term housing budget is insufficient, a court should also consider the fact that the provincial authority could also be joined to report on its available funds. While an alternative accommodation order in the second scenario might adhere to existing legal framework, it might not be the most appropriate solution. This is because it might not be in line with the court's duty to respect the functions of government and to administer justice. This is addressed in the following two chapters.

A third possible situation involves a municipality that has failed to adopt a reasonable short-term housing programme at local level and to budget accordingly. The lack of budget can be approached in different ways. First, the court can accept that the municipality lacks the available resources and refrain from making an alternative accommodation order that has immediate effect. Second, the court can accept that the municipality lacks the available resources, but then require it to apply to the provincial authority, in terms of the EHP, for funding. Third, the court can scrutinise the municipality's general budget to determine whether resources allocated elsewhere or any budget surplus could be used to fund the provision of alternative accommodation.[828]

In *Blue Moonlight*, the court opted to scrutinise the municipality's budget for resources to spend on providing alternative accommodation to the unlawful occupiers. The court did not accept the municipality's report that it could not afford alternative accommodation.[829] It found that the municipality could not claim it lacked the available resources to house the unlawful occupiers since the lack was a result of an unreasonable short-term housing programme.[830] The municipality had not budgeted to use its own resources to provide the unlawful occupiers with alternative accommodation.[831] While it had applied to the provincial authority in terms of the EHP, the application was denied. Despite this, the court found that there is no need to join the provincial government if the municipality could be found to have the available resources

[828] Liebenberg questions whether this is possible, in Liebenberg *Socio-Economic Rights* 192.
[829] *Blue Moonlight* para 71, discussing the SCA decision.
[830] *Blue Moonlight* para 74, discussing the SCA decision.
[831] *Blue Moonlight* para 74, discussing the SCA decision.

elsewhere within its budget. Accordingly, the court probed the entire budget of the municipality and found that an overall surplus was predicted for that year.[832] The municipality denied the existence of a surplus, arguing that the projection was incorrect and there was actually a budget deficit.[833] Nonetheless, the municipality was ordered to finance alternative accommodation for the unlawful occupiers by using the alleged surplus.[834] Since the reallocation of funding is allowed in terms of the EHP, such an order is not necessarily in conflict with the court's duty to adhere to existing legal framework. However, the order might not respect the functions of government or ensure justice. This is addressed in the following two chapters.

Another issue, which a court must take cognisance of, is that available finances do not necessarily translate into resources that are available immediately. It takes time to convert those finances into adequate emergency housing. Land might have to be acquired or prepared,[835] dwellings built or existing buildings renovated.[836] Accordingly, where the court finds that the state has the available finances it must still give the municipality sufficient time to convert the funding into accommodation. Moreover, if the court finds that the state lacks the resources to provide alternative accommodation immediately, the state does not have an immediate short-term housing duty toward the unlawful occupiers, regardless of which budget the court scrutinises or what the reason for the lack is. Hence, the court cannot make an alternative accommodation order with immediate effect. A court must consider whether an order is implementable, which in this context means considering whether the state would be able to provide alternative accommodation by the eviction date within its available resources, before granting an alternative accommodation order.[837]

---

[832] *Blue Moonlight* para 71, discussing the SCA decision.

[833] *Blue Moonlight* para 73. Pope refers to the problem where people migrate to the city after a budget has been set. Pope (2011) *Speculum Juris* 138, 144.

[834] *Blue Moonlight* para 104.

[835] See, *MEC For Department of Human Settlements, Gauteng Province v Molema* para 12, where the court simply required trees to be removed from the property and services provided.

[836] See, for example, *Blue Moonlight (Appl HoA)* para 25.

[837] Smith (2014) *De Rebus* 42. See also, Van Wyk (2011) *PER/PELJ* 67; A Pillay "South Africa: access to land and housing" (2007) 5 *International Journal of Constitutional Law* 544 555.

7 Conclusion

One possible ground for alternative accommodation orders is that the state's housing duty includes a duty to assist persons living in emergency housing situations.[838] This chapter aimed to determine when alternative accommodation orders based on this ground would adhere to existing legal framework.

The legal framework identified includes the state's duty to ensure the realisation of the right of access to adequate housing in terms of section 26(2) of the Constitution. The Housing Act that was enacted to give effect to this constitutional provision also forms part of the legal framework. In addition, the Code is included. The Code is a policy adopted, in terms of the Housing Act, to give effect to the state's housing duty. Focus was placed on the EHP, which is a programme within the Code that deals with the state's housing duty in emergency housing situations. International law instruments, especially the ICESCR, also play a role in interpreting these measures.

In analysing when the existing legal framework would allow for the granting of an alternative accommodation order, the discussion was broken into four parts that loosely resemble the structure of section 26(2) of the Constitution. First, what is meant by the notion that the *state* must carry the duty to fulfil the emergency housing duty was explored. Second, who should benefit from the emergency housing duty was analysed and what the effect of that would be on the granting of alternative accommodation orders. Third, the standards prescribed by the legal framework were explored and their effect on the granting of alternative accommodation orders. Finally, the effect of the limitation on the state's housing duty, in so far as fulfilment thereof need only be progressive and within the state's available resources, was examined.

It was found that, in terms of the EHP, the primary duty to provide emergency housing is placed on municipalities. However, municipalities can seek assistance from the provincial authority if they lack the relevant resources. The provincial authority can also seek assistance from the national authority if necessary. Courts have not always acknowledged the involvement of provincial authorities. This is not in line with the EHP. This raises the question: are courts required to involve provincial authorities if municipal authorities report that they are unable to provide alternative accommodation?

[838] S 26(2) of the Constitution.

The legal framework includes unlawful occupiers who face homelessness because of eviction as beneficiaries to the state's short-term housing duty. Nevertheless, not all unlawful occupiers facing homelessness are able to benefit from the state's short-term housing duty. Some persons are excluded, such as those who were responsible for their living in an emergency housing situation. An alternative accommodation order that adheres to the existing legal framework cannot disregard the exclusions within the EHP and confirmed by jurisprudence.

In respect of the standards of the alternative accommodation to be provided, the EHP sets quite high standards. However, except for the minimum surface area, the standards set by the EHP are maximum standards. Courts have both made alternative accommodation orders where the accommodation was to be lower than these standards and orders that required higher standards than those specified in the EHP. Where the standards required in terms of an alternative accommodation order are too high for the municipality to meet, it does not adhere to the existing legal framework. This is because it disregards the internal limitation within section 26(2) of the Constitution regarding the limited resources of the state. An alternative accommodation order that requires lower standards of housing is sensible since it ensures that more persons can be accommodated within the state's available resources. The need for such an order indicates that the state should reconsider the standards suggested in the EHP.[839]

The state needs only realise the right to housing progressively, within its available resources. This qualification has certain implications. Firstly, it means that persons cannot demand the immediate realisation of their housing rights in terms of section 26(2) of the Constitution. Secondly, it means that short-term housing programmes need not be prioritised above medium and long-term housing programmes. Lastly, it might affect the powers of the court in questioning the state's report regarding its available resources. This raises the question: to what extent are the court's powers to question the state's report affected by this constitutional limitation?

This chapter raised several questions. Part 2 aims to shed more light on these issues. Another pertinent question is whether an alternative accommodation order can be justified on grounds other than the state's housing duty. If the state does not have the available resources to assist

[839] Van Wyk (2007) *JS Afr L* 54-55.

all persons living in emergency housing situations, is there something unique about evictions that justify their prioritisation? If the state has no available resources, could an alternative accommodation order based on other grounds circumvent the limitation within section 26(2)? This is where the second possible ground for alternative accommodation orders comes into play. The following chapter addresses these questions.

CHAPTER FOUR: THE STATE'S DUTY TO RESPECT AND PROTECT HUMAN RIGHTS

1 Introduction

The previous chapter examined the first possible ground for alternative accommodation orders to determine when orders based on this ground would adhere to the existing legal framework. Evident from this discussion was that, due to the limited resources of the state, the high standards of the Emergency Housing Programme (EHP)[840] and the exclusions within the EHP, it is quite a feat for someone seeking alternative accommodation to base such a claim on the state's housing duty alone. This chapter considers whether these limitations can be avoided, by founding the alternative accommodation order on the second possible ground for alternative accommodation orders – the state's duty to respect and protect human rights.

The aim of this chapter is to determine when orders based on the second ground for alternative accommodation orders would adhere to the existing legal framework. An order requiring the state to provide alternative accommodation would adhere to the existing legal framework if the framework authorises the state to comply with the order. In other words, an alternative accommodation order can be granted if justification for placing such a duty on the state can be found in the legal framework.[841] In determining whether an alternative accommodation is authorised, a court must apply the legislative provision or policy that gives effect to the relevant constitutional right. A court should not apply the constitutional right directly unless the constitutionality of the right is challenged.[842] Moreover, in applying the legal framework, a court must take cognisance of the fact that others are not before the court and their rights should not be prejudiced by its order.[843]

The following section sets out the existing legal framework of the second ground for alternative accommodation orders. The remaining sections analyse this framework to determine when alternative accommodation orders in terms of these measures would adhere to the legal framework.

---

[840] Department of Human Settlements *EHP* (2009).

[841] This relates to the rule of law as formal protection. See Chapter 1:3.1.1.

[842] This relates to the principle of subsidiarity, see the discussion in Chapter 1:3.1.4.

[843] As required by the substantive and formal elements of rule of law. See Chapter 1:3.1.1.

2 The legal framework

This section aims to identify the existing legal framework for the second possible ground of alternative accommodation orders. This includes the relevant constitutional provisions, the legislation and policies giving effect to these provisions, applicable common law rules and precedent in which these instruments were interpreted and applied. International law also plays a role in the existing legal framework.

2.1 Constitutional provisions

The second ground for alternative accommodation orders is relevant in situations where an eviction does not seem just and equitable since it would leave the unlawful occupiers homeless. This relates to the court's duty, in terms of section 172(1)(b)[844] and 26(3)[845] of the Constitution to grant an eviction order only if it would be just and equitable, considering all the relevant circumstances. Hence, these constitutional provisions form part of the existing legal framework. As explained, under such circumstances a court might be able to justify requiring the state to provide alternative accommodation on the basis that the state has a duty to prevent the violation of the rights of the parties involved. This duty could be based on section 7(2) of the Constitution, which requires the state to respect and protect all human rights in the bill of rights.[846]

The rights in the bill of rights that could potentially be violated in eviction matters are also included in the legal framework. These include the landowner and other landowners' right to property in terms of section 25(1) of the Constitution.[847] This right prohibits deprivation of property that is arbitrary or not authorised by a law of general application. Section 26(1) of the Constitution, as a negative right, could also potentially be violated, since it entrenches a right of access to adequate housing. It has been suggested that unlawful occupiers of land have a negative right in terms of section 26(1) not to be deprived of their existing access to

[844] This provision states that in a constitutional matter a court can grant any remedy that is just and equitable.

[845] This provision states that all evictions must be court-ordered and that the court must consider all relevant circumstances before granting an order.

[846] Chapter 2 of the Constitution.

[847] That this right is involved is evident from *Blue Moonlight* and *Changing Tides.* For a discussion of these cases, see Chapter 2:3.1.1 and 3.1.2.1 respectively.

housing.[848] Other rights that might potentially be violated are the right of access to the courts in terms of section 34 of the Constitution and the right to equality in terms of section 9 of the Constitution.[849]

2.2 Legislation

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted to give effect to section 26(3) of the Constitution and forms part of the existing legal framework.[850] It provides the procedural and substantive requirements for obtaining an eviction order in terms of section 26(3) of the Constitution. In addition, it gives effect to section 25(1) and section 26(1) of the Constitution.[851] That it aims to balance these rights of the landowner and the unlawful occupiers is evident from the title. The "prevention of illegal evictions from land" protects the unlawful occupiers, whereas the "prevention of unlawful occupation of land" protects the landowner. Contrary to the title of the act, PIE does not prevent unlawful occupation from occurring. Rather, it protects the interests of the landowner by providing a tool for evicting the unlawful occupiers and protects the interests of the unlawful occupiers by requiring that unlawful occupiers only be evicted if the eviction is just and equitable.[852]

2.3 Role of international law

As explained in Chapter 3, courts must consider international law when interpreting the constitutional and legislative provisions above. Article 11.1 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) is relevant for the interpretation of the right against arbitrary evictions in section 26(3) of the Constitution, as well as the court's duty to protect section 26(1) of the Constitution.

In interpreting of article 11.1 of the ICESCR, the United Nations Committee on Economic, Social and Cultural Rights (the Committee) provides an explanation of the term "adequate

[848] In *Grootboom* para 34.

[849] See the discussion on *Modderklip* in Chapter 2:2.3.

[850] Liebenberg *Socio-Economic Rights* 271.

[851] Liebenberg *Socio-Economic Rights* 271.

[852] Z-Z Boggenpoel & J Pienaar "The continued relevance of the mandament van spolie: recent developments relating to dispossession and eviction" (2013) 46 *De Jure* 998 1018.

housing" as included in section 26(1) of the Constitution. Adequate housing requires legal tenure security, which prohibits forced evictions.[853] The term "forced evictions", in this sense, refers to the removal against their will of persons, without access to appropriate (legal) protection. This means that evictions in terms of the law that conform to International Human Rights law are not prohibited.[854] However, according to the Committee, evictions should not leave evictees homeless. If evictees are unable to secure their own alternative accommodation, the state should provide such to the maximum of its available resources.[855]

Another international law instruments relevant to the protection of section 26(1) and realisation of section 26(3) of the Constitution is the International Covenant on Civil and Political Rights. Article 17(1) of the International Covenant on Civil and Political Rights prohibits arbitrary and unlawful interference with a person's home. This article is similar to section 26(3) of the Constitution.

Regarding the protection of section 25(1) of the Constitution, the African Charter on Human and Peoples' Rights requires that the right to property be guaranteed and should only be limited if it is in the interest of public or community need and in terms of the law. Further, the prohibition on forced evictions in terms of article 11.1 of the ICESCR has been interpreted to include a requirement for compensation for property affected.[856] This could include compensation to the landowner if an eviction is denied.[857]

The following section considers when, within the existing legal framework, eviction matters, where the unlawful occupiers face homelessness, would lead to situations where a court would want to make the eviction just and equitable by granting an alternative accommodation order. This is done by considering what the most important relevant circumstances are and how they might be weighed together in an eviction matter. Thereafter, it is examined whether and under what circumstances the state's duty to respect and protect the human rights might justify requiring the state to provide alternative accommodation to "make" the eviction just and equitable.

---

[853] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 7* (1997) para 1. For a discussion on this characteristic, see Muller (2015) *SAPR/SAPL* 82-83.

[854] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 7* (1997) para 3.

[855] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 7* (1997) para 16.

[856] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 7* (1997) para 13.

[857] See Section 5 below.

3 Consideration of relevant circumstances

In respect of the substantive requirements of PIE, the court is required to consider all the relevant circumstances in determining whether an eviction would be just and equitable.[858] PIE provides an open list of such factors, including the duration of the occupation, whether the municipality can make alternative land available, the reason for the occupation and the vulnerability of the unlawful occupiers.[859] Where the landowner seeks the eviction, PIE does not oblige the court to consider whether alternative accommodation is available if the unlawful occupation had been for shorter than six months.[860]

In this section, the different factors that do or should weigh heavily in the balance to determine a just and equitable eviction order are discussed. These factors are identified based on the factors listed in the PIE, as well as factors stressed by courts. They include the identity of the applicant, the size of the group, the danger of the living conditions, the duration of the occupation, the purpose of the eviction, the blameworthiness of the occupiers and their vulnerability.

3.1 Identity of applicant

Whether the applicant is a private landowner or the state carries much weight in eviction matters.[861] PIE allows for both landowners and the state to apply for eviction orders.[862] When an eviction is sought by a private entity, a court is more likely to allow the eviction.[863] There are two reasons why the eviction of the unlawful occupiers is more likely when a private entity applies for the eviction. Firstly, section 26(1) of the Constitution establishes a right of access to adequate housing. The duty to realise this right falls on the state in terms of section 26(2).[864] In the absence of alternative accommodation, an eviction order sought by the state allows it to deprive persons of their homes, which directly contradicts its housing duty.

---

[858] S 4(6), 4(7), 6(3) of PIE.
[859] S 4(6), 4(7), 6(3) of PIE.
[860] S 4(6) of PIE.
[861] *PE Municipality* para 12; *Changing Tides* para 12-20.
[862] In terms of s 4 and 6 of PIE, respectively.
[863] See the discussion of *Blue Moonlight* and *Changing Tides* in Chapter 2:3.1.1 and 3.1.2.1 respectively.
[864] *Modderklip SCA* para 16. See also, Chapter 3:2.4.

Hence, the court is reluctant to grant an eviction order on application by the state if no alternative accommodation is available.[865]

No equivalent duty is placed on private individuals.[866] The state might delegate its duty to private entities through legislative and other measures.[867] A delegation of the state's housing duty through legislative measures seems to have been the basis for the decision in *All Building Cleaning Services CC v Matlaila*[868] (hereinafter "*ABCS*"). The court took into account the fact that the applicant, a private developer, had not offered to build the unlawful occupiers a home on the land.[869] As a result, it denied the eviction order. The court's refusal of the eviction potentially relates to the contention by the unlawful occupiers that, as a private developer, the applicant had a duty to provide them with housing in terms of the Inclusionary Housing Policy.[870]

Inclusionary housing refers to a requirement by the government that part of new residential developments must be used to house families of low-income levels.[871] Although the enactment of national legislation is contemplated to compel private developers, no such legislation has been adopted. As a result, there is currently no duty on private developers to partake in inclusionary housing.[872] Despite a lack of legislation, a few inclusionary housing projects have already been implemented.[873] The cooperation of private developers has been

---

[865] *PE Municipality* para 28.

[866] For decisions where it was found that the housing duty in s 26(2) of the Constitution is not enforceable against private individuals, see *Modderklip HC2* para 7, *Modderklip SCA* para 17, *Changing Tides* para 35. See also, Pope "A Tricky Balancing Act" in *DCM Festschrift* 12; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 92. It has also been found that no legislation puts duty on private individuals *Modderklip HC2* para 4, *Modderklip SCA* para 17, *Brookway* para 30. However, as seen from this discussion, some laws do place such a duty on individuals.

[867] *Grootboom* para 35. See also, Chenwi (2008) *Harv L Rev* 116.

[868] *All Builders And Cleaning Services CC v Matlaila* (42349/13) [2015] ZAGPJHC 2.

[869] *ABCS* para 29.

[870] *All Builders And Cleaning Services CC v Matlaila (First Respondent's Heads of Argument)* (42349/13) [2015] ZAGPJHC 2 (hereinafter "*ABCS 1st Resp. HoA)*") para 10. This policy was adopted by national government in 2008, see Western Cape Government *Western Cape PSDF: Inclusionary Housing Discussion Document* (2009) 2.

[871] Usually 20% of the development must be used for this purpose, see Western Cape Government *Inclusionary Housing* (2009) 29.

[872] Unlike the Emergency Housing Policy, the Inclusionary Housing Policy is not executive (or binding) policy since it was not adopted in terms of an act and is not given binding effect through an act. On binding policy, see Chapter 1:3.2.1.

[873] For examples, see the Western Cape Government *Inclusionary Housing* (2009) 31, 36.

secured through incentives.[874] Examples of such incentives include the state offering public land at a low price on condition that part of the land must be used for low-cost housing.[875] The adoption of inclusionary housing legislation and the conclusion of inclusionary housing agreements are examples of the state's delegation of its housing duty. However, in *ABCS*, no such legislation was adopted[876] or agreement concluded. Hence, the decision in *ABCS* cannot be justified on the basis that the state delegated its housing duty to the landowner.

Apart from legislative measures, private entities may also have a duty to provide alternative accommodation in terms of the common law.[877] This seemed to be the approach followed in *Omar NO v Omar*,[878] where the court found that the unlawful occupiers had alternative accommodation through their families.[879] It seemed to rely on the common law duty of support. However, there are certain requirements to be met for this duty to exist, which the court did not address.[880] Courts should make sure that these requirements have been met before finding that family members must accommodate each other.[881]

Furthermore, it can be argued that section 4(8)(a) of PIE places a limited housing duty on those private entities whose land have been occupied unlawfully. This section requires that the date of eviction be just and equitable. Courts seem to interpret this section to mean that individual private entities are obliged to "house" unlawful occupiers for a limited period.[882] Hence, in the absence of a delegation by the state or a common law duty of support, courts

---

[874] Western Cape Government *Inclusionary Housing* (2009) 9.

[875] Western Cape Government *Inclusionary Housing* (2009) 35.

[876] S 21(i) of Spatial Planning and Land Use Management Act 16 of 2013 does require a municipal spatial development framework to "identify the designated areas where a national or provincial inclusionary housing policy may be applicable". Moreover, Schedule 1 section (h) provides that provincial legislation may include measures regarding "to the approval of a development application which requires the use of land for identified inclusionary residential and economic

purposes". Such legislation has not been enacted. Section 48(8) of the Municipal Planning By-Law City of Johannesburg Metropolitan Municipality 1240 of 2016 simply states that inclusionary housing must be done in terms of the policy or municipal by-law. However, no such by-law has been adopted.

[877] M Kruger "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) *South African Law Journal* 328 342-343.

[878] *Omar NO v Omar* (9643/2007) [2011] ZAWCHC 415.

[879] *Omar NO v Omar* para 30.

[880] See, S Fick "Obtaining alternative accommodation through family: [discussion of Omar NO v Omar [2011] ZQWCHC]" (2015) 26 *Stellenbosch Law Review* 678 684.

[881] See, Fick (2015) *Stell LR* 689-690.

[882] See, the discussion of *Blue Moonlight* and *Changing Tides* in Chapter 2:3.1.1 and 3.1.2.1 respectively.

are less likely to deny an eviction sought by a private landowner. Yet, it may delay the eviction to allow time for the unlawful occupiers to secure alternative accommodation.[883]

The second reason why the eviction of the unlawful occupiers is a more likely outcome, where a private entity applies for the eviction, lies in the constitutional right to property.[884] Section 25(1) of the Constitution protects private owners from arbitrary deprivation of property. Even in its capacity as landowner, the state does not enjoy the protection of this provision. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,[885] the court found that a private owner's section-25(1) right is infringed even before it applies for an eviction.[886] The mere unlawful occupation of its land is an infringement of its right to property.[887]

This heavy weight placed on private ownership might not be justified under all circumstances. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[888] (hereinafter "*Changing Tides*") and *City of Johannesburg Metropolitan Municipality v Hlophe*,[889] for example, the same private developer applied for the eviction of unlawful occupiers from different buildings.[890] Due to the unlawful occupation, it probably did not acquire the properties at a high price and knew when it took ownership of the properties that they were unlawfully occupied by desperately poor persons. Nonetheless, it took transfer and proceeded to apply for the eviction of the occupiers, for the sole purpose of making a profit from the development.[891] To privilege the landowner solely because it is a private entity does not seem justified under these circumstances. Instead, the owner's right to property should carry less weight in such situations.

---

[883] See, the discussion of *Blue Moonlight* and *Changing Tides* in Chapter 2:3.1.1 and 3.1.2.1 respectively.

[884] S 25(1) of the Constitution.

[885] 2012 (2) SA 104 (CC).

[886] *Blue Moonlight* para 37. See also, *Modderklip SCA* para 21.

[887] It also strips the owner of its common law property rights. See, *Wintertide Trading 89 CC v Thompson* (2534/2009) [2010] ZANWHC 14 para 28, *Modderklip HC2* para 9, *Absa Bank bpk v Murray* para 11, *Grobler* para 23, *Modderklip* para 40.

[888] 2012 (6) SA 294 (SCA).

[889] [2015] 2 All SA 251 (SCA).

[890] This was the private developer, Changing Tides. See the discussion of these cases in Chapter 2:3.1.2.1and 3.1.2.2.

[891] See the discussion of these cases in Chapter 2:3.1.2.1and 3.1.2.2.

From the above, it is evident that the identity of the applicant is a weighty relevant circumstance in eviction matters. Since private owners do not have a constitutional duty to house unlawful occupiers and have a right to their property, an eviction order is a more likely outcome when they apply for an eviction. As the entity with the constitutional housing duty, the state is less likely to succeed in an eviction application where no alternative accommodation is available. In fact, it has been argued that an eviction sought by the state should never be allowed if the unlawful occupiers would be left homeless.[892] However, once other relevant circumstances such as the blameworthiness of the unlawful occupiers are considered, the absoluteness of this statement is called into question.[893] The heavy weight placed on the fact that the applicant is a private person might be unfounded under certain circumstances.

3.2 Size of group

The number of unlawful occupiers facing eviction is another weighty relevant circumstance in eviction matters. There are three explanations for the importance of this factor. First, it might be easier for the state to stretch its resources to house one or two additional persons.[894] Nevertheless, fact that the group is small has never been the basis of an alternative accommodation order.[895] As is shown below, courts tend to require the state to provide alternative accommodation to larger, rather than smaller groups.

Second, it may be possible to use the land productively in spite of the unlawful occupation if the group is very small. This was the case in *ABCS*. The developer would still have been able to develop the land for residential purposes, despite the unlawful occupation of the two people. He simply needed to allocate one of the housing units to the unlawful occupiers.[896]

Third, the size of the group comes into play when the effect of the eviction is explored. The eviction of a large group of people might cause problems for the landowner or the surrounding neighbourhood. The unlawful occupiers might simply reoccupy the land or move

[892] Kruger (2014) *SALJ* 333. Kruger refers to *Joe Slovo* para 214-215.

[893] See Chapter 4:4.2.

[894] 64 persons have even been considered a small group, see the discussion of *PE Municipality* in Chapter 2:2.2.

[895] In fact, in *Ives v Rajah* there was only one unlawful occupier, but the court did not grant an alternative accommodation order.

[896] *ABCS* para 29.

onto a nearby property. In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[897] (hereinafter "*Modderklip*"), for example, reoccupation of the land was feared and this was weighed against an eviction without alternative accommodation.[898] In *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd*[899] (hereinafter "*Skurweplaas*"), the unlawful occupiers had moved onto the land after their eviction in *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd*[900] (hereinafter "*Mooiplaats*").[901] Their first eviction simply relocated the problem. Furthermore, an eviction of a large group of people might affect the public order in some other way.[902] In *Mtshali v Tayengwa*[903] the eviction of the unlawful occupiers resulted in them taking refuge under a bridge.[904]

A more subtle consequence of an eviction of a large group of people is the attention that it draws. The bigger the size of the group, the more media attention eviction without alternative accommodation will receive and the more public outrage can be harnessed.[905] This was evident from the Sanral eviction discussed in Chapter 1, which resulted in the ministerial enquiry.[906] Courts might be cautious to make a decision that would spark such public outrage.

From this, it is clear that the size of the group of unlawful occupiers being evicted is a weighty factor. Small groups might be included in the state's short-term housing programme more easily or might be able to remain on the property without interfering with the use thereof. Larger groups might violate the rights of the applicant or other landowners. Moreover, the eviction of a large group without alternative accommodation could disturb the public order or spark public outrage.

---

[897] 2005 (5) SA 3 (CC).

[898] *Modderklip* para 14.

[899] 2012 (4) BCLR 382 (CC).

[900] 2012 (2) SA 337 (CC).

[901] *Skurweplaas (1st Resp HoA)* para 15.

[902] See Pope "Alternative accommodation conundrum" 136-137.

[903] (02312/2013) [2013] ZAGPJHC 219.

[904] *Mtshali v Tayengwa* para 22. See also, *Modderklip* para 44.

[905] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-15 – 12-16.

[906] See, Chapter 1:1. For an example of the type of media attention that the case received, see Phakathi B at Business Day Live *Housing Nightmare in Stark Relief* (2014) http://www.bdlive.co.za/national/2014/06/10/housing-nightmare-in-stark-relief 17-08-2016. For a discussion of the case, see Chilemba (2014) *CLC* 16-18.

3.3 Danger of living conditions

Whether it would be safe to deny the eviction is another relevant circumstance to be considered by the court in determining whether an eviction would be just and equitable. Continued occupation of the property might endanger the lives of the occupiers.[907] Hence, an immediate eviction order is required.[908] Often, this happens when the property was either not intended for residential occupation or not properly maintained for this purpose.[909]

Where the property was not intended for residential occupation, either the nature of the land might be unsafe for human habitation or the land might not have been suitably prepared and lacked basic services, such as running water and ablution facilities.[910] *Skurweplaas* is an example of an eviction matter where the nature of the land was unsafe for human habitation.[911] The land was dolomitic, which meant that it could subside at any moment.[912] An example of an eviction matter where the property was not prepared for residential occupation is *Changing Tides*. Since the case involved the occupation of a warehouse, there were "no toilet or ablution facilities, no water supply or sewage disposal, illegal electricity connections, inadequate ventilation and refuse, including human waste, strewn in open spaces".[913] The building was unsuited for human habitation and the unlawful occupiers had to be evicted.[914] In fact, all of the bad-building cases discussed in Chapter 2 are examples of cases where the occupation of residential property posed a health and safety risk due to the property not being

---

[907] As was found in *Changing Tides*, see Chapter 2:3.1.2.1.

[908] Chenwi (2008) *Harv L Rev* 130 argues that this urgency might result in an eviction without alternative accommodation. In *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants 2002 (1) SA 125 (T)* the occupied land was adjacent to a railway line, above a fuel pipe and below power lines. Living in close proximity to the fuel pipe was dangerous because it conveyed flammable fuels. It was very close to the soil surface. People digging holes for sanitation could puncture the pipe and cause a fire. There were also real dangers of living too close to power or railway lines, such as being electrocuted or run over, respectively. The unlawful occupiers were evicted without alternative accommodation.

[909] See examples in discussion below.

[910] The health and safety of the wider community could also be at play. *Unlawful Occupiers of the School Site v City of Johannesburg* [2005] 2 All SA 108 (SCA) involved an unlawful informal settlement established on land earmarked for schools. Since the dwellings were build all the way up to the road, without leaving a sidewalk, school children had to walk in the road to get to school. When they walked through the informal settlement they were molested and assaulted.

[911] Another example is the case of *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC). In this matter, an informal area built on dolomitic land was declared a "disaster area" in terms of s 55(1) of the Disaster Management Act.

[912] Dolomite stone dissolves in water and can therefore cause the land to subside, also known as sinkholes. SABC *Almost a Quarter of Gauteng Built on Dolomitic Land* (2011). See also discussion in Chapter 4:4.2.1.1.

[913] *Changing Tides* para 2.

[914] See the discussion of *Changing Tides* in Chapter 2:3.1.2.1.

properly maintained.[915] However, despite the apparent urgency, the eviction orders were only executed months after they were granted.[916]

The above shows that the danger posed by the living conditions of the unlawful occupiers is a weighty factor in eviction matters. Where it is too unsafe to allow the unlawful occupiers to remain in occupation, an eviction order will be made. However, in some cases, the emphasis placed on this factor seems a bit artificial since the evictions orders were only executed several months after they were granted.

3.4 Purpose of eviction

Whether the owner intends to use the property is a weighty consideration in eviction matters.[917] When the owner has no productive use for the property a refusal of the eviction order[918] or a delay in the granting or execution of an eviction order[919] until the state is able to provide alternative accommodation, is more likely.[920]

Private owners often need property to earn an income or to live in.[921] One example of a private eviction where the land was needed to earn an income is the High Court decision of *Brookway Property 30 (Pty) Ltd v People Who Intend Invading Portion 150 of the Farm*

---

[915] Another example is *Mainik CC v Ntuli (81/05/01) [2005] ZAKZHC 10*. This case involved 56 residential flats originally tenanted in 1995 by way of oral agreements. The rental price for this occupation varied between R350 and R450 per month. At the time of the eviction application only 17 of the flats were occupied and it was alleged that the occupation of fourteen of those flats was unlawful. The property was in disrepair, which posed a safety risk for the occupiers. The building needed to be electrically rewired and water pipes replaced. This could only be effected once the flats were evacuated. The private owner, a closed corporation, therefore cancelled the lease agreements and applied for the eviction of the occupiers. The eviction order was granted since continued occupation was unsafe.

[916] See, for example, the discussion of *Changing Tides*, where it was calculated that the execution of the eviction was postponed for eight months, in Chapter 2:3.1.2.1.

[917] In some cases the fact that the owner did not use the land meant that potential homelessness of the unlawful occupiers received more weight. See the discussion of *PE Municipality* in Chapter 2:2.2. See also, *Grobler* para 143, *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* 2012 (2) SA 337 (CC) para 18. Strydom and Viljoen stresses the importance of this circumstance in Strydom & Viljoen (2014) *PER/PELJ* 1208.

[918] As was the case in *PE Municipality*, see Chapter 2:2.2.

[919] Due to a postponement of the matter, a late eviction date, a postponement of the eviction date or a suspension of the eviction order.

[920] As was the case in *Modderklip*, see Chapter 2:2.3.

[921] Another reason is to use it for a good cause. This is the case where the owner is a charitable organisation. See, for example, *Dominican Sisters of the Congregation of St Catherine of Siena of King Williamstown v Nyamfu (3936/09) [2010] ZAECGHC 35*; *The Ark City of Refugee v Bailing*. Wilson also argues that the use of the property as a home by the owner might justify eviction without alternative accommodation. See, Wilson (2009) *SALJ* 281.

Zandfontein 317 J.R., Portion 124[922] (hereinafter "*Brookway*").[923] The owner of the land was a private company.[924] It had purchased seven pieces of land for approximately R 30 million with the purpose of developing a shopping complex.[925] Before they could develop the land, people started to occupy the properties unlawfully by erecting informal structures.[926] The number of unlawful occupiers grew gradually and by the time the matter was heard, approximately 400 informal dwellings had been erected on the property.[927] The unlawful occupiers were evicted so that the owner could use the land.[928] In fact, in all of the cases discussed in Chapter 2, in which the court granted an alternative accommodation order, the private owner wanted to use the land to earn an income.[929]

The applicant in *Ives v Rajah*[930] was a natural person, the owner of the property.[931] The reason for the eviction was that the owner wanted to use the property. The unlawful occupier had sold the property to a family friend.[932] She, however, remained in occupation, since she believed she was granted a life-long right to occupy the property.[933] This right was never registered.[934] Eventually, the property was sold in execution to Rajah, pursuant to a mortgage bond.[935] Ives was evicted so that Rajah could use the property.[936]

In *Port Elizabeth Municipality v Various Occupiers*[937] (hereinafter "*PE Municipality*"), the land was apparently not needed by the private landowners.[938] This factor distinguishes this

[922] (33786/2010) [2010] ZAGPPHC 129.

[923] Other cases where the private owner needed to use the land to earn an income are *Blue Moonlight*; *Wintertide Trading 89 CC v Thompson*; *Mtshali v Tayengwa*; *ABCS*.

[924] *Brookway* para 1.

[925] *Brookway* para 2, 7, 15.

[926] *Brookway* para 1.

[927] *Brookway* para 28.

[928] *Brookway* para 44.

[929] See Chapter 2:3

[930] 2012 (2) SA 167 (WCC).

[931] *Ives v Rajah* para 3.

[932] *Ives v Rajah* para 2.

[933] *Ives v Rajah* para 2.

[934] *Ives v Rajah* para 2.

[935] *Ives v Rajah* para 3. This is relevant since PIE does not require the consideration of alternative accommodation if the eviction is by a private person and the property was sold in execution pursuant to a mortgage bond. See s 4(7) of PIE.

[936] *Ives v Rajah* para 36.

[937] 2005 (1) SA 217 (CC).

[938] *PE Municipality* para 57.

case from other private eviction matters.[939] The non-use of the land is used to justify the denial of the eviction order.[940]

Although the intended use of the land plays a role in both private and state evictions, the court tends to be more cautious where the state is the applicant. The state can easily abuse this excuse.[941] However, where the state has a *bona fide* use for the property, such as converting it into an equestrian centre or using it to house others, this factor can carry much weight.[942]

Minister of Local Government and Housing for the Western Cape v Various Unlawful Occupiers of Houses Situated in Precincts 4 and 6, Delft Symphony,[943] is an example of a High Court matter where the state needed the land to fulfil its housing duty toward other people.[944] Here, 1600 people had unlawfully taken occupation of houses allocated to other people in the housing queue.[945] These houses were built as part of what was known as the state's N2 Gateway Project, which was aimed at upgrading informal settlements in the area.[946] The state immediately reacted to the unlawful occupation and applied for an urgent eviction in terms of section 5 of PIE within eight days of their occupation.[947] The eviction order was granted.[948]

In the High Court decision of *Resnick v Government of the Republic of South Africa*[949] (hereinafter "*Resnick*"), a single mother of two started occupying a military base owned by the state in 1999, without consent.[950] The base had not been in operation for 8 years.[951] After

---

[939] Another relevant factor is that the state was the applicant and not the landowner. See, *PE Municipality* para 61. See the discussion on *Changing Tides* regarding how the court distinguished this matter from *PE municipality* based on the use of the property in Chapter 2:3.1.2.1.

[940] *PE Municipality* para 59.

[941] *Joe Slovo* para 171.

[942] It can result in an eviction without alternative accommodation. See, Chenwi (2008) *Harv L Rev* 130.

[943] *Minister of Local Government and Housing for the Western Cape v Various Unlawful Occupiers of Houses Situated in Precincts 4 and 6, Delft Symphony* (102/08) [2008] ZAWCHC 15 (hereinafter "*Delft Symphony*").

[944] See also, *Vrygrond Development.*

[945] *Delft Symphony* para 4.

[946] *Delft Symphony* para 4.

[947] *Delft Symphony* para 5.

[948] *Delft Symphony* para 6. A similar example is that of *Vrygrond Development.*

[949] *Resnick v Government of the Republic of South Africa* 2014 (2) SA 337 (WCC).

[950] *Resnick* 9.

[951] *Resnick* 9.

she moved onto the property, she approached the state and offered to lease the property. They entered into a valid lease agreement and her occupation became lawful.[952] Some two years later, she fell into arrears and, after several failed negotiations, her contract was terminated in 2005.[953] She continued to occupy the property unlawfully.[954] The state needed Resnick to vacate the premises because the South African Police Service wanted to use it as an equestrian centre.[955] The purpose of this centre would be to "facilitate crime control within the area".[956] Resnick was evicted from the property without alternative accommodation.[957]

From this section, it is evident that the purpose of the eviction is important in both public and private evictions. Where the purpose of the eviction is that the applicant intends to use the land, a court is more likely to grant the eviction order. Usually, in public evictions, the state intends to use the land to perform an official function. In private evictions, the owner either wants to use the land to generate an income or to occupy it.

3.5 Duration of occupation

Another important relevant circumstance is the duration of the occupation. Both sections 4 and 6 of PIE emphasise the period of occupation. In terms of section-4 applications by private landowners, where the unlawful occupation had subsisted for less than 6 months a court is not obliged to consider whether alternative accommodation is available. As a result, a short occupation might weigh heavily in favour of an eviction, since section 4 provides that a lack of alternative accommodation would not play a role.[958]

The approach, to disregard a lack of alternative accommodation where the occupation has been short is, not shared across the board.[959] In *Mooiplaats*, the court concluded that, even though the consideration of alternative accommodation is excluded by section 4(6) of PIE,

[952] *Resnick* 9.
[953] *Resnick* 9-11.
[954] *Resnick* 12.
[955] *Resnick* 17.
[956] *Resnick* 17.
[957] *Resnick* 18-19.
[958] *Mainik CC v Ntuli* para 3; *Wintertide Trading 89 CC v Thompson* para 8. See also *Modderklip HC2* para 2.
[959] In Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 29 it is argued that this distinction has been done away with by the court.

the court would still consider it.[960] This is because the court is enjoined by the Constitution to consider *all* relevant circumstances and the emphasis placed by PIE on the duration of the occupation is, therefore, relevant but not decisive.[961] In *Modderklip,* the short occupation of the unlawful occupiers also did not lead to a disregard of the alternative accommodation consideration. One comment was that, although the application for eviction was made within 6 months of the unlawful occupation, by the time the decision was made they had been living there for a year.[962] Nevertheless, the fact that the applicant had acted quickly counted its favour. Moreover, the court's decision to take the lack of alternative accommodation into account could be justified on the basis that the unlawful occupiers had previously been evicted from elsewhere.[963] It might be that their previous occupation was for longer than six months and that the court had erred in not considering their lack of alternative accommodation in the earlier eviction. Hence, the court might be attempting to correct this wrong.[964] If this was the case, the court should have made this clear to be consistent with the norm of certainty under the rule of law. Accordingly, it is likely that a short occupation would weigh in favour of an eviction unless the occupiers moved onto the land because of an eviction where their lack of alternative accommodation was not considered.

Similar to the weight placed on short occupations, courts have been inconsistent regarding the weight placed on lengthy occupation periods. The oft-quoted statement in *PE Municipality*, which refers a reluctance to evict relatively settled occupiers without alternative accommodation, indicates that the length of occupation carries much weight.[965] In contrast, in some instances, the court has found that a long period of unlawful occupation weighed in favour of an eviction. In those instances, it is reasoned that persons who were able to occupy property for a long period without paying rent had the opportunity to save money for

---

[960] *Mooiplaats* para 16. This is the case that preceded *Skurweplaas* since the persons evicted from the land in *Mooiplaats* moved onto the farm Skurweplaas. See the discussion in Chapter 2:3.2.

[961] *Mooiplaats* para 9; *SOHCO* para 12; *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA) para 13. See also, Pope "A Tricky Balancing Act" in *DCM Festschrift* 10; Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 29.

[962] This is not strictly correct since only the initial occupiers would have been in occupation for a year. See the discussion of this case in Chapter 2:2.3.

[963] See the discussion of this case in Chapter 2:2.3.

[964] A similar argument can be made regarding the court's disregard of the short duration of occupation in *Skurweplaas*. See the discussion of this case in 3.2.

[965] *PE Municipality* para 28. Wilson interprets the quote in this way. See, Wilson (2009) *SALJ* 280.

accommodation and to find an alternative place to stay.[966] The difference could relate to the fact that, in *PE Municipality* the unlawful occupiers thought they had consent and were therefore not blameworthy.[967] In *Ives v Rajah*, the unlawful occupier knew about the pending eviction for three years, whereas in *Resnick* the unlawful occupier knew her occupation was unlawful since she had defaulted on the lease agreement.

The above indicates that the period of unlawful occupation can be an important relevant circumstance in eviction matters. A short period of occupation may weigh in favour of an eviction without alternative accommodation, whereas a longer period of occupation might weigh against an eviction without alternative accommodation. Courts have not been consistent in their approach. Sometimes a short period of occupation had carried no weight and other times a lengthy occupation had weighed in favour of an eviction without alternative accommodation. Whether a lengthy occupation is considered to weigh in favour of or against an eviction might have to do with the degree of blame to be placed on the unlawful occupiers.

3.6 Blameworthiness of the occupiers

The blameworthiness of the unlawful occupiers has often been considered by the court.[968] Unlawful occupiers are not automatically considered blameworthy since they are not necessarily responsible for their unlawful occupation. Hence, the blameworthiness considered by the court goes beyond mere unlawful occupation. On the one hand, unlawful occupiers can be blameworthy to the extent that they are responsible for the fact that they are facing eviction.[969] On the other hand, they can be blameworthy to the extent that they did not attempt to procure alternative accommodation for themselves.[970]

As concluded above, the state does not have a duty to accommodate people within its short-term housing programme, who intentionally create the emergency, which leaves them homeless.[971] There are two instances where it can be argued that persons intentionally create

[966] This was found in both *Ives v Rajah* para 26 and *Resnick* 17-18.

[967] See, *PE Municipality* para 50.

[968] See, for example, *Vrygrond Development*; *Daniels*; *Resnick*; *Ives v Rajah*. See also, Currie & De Waal *The Bill of Rights Handbook* 183; Chenwi (2008) *Harv L Rev* 130.

[969] *Vrygrond Development*; *Daniels*. See the discussion on blameworthiness in Chapter 3:4.

[970] *Resnick*; *Ives v Rajah*. See the discussion on blameworthiness in Chapter 3:4.

[971] Chapter 3:4.

the emergency that leaves them homeless. The first situation is when a lawful occupier does something intentionally, knowing that his actions will cause his lawful occupation to be terminated. By unlawfully dealing drugs from the property, the unlawful occupier, in *City of Cape Town v Daniels*[972] (hereinafter "*Daniels*"), contributed toward the termination of her lawful occupation and was evicted.[973] The second instance is when a person unlawfully occupies land with the sole purpose of receiving housing from the state. In *City of Cape Town v Persons who are presently unlawfully occupying erf 1800, Capricorn: Vrygrond Development*[974] (hereinafter "*Vrygrond Development*"), the unlawful occupiers were evicted when they occupied land earmarked for the housing of others.[975] As explained earlier, there is a fine line between a land invasion that was done out of need and one that was done out of greed.[976]

While blameworthiness on the part of the unlawful occupier means that the state does not have a duty to house them within its short-term housing programme, a court could still find that their eviction without alternative accommodation would not be just and equitable. Nonetheless, in both *Daniels* and *Vrygrond Development*, the blameworthiness of the unlawful occupiers weighed heavily in favour of an eviction.[977]

The blameworthiness of the unlawful occupiers in not securing their own alternative accommodation also plays a role. Unlawful occupiers are expected to do what they can to find alternative accommodation themselves and should not simply expect the state or the applicant to solve their housing problems.[978] In *Omar NO v Omar*, for example, the case was postponed so that the unlawful occupiers could have time to apply to old age homes or secure other accommodation. After approximately a year, the unlawful occupiers had done nothing

[972] (5090/2011) [2011] ZAWCHC 340.

[973] *Daniels* para 8. See the discussion of this case in Chapter 3:4.

[974] 2 All SA 438 (C).

[975] *Vrygrond Development* 7. See the discussion of this case in Chapter 3:4. This could result in an eviction without alternative accommodation. See, Chenwi (2008) *Harv L Rev* 130.

[976] See Chapter 3:4.

[977] See also, *Betta Eiendomme v Ekple-Epoh* 1085H-I, where the fact that the unlawful occupiers deliberately invaded the land was considered to weigh against them.

[978] *Omar NO v Omar*; *Ives v Rajah*; *Resnick*.

substantial in this regard and the court found that their lack of proactivity could not count in their favour.[979]

The court is even less sympathetic where the occupiers were aware of the illegality of their occupation for a long period and did not attempt to find a solution during that time. In both *Ives v Rajah* and *Resnick*, this was one of the reasons for evicting the unlawful occupiers without alternative accommodation.[980] Although it might be difficult for indigent people to find accommodation themselves, the court has stated that the least they could do is to apply to the state's housing programme.[981] Neither Ives nor Resnick took this initiative, although they had been in unlawful occupation for several years.[982] Such blameworthiness counted against them and they were evicted.[983] It is this blameworthiness in *Ives v Rajah* and *Resnick* that might distinguish the cases from *PE Municipality*, where the unlawful occupiers allegedly believed that they had consent to occupy the property and were not aware of their unlawful occupation for the duration thereof.[984]

In contrast with *Ives v Rajah* and *Resnick*, the blameworthiness of the unlawful occupiers, in *Modderklip*, seemed to count in their favour. Here, the court labelled the actions of the unlawful occupiers as a land invasion.[985] Accordingly, the court found that this meant they should not be evicted without alternative accommodation. In the absence of alternative accommodation, an eviction would likely cause them to simply reoccupy the land or invade someone else's land, which would just perpetuate the problem.[986] The size of the group seems to have made the difference in how this factor was addressed in these cases.

This section evidences that the blameworthiness of the unlawful occupiers can play a big role in eviction proceedings.[987] Unlawful occupiers can be blameworthy either based on the reason for the eviction or based on their lack of proactivity in finding alternative accommodation.

---

[979] *Omar NO v Omar* para 14, 15. The court, in *Olivia Road*, also required unlawful occupiers to be proactive in securing alternative accommodation. See, *Olivia Road* para 20. See also, Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 94.

[980] See, *Ives v Rajah* para 26; *Resnick* 17-18.

[981] Ives had not applied for housing, see *Ives v Rajah* para 12.

[982] *Ives v Rajah* para 26; *Resnick* 17.

[983] *Ives v Rajah* para 26. *Resnick* 18-19.

[984] *PE Municipality* para 50.

[985] *Modderklip* para 44.

[986] *Modderklip* para 14. See the discussion of *Modderklip* in Chapter 2:2.3.

[987] This is also argued in Wilson (2009) *SALJ* 281.

Blameworthiness might count in favour of an eviction without alternative accommodation of the unlawful occupiers. However, as seen in *Modderklip*, sometimes the blameworthiness of the unlawful occupiers has actually counted in their favour.

3.7 Vulnerability of occupiers

The vulnerability of the unlawful occupiers should be an important relevant circumstance in eviction matters. Section 4 of PIE identifies certain people that might be more vulnerable when facing eviction. These are disabled persons, the elderly, children and women-headed households.[988] In *Vrygrond Development*, where a group of people unlawfully occupied houses earmarked for low-cost housing,[989] the court distinguished between those unlawful occupiers who were vulnerable and those who were not.[990] Those who did not fall within one of the vulnerability groups were evicted without available alternative accommodation.[991] Persons falling within a vulnerable group were not evicted.[992] Such a distinction can be justified by the fact that those who do not fall within one of these groups may be more capable of working and earning the money required to rent their own accommodation.[993]

The approach in *Vrygrond Development* does not seem peculiar since it is in line with the provisions of PIE. It prioritises the vulnerable groups identified in the Act.[994] Nevertheless, this case is unique. Very rarely has a court differentiated between those unlawful occupiers who can be classified as "vulnerable" and those who cannot.[995] In *Government of the Republic of South Africa v Grootboom*[996] (hereinafter "*Grootboom*"), for example, the court was not

---

[988] S 4(6) and 4(7) of PIE. The importance of these circumstances is confirmed in United Nations *Basic Principles and Guidelines on Development-Based Evictions and Displacement A/HRC/4/18* (2013) para 31. See also, Muller (2014) *SAJHR*.

[989] *Vrygrond Development* 3. See the discussion of this case in Chapter 3:4.

[990] Vulnerability was determined in terms of the factors mentioned in ss 4(6) and 4(7) of PIE. It also distinguished between other classes of persons, such as those who would definitely be awarded housing in the scheme and those whose subsidies have not been granted yet (and might not be granted at all). It is within this group (those who might be allowed to occupy the respective homes if they are granted subsidies) that the court made the distinction between people falling within a vulnerable group and those who do not. See, *Vrygrond Development* 28.

[991] *Vrygrond Development* 28.

[992] Pending the outcome of their subsidy application, see *Vrygrond Development* 28.

[993] This relates to the capabilities approach of Sen, see A Sen "Equality of what?" (1980) 1 *The Tanner Lecture* 197 218. This approach is discussed in Chapter 6:2.

[994] See, *Vrygrond Development* 28.

[995] Pope "A Tricky Balancing Act" in *DCM Festschrift* 10.

[996] 2001 (1) SA 46 (CC).

prepared to treat those with children different from the other occupiers.[997] A reason for this might be that it will result in only some of the unlawful occupiers being evicted. This will not solve the landowner's problem since it will not obtain vacant occupation of the land.[998] Muller argues that the approach of the court should change to give more credence to the vulnerability of some unlawful occupiers.[999] This would bring its jurisprudence in line with the existing legal framework.

In this section, the relevant circumstances most often taken into account by courts, as well as those that courts are required to take into account were discussed. From this discussion, it is evident that courts are not always consistent in how they weight these circumstances in trying to determine a just and equitable court order. Often the same factor weighed in favour of an eviction without alternative accommodation in one case and weighed against an eviction without alternative accommodation in another. An explanation could be that these circumstances cannot be considered in isolation. The unique relevant circumstances of each case might justify a different weighting of a specific circumstance. For this reason, the way in which courts have balanced a mix of these relevant circumstances in actual cases, to determine whether an eviction order would be just and equitable, is discussed in the next section.

4 Just and equitable orders

Before the balancing of the above relevant circumstances is discussed, it is necessary to consider the constitutionally prescribed method of considering these circumstances. Section 172(1)(b) of the Constitution provides that, in constitutional matters, courts must issue orders that are just and equitable. All eviction matters are necessarily constitutional matters since they are governed by section 26(3) of the Constitution.[1000] Hence, all eviction orders must be just and equitable.[1001]

---

[997] *Grootboom* para 70-79.

[998] See Chapter 4.3 on equalising condition below.

[999] See, Muller (2014) *SAJHR* 46.

[1000] *PE Municipality* para 7; *Olivia Road HC* (hereinafter "*Olivia Road HC*") para 26; *Joe Slovo* para 17; *Mooiplaats* para 65; *Skurweplaas* para 84. See also, Pienaar *Land Reform* 748.

[1001] This is confirmed in s 4 and 6 of PIE.

This section explores the meaning of the just and equitable measure as interpreted by courts in eviction matters. The term is said to "elude easy description".[1002] As an abstract and vague measure, it is important to look at how the measure is defined in the context of evictions specifically. In the final part of the section, how this measure is applied in the granting of eviction orders is examined.

4.1 Definition of the just and equitable measure in the context of evictions

Only two Constitutional Court matters explore the meaning of the term 'just and equitable' in the context of eviction in detail.[1003] These are *PE Municipality* and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes.*[1004] It is this requirement that evictions must be just and equitable that sets evictions under PIE apart from common law evictions.[1005] Courts are required to look beyond merely establishing whether the occupation is unlawful, to whether an eviction would be just and equitable. Moreover, where occupation is found to be unlawful, an eviction is not guaranteed.[1006]

To determine whether an eviction is just and equitable the interests of the unlawful occupiers, the landowner[1007] and the public must be balanced.[1008] This means that an order should not be just and equitable toward the unlawful occupiers only, but also toward the other role players.[1009] The interests of the different role players are gauged from the relevant

---

[1002] Pope "A Tricky Balancing Act" in *DCM Festschrift* 25, referring to *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village 2013 (1) SA 583 (GSJ)*. See also, Smith (2014) *De Rebus* 41.

[1003] Currie and De Waal confirms that the meaning of this measure has not been explored sufficiently. Currie & De Waal *The Bill of Rights Handbook* 590.

[1004] 2010 (3) SA 454 (CC) (hereinafter "*Joe Slovo*").

[1005] Evictions in terms of the common law are generally based on the *rei vindicatio.* This remedy requires that the landowner prove that it owns the land, the land is in possession of the unlawful occupier and exists and is identifiable. If this is proved the eviction would succeed regardless of whether it would leave the unlawful occupier homeless. The requirements for the *rei vindicatio* can be found in *Chetty v Naidoo* 1974 3 SA 13 (A). See, Van der Walt *Property and Constitution* 159 fn145; Pienaar *Land Reform* 700.

[1006] *PE Municipality* para 33-37.

[1007] Pope (2011) *Speculum Juris* 137.

[1008] *PE Municipality* para 33, 37. That the interests of the public must weigh in the balance is confirmed in *Joe Slovo* para 99, 101. See also, Pope (2011) *Speculum Juris* 136-137, 143; Chenwi (2008) *Harv L Rev* 134; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 93; M Bishop "Remedies" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 9 9-56.

[1009] *Absa Bank bpk v Murray* para 22.

circumstances before the court. Balancing can have one of two outcomes. For one, there could be a finding that one right or interest outweighs the other. That is, one right or interest wins. The other is that a balance is struck between the rights and interests. That is, no right or interest wins, instead, a compromise is reached.[1010]

The 'just and equitable' criterion determines the weight attached to the interests of the role-players.[1011] This criterion is given content by the values underlying the Constitution: human dignity, equality and freedom.[1012] Another value, often associated with these, namely Ubuntu, should also be considered. Ubuntu is a customary law conception that "a person is a person through other people"[1013] and that people find their worth through the acknowledgement thereof by others.[1014] The effect of considering Ubuntu is that, although the individual rights of the role players are considered, their interdependence and duties toward one another are also acknowledged.[1015] In addition to these concepts, the form and theory of justice applied by the court also plays a role in what it considers just and equitable.[1016]

In applying this measure, the weight afforded to the interests and circumstances to be considered is at the discretion of the court.[1017] This discretion can be interpreted widely or narrowly. A narrow interpretation means that if the procedural requirements of PIE were met and there is no valid defence a court must grant an eviction order but has discretion as to the content of the order and the conditions attached. A wide interpretation gives the court discretion to deny an eviction order even if the procedural requirements were met and no defence exists.[1018] This wider discretion is preferred by the Supreme Court of Appeal.[1019] Such a wide discretion is necessary because each case has unique circumstances, which means that

---

[1010] Woolman & Botha "Limitations" in *CLOSA* 34-95. On the fact that balancing can requires compromise, see *Absa Bank bpk v Murray* para 21.

[1011] *PE Municipality* para 34-35.

[1012] *PE Municipality* para 15.

[1013] This is translated from the Zulu phrase "umuntu, ngumuntu ngabantu" B Nussbaum "African culture and Ubuntu - reflections of a South African in America" (2003) 17 *Perspectives* 17.

[1014] S Fick *Consenting to Objectifying Treatment? Human Dignity and Individual Freedom* LLM University of Stellenbosch (2012) 30.

[1015] *PE Municipality* para 37.

[1016] See Chapter 6.

[1017] *Absa Bank bpk v Murray*. See also, Pope "A Tricky Balancing Act" in *DCM Festschrift* 25; Liebenberg *Socio-Economic Rights* 278.

[1018] Pienaar *Land Reform* 750.

[1019] Pienaar *Land Reform* 750, referring to *Changing Tides*.

a blanket approach should not be employed.[1020] Some inference regarding how certain circumstances are balanced against each other can be made.[1021] Nevertheless, these inferences should not be used as templates for the adjudication of subsequent matters.[1022]

4.2 Application of the just and equitable measure in the context of evictions

Case law provides examples of how courts balance the possible relevant circumstances identified above. From this, it is possible to identify certain trends. This can assist in determining the specific situations wherein courts are likely to find that an eviction would not be just and equitable and to want to grant an alternative accommodation order to "make" the eviction just and equitable. This section focuses on cases where unlawful occupiers are unable to secure their own alternative accommodation and the state does not have an immediate duty to house the unlawful occupiers.[1023] The chapter focuses on the possible grounds other than the state's short-term housing duty for placing the duty to provide alternative accommodation on the state.

From case law, it is evident that an eviction without an alternative accommodation order would be the most probable outcome where the unlawful occupiers are blameworthy, coupled with the fact that the group is very small. *Daniels* is an example of such a case. This case involved the eviction of only six people.[1024] They dealt drugs from the property.[1025] As a result, they were evicted without an alternative accommodation order.[1026]

[1020] *Emfuleni Local Municipality v Builders Advancement Services CC* para 7; *PE Municipality* para 20. See also, Pope (2011) *Speculum Juris* 138; Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 92.

[1021] See Chapter 4:4.2.

[1022] Pienaar *Land Reform* 761.

[1023] There are certain situations in which this is the case. One such situation is where the unlawful occupiers do not qualify under the EHP. Another is where the state does not have the available resources to accommodate the unlawful occupiers. See Chapter 3. The reason why the section does not consider such situations is that situations, where the court has an immediate duty, technically do not involve a balancing exercise in terms of s 26(3) of the Constitution or PIE. The fact that the unlawful occupiers would not be homeless because the state must provide them with housing in terms of its short-term housing duty usually makes the eviction just and equitable.

[1024] *Daniels* para 20.

[1025] *Daniels* para 7-9.

[1026] See also, the discussion in 3.6.

The blameworthiness of the unlawful occupiers carries less weight if the size of the group is large. A court would be more reluctant to grant an eviction without an alternative accommodation order if the group is large. This is because the eviction of a large group of people without alternative accommodation might disturb the public order or cause the evictees to reoccupy the land or unlawfully occupy other land in the vicinity. *Modderklip* is an example of such a case. In this case, the unlawful occupiers were described as having committed a land invasion. Hence, they were acting out of greed. Nevertheless, since there were 40 000 unlawful occupiers, they could not be evicted without disrupting the social order.[1027]

Whatever the size of the group, where the land is state-owned and not needed, a denial of the eviction is the most probable outcome.[1028] In fact, in terms of *PE Municipality*, a denial of the eviction order is even a possible outcome where unlawfully occupied land is not needed and privately owned. However, this is less likely if the private owner itself applied for the eviction order.[1029] Moreover, where the group is small, a denial of the eviction order might even be the case where the landowner intends to use the land if the use of the land would not be frustrated by the continued occupation of the land.[1030]

The above situations illustrate the types of relevant circumstances that would involve a "win-lose" balancing of interests or rights. One right would outweigh the other. There are, however, situations where the court is reluctant to employ this type of balancing. In these situations, the rights or interests carry similar weight and a compromise is necessary.[1031]

Wilson refers to such situations as stalemate situations.[1032] A stalemate situation exists when the court finds that an eviction would not be just and equitable toward the unlawful occupiers, but a denial would not be just and equitable toward the landowner (or other role players). Circumstances that have caused stalemate situations are ones in which there is a large group

[1027] See the discussion of *Modderklip* in Chapter 2:2.3.

[1028] This is based on the fact that the identity of the applicant and the purpose of the eviction are both weighty factors. See, Chapter 4:3.1and 3.4 respectively.

[1029] In *Skurweplaas* the court found that the landowner does not need the land in the foreseeable future. *Skurweplaas (Appl HoA)* para 52.

[1030] See, for example, *ABCS*.

[1031] For the types of balancing, see Woolman & Botha "Limitations" in *CLOSA* 34-95.

[1032] This term is referred to by Stuart Wilson to refer to the conflict between s 25 and s 26 of the Constitution in eviction matters, in Wilson (2009) *SALJ* 285.

of unlawful occupiers, but the eviction is applied for by a private landowner and the land is needed for use and/or unsafe to occupy.[1033] Other circumstances that might cause a stalemate situation are ones in which the unlawful occupiers are vulnerable, not blameworthy[1034] and have lived on the land for a long time, but the land is privately owned and needed for use or unsafe to occupy.[1035] In fact, whenever the unlawful occupiers face homelessness purely because the state does not have the resources to accommodate them within its short-term housing programme[1036] and the private landowner wants to use the land a stalemate situation is created.

A possible compromise in balancing these rights and interests is a delay in the granting or execution of an eviction order.[1037] The purpose of the delay can either be to allow the unlawful occupiers to secure their own alternative accommodation or to wait until they can be accommodated in the state's short-term housing programme.[1038] A postponement of the matter, during the adjudication phase,[1039] until the state can provide alternative accommodation is an example of a delay in granting the eviction order. Likewise, a denial of the eviction, during the adjudication phase, with the understanding that a subsequent application for eviction can succeed if alternative accommodation can be guaranteed, is an example of a delay in granting the eviction order. The execution of the eviction order can be delayed, during the adjudication phase, by setting a date for an eviction long after the eviction order to give the state time to provide alternative accommodation. Execution can also be delayed by postponing the eviction date, during the return phase, because the state argues that it needs more time to provide alternative accommodation. Another way of delaying the execution of the eviction order is to suspend the eviction order, during the return phase. While these delays may occur in different phases, they have the same effect of ensuring a just

---

[1033] *Changing Tides* is an example of a case in which all of these circumstances were prevalent. See the discussion in Chapter 2:3.1.2.1.

[1034] On application of the statement in *Occupiers of Erven 87 and 88 Berea*, that evictions that leave people homeless cannot be just and equitable, a stalemate would be created even if unlawful occupiers were blameworthy.[1034] Nonetheless, in that case, the unlawful occupiers were not considered blameworthy. It can be argued that the statement is not absolute and that there can still be relevant circumstances, such as blameworthiness on behalf of the unlawful occupiers, which would make such an order just and equitable.

[1035] This seems to have been the case in *Omar NO v Omar* and *ABCS*. Instead of finding that the state must provide alternative accommodation, the court ensured that the unlawful occupiers could find alternative accommodation elsewhere.

[1036] Hence, not where it has no such duty because, for example, the unlawful occupiers were blameworthy.

[1037] See Strydom & Viljoen (2014) *PER/PELJ* 1223.

[1038] Kruuse (2011) *SALJ* 622.

[1039] For the phases, see Chapter 1:2.

and equitable outcome, considering all the relevant circumstances at that time, including that an immediate eviction would leave the unlawful occupiers homeless. This is the substantive requirement for an eviction and can be distinguished from the procedural requirements. It is important that this substantive requirement (that the eviction must be just and equitable) be met regardless of the procedural stage of the eviction. For this reason, all of these means of delay are dealt with together under the term "delay of the eviction" of "delay of an eviction".

In *Grobler v Msimanga*,[1040] the state reported that it would only be able to accommodate the unlawful occupiers after two years.[1041] By the time the matter was heard, only a few months of the two-year period were left. The court accepted the municipality's projections and set the eviction date for eight months later.[1042] In *Brookway*, the state, similarly, asked for a delay of two years.[1043] The court denied the request because the private landowner would be without the use of its property for too long.[1044] Accordingly, a delay of the eviction cannot cure a stalemate situation if the delay would be unreasonably long. Similarly, it cannot cure a stalemate situation if continued occupation would be too unsafe.[1045]

A crucial question is whether, in circumstances where a delay of the eviction would not lead to a just and equitable order, the court should subject an eviction order to conditions that equalise the balance between the private landowner and the unlawful occupiers and ensure a just and equitable outcome. In other words, does the existing legal framework allow the court to attach conditions to the eviction order simply to equalise the balance (equalising conditions)?[1046] The following section provides some insight into answering this question. The focus is on the situations where the interests of the private landowner compete with those of the unlawful occupiers. However, for the most part, the findings regarding the section 26(1) right of the unlawful occupiers can be applied equally to the other stalemate situations. Where relevant, any differences in respect of other stalemate situations, such as where the state needs the land or the occupation is too unsafe, are indicated.

[1040] [2008] 3 All SA 549 (W).

[1041] *Grobler* para 214.

[1042] *Grobler* para 219, 254.

[1043] *Brookway* para 15-16.

[1044] *Brookway* para 17.

[1045] This was the case in *Blue Moonlight*; *Changing Tides* and *Hlophe*.

[1046] Wilson argues that the court can make an alternative accommodation order to equalise the balance but does not explain on what grounds such a duty should be placed on the state. See, Wilson (2009) *SALJ* 278.

4.3 Use of the just and equitable measure to attach equalising conditions to eviction orders

An equalising condition in this context refers to a condition attached to the eviction order by the court to ensure that an eviction order that would otherwise not be just and equitable is made just and equitable. This is relevant in stalemate situations. It comes into play where a simple eviction would not be just and equitable toward the unlawful occupiers. A delay of the eviction would not be just and equitable toward the landowner or other role players. The aim of the equalising condition is to choose one of these options but to mitigate the injustice by providing a remedy for the party who is wronged. An alternative accommodation order could be considered an example of such a remedy.

An alternative accommodation order as an equalising condition is what the courts seem to allude to when they reference the popular quote from *PE Municipality* to justify ordering the state to provide alternative accommodation.[1047] The reasoning seems to be that, if an eviction order of relatively settled occupiers without alternative accommodation will not easily be just and equitable, it should be "made" just and equitable by ensuring accommodation.[1048] *Changing Tides* confirms this line of thought. It interprets section 4(12) of PIE to authorise the court to make an eviction just and equitable by attaching certain conditions to the order.[1049] This interpretation of PIE forms part of the existing legal framework. What needs to be determined, is whether the existing legal framework allows that the content of such a condition is that the *state* must provide alternative accommodation.

One possible justification for placing this duty on the state is that it is the entity with the primary housing duty.[1050] Orders to provide housing should be directed at the state. However, where the state has no duty to provide immediate housing,[1051] this cannot be a ground for an alternative accommodation order. Where the state has such a duty, the reason for an

[1047] The quote can be found at *PE Municipality* para 28. Such interpretation seems evident in *Joe Slovo* para 148, 313; *Changing Tides* para 15.

[1048] See *Joe Slovo* para 148, 313; *Changing Tides* para 15; *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* para 14, 16, 18. This is also the reasoning of Wilson in Wilson (2009) *SALJ* 278. On this interpretation by the court, see also Strydom & Viljoen (2014) *PER/PELJ* 1213-1214.

[1049] See case discussion in Chapter 2:3.1.2.1.

[1050] S 26(2) of the Constitution. See also Chapter 4:3.1.

[1051] As with the type of evictions discussed here.

alternative accommodation order would not be to equalise the balance but to force the state to comply with its duty.[1052]

Another possible justification for placing the duty to provide alternative accommodation on the state is that it is responsible for the unlawful limitation of rights.[1053] In the context of evictions that cause homelessness, the unlawful occupiers are deprived of their existing access to housing. This might constitute a limitation of their negative right of access to adequate housing.[1054] Moreover, if the eviction is not granted, the private landowner's use of its land is limited. This might constitute a limitation of its rights to property and equality.[1055] In addition, if it is a large group that cannot be evicted without alternative accommodation because the group would cause public disorder, reoccupy the land or occupy someone else's land, this might constitute a limitation of the owner's right of access to courts, as was found in *Modderklip*.[1056] The following section considers when, within the existing legal framework, the state can be held responsible for such limitations of rights and whether, within the framework, an alternative accommodation order can be granted as remedy.

5 Remedy for the limitation of rights

In *Brookway*, the court ordered the municipality to apply for funding from the provincial authority for the provision of alternative accommodation to the evictees before it.[1057] The court found that it would not order an eviction if the eviction would leave the unlawful occupiers homeless.[1058] If the state, "for whatever reason", was unable to provide alternative accommodation, the court would order it to pay constitutional damages to the landowner for the limitation of its rights.[1059] This is an example of the types of orders discussed in this section.

[1052] See Chapter 2:3.4.

[1053] S 26(1) of the Constitution.

[1054] S 26(1) of the Constitution.

[1055] S 25(1) and s 9 of the Constitution, respectively. Or, if the land was earmarked for housing then the right of access to adequate housing of the beneficiaries come into play. See, *Vrygrond Development*.

[1056] S 34 of the Constitution. For the discussion on *Modderklip*, see Chapter 2:2.3.

[1057] *Brookway* para 44.

[1058] *Brookway* para 38.

[1059] *Brookway* para 37.

As is evident from the *Brookway* decision, founding alternative accommodation orders on violations of human rights (other than the positive right of access to adequate housing)[1060] is not subject to the internal limitation of section 26(2) of the Constitution that the state must have available resources. In fact, the court in *Brookway* only aimed to grant such an order if both the municipality and the provincial government reported that they did not have the available resources.[1061] Since no evidence must be led regarding the state's available resources, an alternative accommodation order based on the second ground is less complicated than alternative accommodation orders based on the first ground (the positive right of access to adequate housing). Even where the state proves that it lacks the available resources, a court is technically not limited by this fact and can still grant an alternative accommodation order.[1062]

This section, first, explores whether an eviction order or the delay of the eviction in a stalemate situation might amount to an unconstitutional limitation of the human rights identified above, sections 9, 25(1) 26(1) or 34 of the Constitution. Second, it determines whether the existing legal framework permits granting an alternative accommodation order against the state as remedy for the limitation. Third, the section considers when the existing legal framework authorises holding the state liable for such limitations.

5.1 Limitation of rights

To determine whether there was an unconstitutional limitation of a right in the Bill of Rights, a two-stage process is followed.[1063] The first stage is to determine whether the right has been limited.[1064] Whoever alleges the limitation carries the burden of proving it.[1065] In this context, the burden would be on either the unlawful occupiers or the landowner. The second stage is to consider whether the limitation is constitutionally sound in terms of section 36(1) of the

[1060] S 26(1) of the Constitution.

[1061] *Brookway* para 37.

[1062] Currie & De Waal *The Bill of Rights Handbook* 569.

[1063] *S v Zuma* 1995 (2) SA 642 (CC) para 21; *S v Makwanyane* 1995 (3) SA 391 (CC) para 100, 208; *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* para 44; Woolman & Botha "Limitations" in *CLOSA* 34-3 – 34-4; Liebenberg *Socio-Economic Rights* 93.

[1064] *S v Zuma* para 21; *S v Makwanyane* para 208; *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* para 44; Woolman & Botha "Limitations" in *CLOSA* 34-3 – 34-4; Liebenberg *Socio-Economic Rights* 93-94.

[1065] *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* para 44; Woolman & Botha "Limitations" in *CLOSA* 34-3 – 34-4; Liebenberg *Socio-Economic Rights* 94.

Constitution.[1066] A limitation of a right in the Bill of Rights is constitutionally sound if it is done in terms of a law of general application and is reasonable and justifiable based on certain factors.[1067] The burden of proof in this regard lies with the entity that caused the limitation.[1068] In this context, since the aim is to get an alternative accommodation order against the state, the landowner or the unlawful occupiers would have to prove that their rights have been limited by the state. The burden of proof would then shift to the state to prove that the limitation was constitutional.

This two-stage process is subsequently followed with respect to the potential limitation of sections 9, 25(1), 26(1) and 34 of the Constitution in the context of evictions. The potential limitation of the property[1069] and housing[1070] rights is discussed separately, whereas the potential limitation of sections 9 and 34 is discussed together. Although some general observations can be made regarding the application of section 36(1) of the Constitution, the enquiry is factual and the outcome might differ depending on the facts.[1071]

5.1.1 Limitation of the right to property in terms of section 25(1) of the Constitution

Section 25(1) of the Constitution provides that a deprivation of property is only lawful if it is done in terms of a law of general application and is not arbitrary. The court, in *Changing Tides*, suggested that a denial of an eviction would amount to an unconstitutional infringement of the landowner's right in terms of section 25(1) of the Constitution.[1072] It found that a delay of the eviction might amount to a limitation of the right, but might be just and equitable.[1073]

[1066] *S v Zuma* para 21; *S v Makwanyane* para 208; *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* para 44; Woolman & Botha "Limitations" in *CLOSA* 34-6; Liebenberg *Socio-Economic Rights* 94.

[1067] S 36(1) of the Constitution.

[1068] *S v Makwanyane* para 102; *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* para 44; Liebenberg *Socio-Economic Rights* 94.

[1069] S 25(1) of the Constitution.

[1070] S 26(1) of the Constitution.

[1071] Currie & De Waal *The Bill of Rights Handbook* 154.

[1072] *Changing Tides* para 18. See also, Pope "A Tricky Balancing Act" in *DCM Festschrift* 21. Referencing *Blue Moonlight* para 37. On this mere acceptance that s 25(1) of the Constitution would be violated, see Strydom & Viljoen (2014) *PER/PELJ* 1207-1208.

[1073] *Changing Tides* para 25.

Kruger[1074] fleshes out this argument that a delay of an eviction[1075] might limit the landowner's right in terms of section 25(1)[1076] and argues that a court-sanctioned delay of the enjoyment of this right would amount to an unlawful deprivation. To succeed with this argument, there must have been a deprivation, which was either not authorised by a law of general application or arbitrary. He argues that any court-sanctioned delay an eviction can be classified as a deprivation, even within the strictest definition of deprivation provided by the Constitutional Court. That is, the definition given to deprivation in *Mkontwana v Nelson Mandela Metropolitan Municipality.*[1077] In this case, the court found that deprivation is a "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society".[1078] This is because the landowner had to carry the financial burden of obtaining an eviction order, as well as endure the loss of use of his property during this time. Yet, even after obtaining the order, it cannot use its land.[1079]

Kruger relies on the decision in *Changing Tides*, where it was found that section 4(8) of PIE sanctions a delay in the execution of an eviction order.[1080] Similarly, section 4(6), 4(7) and 6(3) of PIE authorises a delay in the granting of an eviction order. This means that deprivation is sanctioned by a law of general application.[1081] Hence, his argument is that a delay of the eviction is a deprivation that is done in terms of a law of general application.

For such a deprivation in terms of a law of general application to be unlawful under section 25(1) of the Constitution, it must be arbitrary. An arbitrary deprivation is one where sufficient reason for the deprivation is not provided in the authorising law.[1082] Kruger argues that a delay of an eviction is arbitrary since it places an unjustified housing duty on a single private

---

[1074] Kruger (2014) *SALJ*.

[1075] Kruger focuses on delays in the execution of eviction orders. As explained above, the argument can be applied to other types of court-sanctioned delays as well.

[1076] See also, Van der Walt *Constitutional Property Law* 257-258.

[1077] 2005 (1) SA530 (CC).

[1078] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA530 (CC) para 32, as referenced in Kruger (2014) *SALJ* 336-337. See also, Currie & De Waal *The Bill of Rights Handbook* 538-439.

[1079] Kruger (2014) *SALJ* 334-335.

[1080] This section requires the court to decide on a just and equitable date for the eviction. *Changing Tides* para 25.

[1081] Kruger (2014) *SALJ* 337-338. See also, Van der Walt *Constitutional Property Law* 257.

[1082] Kruger (2014) *SALJ* 338, relying on *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (hereinafter "*FNB*") para 100. See also, Currie & De Waal *The Bill of Rights Handbook* 542-543; Chenwi (2008) *Harv L Rev* 116.

landowner.[1083] This was argued in *Modderklip* and confirmed by the court in *Skurweplaas.*[1084] Accordingly, he contends that a delay of an eviction amounts to an unlawful deprivation of property.[1085]

A counterargument could be that the temporary burden would not be arbitrary if the landowner acquiesced to the unlawful occupation[1086] or knowingly acquired ownership of property that was unlawfully occupied.[1087] In terms of this argument, a delay of the eviction order would be arbitrary if the landowner had not acquiesced to the unlawful occupation or had not knowingly acquired property that was unlawfully occupied. Moreover, the knowledge or consent of the landowner is unlikely to be determinative regarding whether a delay would be arbitrary, but would rather only be a factor in the decision.

Van der Walt argues that a deprivation in terms of PIE would only be arbitrary if it amounts to an "unnecessarily heavy" burden on the landowner.[1088] That is, if a landowner is unable "to reclaim its land within a reasonable time."[1089] It could be argued that a very long delay of the eviction order in a stalemate situation would fall into this category. While Kruger does not expressly limit his analysis to long delays, his focus is on such delays. That is, delays linked to the date on which the state is able to provide alternative accommodation within its short-term housing programme, which could be "a number of years".[1090] Accordingly, a long delay of the eviction order might amount to an unlawful deprivation of the landowner's property.[1091] This is confirmed in *Brookway* where the court found that a two-year delay would amount to a violation of section 25(1).[1092] If this approach is followed, the fact that the landowner acquiesced to the unlawful occupation or acquired property knowing that it is unlawfully occupied would affect whether a delay would be considered unreasonably long.

[1083] Kruger (2014) *SALJ* 349.

[1084] See *Modderklip HC2* para 52; *Modderklip SCA* para 31; *Modderklip* para 15, 19; *Skurweplaas HC* para 9-10.

[1085] Kruger (2014) *SALJ* 357.

[1086] If it had allowed the unlawful occupation for a long time.

[1087] *Blue Moonlight* para 31. This is argued in Strydom & Viljoen (2014) *PER/PELJ* 1232.

[1088] Van der Walt *Property and Constitution* 55. A Van der Walt *Constitutional Property Law* (2005) 161; Van der Walt *Constitutional Property Law* 246. See also, see Kruger (2014) *SALJ* 355.

[1089] Van der Walt *Property and Constitution* fn 108.

[1090] Kruger (2014) *SALJ* 335.

[1091] Van der Walt *Constitutional Property Law* 256. This is in accord with the contention by the landowner in in *Blue Moonlight* para 31 that an indefinite delay would amount to an arbitrary deprivation. See also, Kotze *Effective Relief* 10.

[1092] *Brookway* para 37.

In terms of the two-stage process, if it is found that section 25(1) of the Constitution is limited, the next step will be to consider whether the limitation is constitutional in terms of section 36(1) of the Constitution. Kruger argues that this subsequent test against the limitation clause cannot point to a lawful limitation if the deprivation has already been found to be arbitrary in terms of section 25(1) of the Constitution. This is because an arbitrary deprivation is by definition one without justification. It cannot be reasonable and justifiable in terms of section 36(1) of the Constitution.[1093]

Based on this argument, an unreasonably long delay of an eviction in a stalemate situation would not be constitutionally sound and should not be granted. To prevent the limitation the eviction order must be executed within a short time. However, in a stalemate situation, an eviction within a short time would not be just and equitable toward the unlawful occupiers. Hence, if a court chooses to equalise the balance in a stalemate situation through a delay of the eviction for a long time,[1094] this is likely to place an unconstitutional limitation on the landowner's right to property.

Whether the state can be held liable to prevent or remedy this limitation is discussed in Section 5.3 below. The following section considers whether the granting of an eviction order, to be executed within a short time, would amount to an unconstitutional limitation of the unlawful occupiers' right in section 26(1) of the Constitution.

5.1.2 Limitation of the negative right of access to adequate housing in terms of section 26(1) of the Constitution

In *Grootboom*, the Constitutional Court found that section 26(1) of the Constitution entrenches at least a negative right not to be deprived of existing access to adequate housing.[1095] To determine whether an eviction of unlawful occupiers would amount to an

[1093] He relies on *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para 63, where the court found that an arbitrary differentiation between persons cannot amount to a reasonable and justifiable limitation to the right to equality. See, Kruger (2014) *SALJ* 357, fn 174. See also, Currie & De Waal *The Bill of Rights Handbook* 557-558; A Van der Walt "The limits of constitutional property" (1997) 12 *Southern African Public Law* 275 275-330.

[1094] By postponing the matter, postponing the eviction date or suspending the eviction order.

[1095] *Grootboom* para 34. The existence of such a right is contentious, especially since the court, in *TAC*, found that no standalone right in terms of s 27(1) of the Constitution exists. See *TAC* para 39. However, with reference to *TAC* the court in *Jaftha v Schoeman; Van Rooyen v Stoltz* para 32-33 found that s 26(1) does not create a standalone *positive* right, but does constitute a standalone *negative* right against interference. Further, Pieterse argues convincingly, that a negative right can be found within the state's duty to respect and protect human rights. This places a negative duty on the state to refrain from interfering with someone's existing rights, such as

unconstitutional limitation of this negative right, the two-stage process must be followed. Accordingly, it must first be examined whether an eviction of unlawful occupiers could constitute a limitation of the unlawful occupiers' right of access to adequate housing. If so, the limitation clause must be applied to determine whether the limitation could be constitutional.

It is difficult to determine whether an eviction would amount to a loss of existing access to adequate housing since the Constitutional Court refused to give content to the right.[1096] One characteristic of the occupation in eviction matters that might be difficult to reconcile with the notion of adequate housing is that it is unlawful. It could be argued that unlawful occupation cannot be considered "adequate housing". In fact, one of the things that courts place emphasis on when granting alternative accommodation orders is that the accommodation must be secure against eviction and provide some form of tenure security.[1097] This corresponds with the international law understanding of the term adequate housing, which includes legal tenure security; availability of services to ensure health, nutrition, comfort and security; affordability; habitability; accessibility; proximity to essential facilities; and cultural adequacy.[1098] Tenure security is threatened when occupation is unlawful.

Another characteristic of the occupation in some eviction matters that might be difficult to reconcile with the notion of adequate housing is that it poses a risk to the health and safety of the unlawful occupiers. This was the case in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*.[1099] It is equally hard to imagine that such occupation would be considered adequate.

If unlawful or unsafe occupation is not seen as adequate housing, an eviction would not constitute a violation of the occupiers' negative right not to be deprived of their existing

---

their existing access to adequate housing. Likewise, it requires the state to prevent such interference by others. This means that such a negative duty at least rests on the state, if not on private parties. See, M Pieterse "Towards a useful role for section 36 of the Constitution in social rights cases - Residents of Bon Vista Mansions v Southern Metropolitan Local Council" (2003) 120 *South African Law Journal* 41 45-46. See also, Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-17 – 33-19.

[1096] See the discussion on *Grootboom* in Chapter 2:2.1. See also the criticism against providing content to this right in Chapter 3:6.1.

[1097] See the discussion in 5.2.

[1098] This is also a characteristic of the right to adequate housing in terms of the ICESCR see United Nations Committee on Economic, Social and Cultural Rights *General Comment No 4* (1991) para 8(a); Muller *The Impact of Section 26 of the Constitution* 19.

[1099] 2008 (3) SA 208 (CC).

access to *adequate* housing. Accordingly, an alternative accommodation order could not be justified on the basis that it remedies the violation of the unlawful occupiers' negative right in terms of section 26(1) of the Constitution.

This might be considered too strict an interpretation of section 26(1). It could be argued that the loss of any access to housing, whether adequate or not, would amount to a limitation of the negative right of access to adequate housing.[1100] In terms of this interpretation, the rights of people, who are left homeless by the eviction, are limited.

Another argument against the finding that there was a limitation of the right of access to adequate housing relates to the idea that a person's rights are always limited to the extent that they may not interfere with the rights of others to exercise their rights.[1101] Accordingly, the unlawful occupiers' right of access to adequate housing is limited to the extent that they must not interfere with the right to property of landowners. Should a court dismiss this argument, the second step of the process must be followed.

Accordingly, it must be determined whether the limitation is done in terms of a law of general application and whether it is reasonable and justifiable.[1102] As with the section-25(1) enquiry, if an eviction order in terms of PIE amounts to a limitation, then the limitation is done in terms of a law of general application. In respect of whether the limitation is reasonable and justifiable, five factors must be considered:[1103]

> " (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

All of the factors are considered simultaneously, which means that a finding that one of the factors points to an unlawful limitation does not necessarily prevent the consideration of

---

[1100] Currie and De Waal states that Yacoob in *Joe Slovo* para 116 acknowledges this. Currie & De Waal *The Bill of Rights Handbook* 586.

[1101] This is already relevant in the first stage. Ackermann J finds this in relation to the right to privacy, see *Bernstein v Bester NO and others* 1996 (2) SA 751 (CC) para 79, referred to in Woolman & Botha "Limitations" in *CLOSA* 34-23.

[1102] S 36(1) of the Constitution.

[1103] S 36(1)(a)-(e) of the Constitution.

other factors.[1104] Inquiring into the nature of the right can be understood to require the court to determine the importance of the right in relation to other rights.[1105] However, the Constitutional Court has found that rights should not be ranked.[1106] Still, the protection of some rights would be more important to "an open and democratic society".[1107] Hence, the limitation of a more "important" right would require more compelling justification.[1108] Protection of the right of access to adequate housing is considered "important" in such a society.[1109] Accordingly, justification for the limitation of such a right must be compelling.

The factor relating to the importance of the purpose of the limitation requires the court to determine the purpose of the limitation first and then to examine its importance.[1110] In the context of evictions, the purpose of the limitation is to prevent unlawful occupation[1111] and the further limitation of the landowner's right to property.[1112] The purpose of the limitation is important because it ensures the protection of the constitutional right of the landowner.[1113] However, it might be less important in situations where the landowner has no intention to use the property in the near future. More broadly, the purpose of the limitation is to uphold social order. Rights are meaningless if they can be limited by others without consequence. Hence, in an open and democratic society, the prevention of illegal self-help would be an important objective. However, this self-help might occur because of need, not greed.[1114]

[1104] Woolman & Botha "Limitations" in *CLOSA* 34-93 in respect of *S v Makwanyane*.

[1105] Woolman & Botha "Limitations" in *CLOSA* 34-70.

[1106] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 29-31; Woolman & Botha "Limitations" in *CLOSA* 34-70 – 34-71.

[1107] S 36(1) of the Constitution. See, Woolman & Botha "Limitations" in *CLOSA* 34-71 – 34-72.

[1108] Woolman & Botha "Limitations" in *CLOSA* 34-71.

[1109] *Jaftha v Schoeman; Van Rooyen v Stoltz* 39; Woolman & Botha "Limitations" in *CLOSA* 34-72. Another argument is that the nature of the right refers to whether the right can in fact be limited. Arguably, the right to housing cannot be limited. Any limitation of the right completely deprives the holder of his enjoyment thereof. See, H Cheadle "Limitations" in Cheadle H, et al. (eds) *South African Constitutional Law: The Bill of Rights* (2002) 706-708; as referred to in Woolman & Botha "Limitations" in *CLOSA* 34-73. However, this argument is flawed in that it insinuates that some rights cannot be limited. This is not in line with the Constitution. See, Woolman & Botha "Limitations" in *CLOSA* 34-73.

[1110] Woolman & Botha "Limitations" in *CLOSA* 34-73.

[1111] As is clear from the title of PIE.

[1112] Unlawful occupation constitutes a limitation of s 25(1) of the Constitution, see *Blue Moonlight* para 36.

[1113] S 25(1) of the Constitution.

[1114] See Chapter 3:4. See also, *Modderklip* para 44.

In respect of the factor regarding the nature and extent of the limitation, the greater the limitation, the more compelling the justification must be.[1115] In an eviction matter that leaves the unlawful occupier homeless, there is a total loss of enjoyment of the right. However, where alternative accommodation is available or provided by the state, the extent of the limitation is mitigated. Hence, if an eviction would leave the unlawful occupiers homeless, the extent of the limitation would be great and would require compelling justification.

The fourth factor considers the relationship between the limitation and its purpose. In the context of eviction of unlawful occupiers, there is a direct relationship between the limitation and the purpose thereof. The unlawful occupation and the limitation of the landowner's right to property are both ended by the eviction.

Finally, a court must consider whether there are less restrictive means to achieve the purpose of the limitation. In the context of eviction, less restrictive means are possible. The land could be expropriated,[1116] which would end the limitation of the right to property, as well as the unlawful occupation. However, this might have separation of powers implications.[1117] Alternative accommodation could be provided to the unlawful occupiers by the state, which would prevent the complete loss of the enjoyment of the right of access to adequate housing by the unlawful occupiers. The landowner could be compensated, which would mitigate the continued limitation of its right.

The fact that less restrictive means could be identified does not mean that the limitation is not justifiable. A court will always be able to come up with less restrictive means.[1118] Two considerations affect the weight of this factor. One consideration is whether these less restrictive means are as effective at achieving the purpose for the limitation.[1119] None of the less restrictive means would be effective at addressing the social order issue of condoning unlawful behaviour. Hence, where the unlawful occupation occurred out of greed, these less

---

[1115] *S v Manamela* 2000 (3) SA 1 (CC) para 32,69; as referred to in Woolman & Botha "Limitations" in *CLOSA* 79.

[1116] S 9(3) of the National Housing Act allows for expropriation by municipalities for purposes of housing, referred to in Strydom & Viljoen (2014) *PER/PELJ* 1236.

[1117] See Chapter 5.

[1118] *S v Mamabolo* 2001 (3) SA 409 (CC) para 49, as referred to in Woolman & Botha "Limitations" in *CLOSA* 89.

[1119] In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) para 81, the court found that means cannot be considered less restrictive in terms of s 36(2)(e) if it is less effective. Referred to in Woolman & Botha "Limitations" in *CLOSA* 34-91.

restrictive measures should not be taken. Moreover, only the alternative accommodation order really achieves the purpose of protecting the landowner's right to property. The other consideration that affects the weight of the less restrictive means is the burden placed on the resources of the state.[1120] All of the less restrictive measures place a heavy burden on the resources of the state. This is especially relevant in stalemate situations, where the reason for the limitation is often due to the limited resources of the state – the state was unable to provide alternative accommodation in terms of the EHP to prevent the loss of access to housing. Bypassing of the EHP in this way creates separation of powers issues.[1121]

Three of the factors – the nature of the right, the extent of the limitation and availability of less restrictive means – suggest that the limitation is unconstitutional. Two factors – the importance of the purpose of the limitation and the relationship between the limitation and its purpose – point to the limitation being constitutional. Clearly, it yet again comes down to a tension between the landowner's right in terms of section 25(1) of the Constitution and the unlawful occupiers' rights in terms of section 26(1) of the Constitution.

A circumstance such as greed or blameworthiness on the part of the unlawful occupiers would tip the scale in favour of the landowner. However, where the unlawful occupiers are poor; have been occupying the land for a long time; and qualify for the state's housing scheme, an argument can be made that an eviction would not be reasonable and justifiable. Accordingly, an eviction would amount to an unlawful limitation of the unlawful occupier's rights.

If this final argument succeeds, a delay of the eviction would unlawfully limit the rights of the landowner, while ordering that the eviction order be executed within a short period would unlawfully limit the rights of the unlawful occupiers. The unlawful limitation of the rights of one of the parties is inevitable. Regardless of the side of the balance that the court chooses to uphold, any order would amount to the unlawful limitation of the rights of one of the parties.

However, as indicated earlier in this section, it is unlikely that an eviction would constitute a limitation of the unlawful occupiers' right in terms of section 26(1) of the Constitution. The

[1120] A judge will always be able to find less restrictive means, but it might have great administrative or cost implications and might negatively affect the rights of others. *S v Manamela (Director-General of Justice Intervening)* para 95; as referred to in Woolman & Botha "Limitations" in *CLOSA* 34-89.

[1121] See Chapter 5:3.

fact that such an argument has not been raised in eviction matters suggests that litigants do not consider it a viable argument. This does not mean that an eviction order with immediate effect would be just and equitable.[1122] It only means that justification for an alternative accommodation order against the state is unlikely to be based on the unconstitutional limitation of the unlawful occupiers' negative right of access to adequate housing.

5.1.3 Limitation of other rights

Even when an eviction that would leave the unlawful occupiers homeless is considered just and equitable toward them, it could still be argued that the unlawful occupiers should not be evicted because an eviction would cause them to reoccupy the land, unlawfully occupy other land or disturb the social order. In *Modderklip* an eviction order had been granted but could not be executed based on these reasons, as well as the fact that the execution would be too expensive.[1123] The court found that these facts made it impossible for the landowner to execute the eviction order and this amounted to an unlawful limitation of its right of access to courts.[1124] Furthermore, the limitation could not be lawful in terms of section 36 of the Constitution, since it was not done in terms of a law of general application.[1125]

The facts that led to this decision were unique. This influences the extent to which the case can be used as precedent. For one, the reason for the landowner's inability to execute the order was that the group of unlawful occupiers was extremely large; there were some 40 000 people. Hence, the case can only be relied upon where the size of the group is similarly problematic. Two, the delay in the execution of the eviction order was not court ordered in terms of PIE. Accordingly, the limitation could not be constitutional.[1126]

The extent to which this decision could apply to situations where there is a delay of an eviction, in terms of PIE, is uncertain.[1127] If there is a delay of an eviction in respect of a large group of unlawful occupiers due to factors similar to that in *Modderklip*, could it still be

[1122] See *Occupiers of Erven 87 and 88 Berea* para 57.
[1123] *Modderklip* para 9, 14, 44, 45.
[1124] S 34 of the Constitution.
[1125] *Modderklip* para 52.
[1126] In terms of s 36 of the Constitution.
[1127] In *Blue Moonlight SCA* para 70-71 the precedent value of *Modderklip* is questioned. See also, Kruger (2014) *SALJ* 340-341.

argued that the delay constitutes an unconstitutional limitation of the landowner's right of access to courts? To answer this question the two-stage process must be followed.

The first stage entails determining whether the landowner's right of access to courts was limited. If the reasons for the inability to execute the order are similar to *Modderklip*, then this case is precedent for the fact that the landowner's right of access to the court would be limited.

During the second stage, one must determine whether the limitation is constitutional in terms of section 36 of the Constitution. Hence, it must be determined whether the limitation was done in terms of a law of general application and whether it is reasonable and justifiable. If there is a delay of an eviction in terms of PIE, the limitation would be in terms of a law of general application.[1128] To determine whether the limitation is reasonable and justifiable, the factors listed in section 36 must be considered.[1129]

One of these factors, "the nature and extent of the limitation",[1130] renders a particularly interesting outcome when applied in this context. The extent of the limitation is that the landowner is unable to protect his constitutional right to property. Hence, the actual issue in such a situation is the protection of the landowner's right to property.[1131]

With regard to this notion, *Modderklip* is a perfect example of an equalising condition.[1132] An eviction would not have been just and equitable toward other landowners,[1133] the public[1134] and possibly also the unlawful occupiers. A delay of the eviction would not have been just and equitable toward the landowner since it would violate its right to property. To remedy this violation and equalise the balance, the court suspended the eviction order subject to the condition that the landowner must be compensated in the form of constitutional damages.[1135]

[1128] Kruger (2014) *SALJ* 337-338. See also, Van der Walt *Constitutional Property Law* 257.

[1129] S 36(1)(a)-(e) of the Constitution.

[1130] S 36(1)(c) of the Constitution.

[1131] Liebenberg *Socio-Economic Rights* 285.

[1132] See Van der Walt *Constitutional Property Law* 162.

[1133] This is because the unlawful occupiers would probably reoccupy the land if evicted without alternative accommodation.

[1134] This is because the unlawful occupiers might occupy other land unlawfully.

[1135] See Van der Walt *Constitutional Property Law* 162. For a comprehensive argument in favour of compensation for these kinds of deprivations, see K Bezuidenhout *Compensation for Excessive but Otherwise Lawful Regulatory State Action* LLD University of Stellenbosch (2015) 286-287.

Hence, if a court orders a delay of an eviction to preserve the public order, this might amount to a limitation of the landowner's right of access to courts. However, it is more likely to amount to an unconstitutional limitation of the landowner's right to property.[1136]

Similar to this finding, the allegations regarding limitation of section 9 of the Constitution are in fact about the landowner's right to property.[1137] The Supreme Court of Appeal, in *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd*[1138] (hereinafter *Modderklip SCA*"), found that continued occupation would amount to an unfair discrimination against the landowner. This is because the landowner is required to carry the burden of housing the unlawful occupiers. Placing this burden on the landowner and not equally on other private persons is not justified.[1139] To determine the correctness of this statement the two-stage process must be followed. As with the limitation analysis for section 34 of the Constitution, application of the second stage reveals that the limitation is actually that of the landowner's right to property. That is because the factor relating to the extent of the limitation would again indicate that the extent of the limitation is that the landowner is unable to enjoy its constitutional right to property. Hence, the actual issue in such a situation is the limitation of the landowner's right to property.[1140] The fact that the occupation amounts to unequal treatment of the landowner could be used to confirm that the deprivation is arbitrary.[1141]

Wherever the rights of the parties are unconstitutionally limited, the possibility of a remedy is created.[1142] The form that such a remedy may take and whether it can be in the form of an alternative accommodation order against the state is explored below.

[1136] For the reasons provided in Chapter 4:5.1.1.

[1137] S 25(1) of the Constitution.

[1138] 2004 (6) SA 40 (SCA).

[1139] See discussion of *Modderklip SCA* in Chapter 2:2.3. A similar argument is made in *Skurweplaas.* See Chapter 2:3.2.

[1140] Liebenberg *Socio-Economic Rights* 285.

[1141] This relates to Kruger's argument in respect of arbitrariness. See Chapter 5:5.1.1.

[1142] S 38 of the Constitution reads, "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."

5.2 Appropriateness of an alternative accommodation orders as remedy

In a stalemate situation, the court finds that an eviction would not be just and equitable toward the unlawful occupiers or the public and a delay of the eviction would not be just and equitable toward the landowner. To solve the tension, the court might decide either to grant the eviction and remedy the limitation of the unlawful occupiers' right or to delay the eviction and remedy the limitation of the landowner's right. Section 38 of the Constitution stipulates that, upon the unconstitutional limitation of a right in the bill of rights, the court may grant any relief it finds appropriate.

Modderklip is the only case in which a remedy had been specifically based on the violation of one of the rights discussed in this chapter. In this matter, the court ordered the state to pay constitutional damages to the landowner and not to provide alternative accommodation to the unlawful occupiers.[1143]

The purpose of constitutional damages is to provide relief for the unconstitutional violation of a constitutional right.[1144] Three types of constitutional damages can be identified, damages to correct a loss, damages as a punitive measure[1145] and symbolic damages.[1146] The first type of damages, damages to correct a loss, is most relevant to the current discussion. This is because the purpose of awarding relief is to "make" the order just and equitable.

Constitutional damages should only be granted as last resort if no other remedy is available.[1147] In the current context a constitutional remedy, like constitutional damages, might be the only solution to a stalemate situation. Kotze argues that the constitutional damages awarded in *Modderklip* cannot be considered effective. Her main argument in this regard is that the order did not realise the right of access to adequate housing of the unlawful

[1143] See the discussion on *Modderklip* in Chapter 2:2.3.

[1144] Constitutional damages can be direct or indirect. Indirect constitutional damages rely on relief provided in terms of legislative provisions or common law rules to remedy the limitation of a right. Direct constitutional damages flows directly from the constitutional provisions and are not awarded in terms of legislation or common law. Kotze *Effective Relief* 108, 110, 114.

[1145] While punitive damages might be an attractive form of relief to prevent future violations by the state, in light of the fact that the state already lacks the requisite resources to provide emergency housing requiring it to pay money as a punitive measure does not make sense.

[1146] Kotze *Effective Relief* 114.

[1147] Kotze *Effective Relief* 106.

occupiers in that it did not provide legally secure tenure for the unlawful occupiers.[1148] A counterargument to this contention is that the aim of the award for constitutional damages, in *Modderklip*, was not to provide relief for the limitation of the unlawful occupiers' rights but the landowner's right of access to courts. There was no finding that any right other than the landowner's right of access to courts was unconstitutionally limited. Similarly, in the current context, constitutional damages are unlikely to be awarded due to the unconstitutional limitation of the rights of the unlawful occupiers. A second counterargument is that the order, in *Modderklip*, does provide secure tenure to the unlawful occupiers since it allows the unlawful occupiers to remain in occupation until the state provides them with alternative accommodation.[1149]

Kotze further argues that the award of constitutional damages was ineffective, in *Modderklip*, because it amounted to an arbitrary deprivation of the landowner's property.[1150] It essentially allows an unlawful situation to prevail. However, the point of the order is to compensate the landowner for the unconstitutional limitation of its rights so that an unlawful situation (the non-execution of the eviction order) can prevail. In addition, it could be argued that the award of damages essentially provides effective relief for the arbitrary deprivation of the landowner's property. This is certainly the case in the scenarios discussed in this chapter.

Still, constitutional damages might not be appropriate in all situations. For one, some stalemate situations exist because the landowner needs to use the land. Receiving constitutional damages might not suffice.

Second, a landowner might not be as willing, as the landowner in *Modderklip* was,[1151] to part with its property indefinitely, possibly forever. This could be solved by placing a deadline on the state to ensure that the unlawful occupation is ceased. Usually, this would entail postponing the eviction order until the state has the available resources to fulfil any short-term housing duty it has toward the unlawful occupiers. The state can fulfil its short-term housing duty either by expropriating the property or by providing those unlawful occupiers who qualify under the EHP with alternative accommodation. A deadline on the state would

[1148] Kotze *Effective Relief* 133-134.
[1149] *Modderklip* para 68.
[1150] In terms of s 25(1) of the Constitution.
[1151] *Modderklip* para 6.

also solve any potential problem regarding the continued ownership of the landowner and its continued responsibility for the property.

Another possible problem with granting constitutional damages is that it probably would not be effective relief as compensation for the unlawful occupiers for the violation of their rights, unless it enables them to secure alternative accommodation elsewhere. With a large group, the resources could rather be used to provide them with alternative accommodation. This would solve the landowner's problem and would probably be more cost-effective than funding individual places of accommodation. This begs the question, can an alternative accommodation order be granted as relief for the unconstitutional limitation of the rights discussed in this chapter?

In *Fose v Minister of Safety and Security*,[1152] the court found that section 38, on which the constitutional damages awarded in *Modderklip* was based, gives the court a wide discretion to forge new remedies if human rights are violated.[1153] An alternative accommodation order might be one such remedy. In fact, the effect of the order, in *Modderklip*, was that the unlawful occupiers were not evicted without accommodation, but received (permanent)[1154] accommodation from the state. This has the same effect of not resulting in an eviction without alternative accommodation as an alternative accommodation order. The order in *Skurweplaas*, where the argument in favour of an alternative accommodation order is based on *Modderklip*, confirms the possibility that an alternative accommodation order could be granted as a constitutional remedy for the violation of one of the rights discussed in this chapter.[1155]

A constitutional remedy for the provision of housing is not foreign to South African constitutional law. In *Tswelopele Non-Profit Organisation and Others v City of Tshwane*

[1152] 1997 (3) SA 786 (CC).

[1153] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

[1154] The state would not pay the damages and then remove the unlawful occupiers. That would be double payment. Hence, the occupiers would remain there indefinitely. Furthermore, the state would have to provide them with alternative accommodation if they want to evict them. See, *Modderklip* para 68.

[1155] See Chapter 2:3.2. Trengrove supports the granting of compensation in kind since the quantification of damages can be complicated in W Trengove "Judicial remedies for violation of socio-economic rights" (2004) 1 *Economic and Social Rights Review* 6 8, as referred to in Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-62.

Metropolitan Municipality,[1156] the court created a constitutional remedy for the replacement and reconstruction of unlawfully destroyed informal houses.[1157] The basis of the remedy was to provide relief for the unconstitutional limitation of the right, in section 26(3) of the Constitution, not to have one's home destroyed without a court order.[1158] In *Tswelopele*, the state had demolished homes that were unlawfully erected on land.[1159] The state had not obtained a court order in terms of PIE.[1160] Consequently, the demolition and eviction unconstitutionally limited the unlawful occupiers' section-26(3) right.[1161] The state was forced to provide the unlawful occupiers with alternative homes on the same piece of land.[1162]

While the facts of *Tswelopele* are wholly different from the types of cases discussed in this chapter, the case does indicate that the court has a wide discretion in creating constitutional remedies. It is willing to make orders that go beyond mere compensation and require parties to provide housing. An alternative accommodation order can be considered as such a constitutional remedy.

It is uncertain from which state budget the resources for complying with the alternative accommodation order should be provided. It might come from the state's short-term housing budget since it amounts to the fulfilment of the state's short-term housing duty toward the unlawful occupiers.[1163] However, this line of argument is likely to be used when the state does not have sufficient funds within its short-term housing budget, the unlawful occupiers do not qualify under the short-term programme or the state has no reasonable short-term housing budget. Hence, the state would have to find the resources elsewhere.[1164] It might have to reprioritise funds allocated to other causes. Whether such reprioritisation would be fair toward those who would have benefited from them is considered in Chapter 6.

[1156] *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) (hereinafter "*Tswelopele*").

[1157] *Tswelopele* para 26, 28.

[1158] *Tswelopele* para 4, 15.

[1159] *Tswelopele* para 1.

[1160] *Tswelopele* para 2.

[1161] *Tswelopele* para 4, 15.

[1162] *Tswelopele* order.

[1163] See Chapter 4:4.2.1.1.

[1164] See JC Schwartz "How governments pay: Lawsuits, budgets and police reform" (2016) 63 *University of California Los Angeles Law Review* 1144 for an examination of how governments pay for orders against it.

Moreover, the availability of state resources is not a condition for granting an alternative accommodation order based on the second ground, unlike for the first ground for alternative accommodation orders.[1165] It will be easier to get relief since the state cannot argue that it does not have the available resources. However, there is a risk that the state would not be able to comply with the order. Another risk is that the effect of such orders would be that the litigation budget increases, leaving even fewer resources for the housing budget.

A problem with granting an alternative accommodation order in these matters is that the limitation was done in terms of PIE. Since PIE allows the limitations of rights, it can be argued that PIE is not in line with the Constitution. Hence, the remedy cannot simply be to address the loss of the victim, but must also bring PIE in line with the Constitution.[1166] An argument could be that section 4(12) of PIE allows for the remedying of any limitation of rights by attaching a condition to the eviction order.[1167] However, section 4(12) is only concerned with conditions attached to eviction orders and would not allow for an equalising condition attached to a denial or postponement of an eviction order. PIE should be amended to include the possibility of attaching a condition to any order made in terms of PIE, even an order that denies or postpones an eviction.[1168] This can be achieved simply to strike out the words "for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures" from s 4(12) of PIE so that it reads: any order in terms of this section is subject to the conditions deemed reasonable by the court. Such an amendment would provide certainty regarding the circumstances under which such remedy may be granted.

5.3 Liability of the state

Where an unlawful limitation of the rights is found, the liability of the state to remedy the limitation must be proved. If the state is the applicant, then the limitation of the rights of the unlawful occupiers can easily be ascribed to it.[1169] Yet, where the application is made by a private landowner, it gets more complicated. Similarly, the limitation of the rights of the

[1165] *Jaftha v Schoeman; Van Rooyen v Stoltz* para 31.

[1166] This is because, as legislation, PIE must adhere to the Constitution in terms of the rule of law and the principle of constitutional supremacy. See Chapter 1:3.1.1. For the idea that PIE must be brought in line with the Constitution, see Kruger (2014) *SALJ* 330, 361.

[1167] See Chapter 4:4.3.

[1168] Kruger (2014) *SALJ* 360.

[1169] Liebenberg *Socio-Economic Rights* 190.

landowner can be ascribed to the unlawful occupiers. It is more difficult to justify that the state must be held liable when the perpetrator seems to be a private party.[1170] After all, the Constitutional Court in *Grootboom* confirmed the possible horizontal application of section 26(1) of the Constitution,[1171] whereas *Modderklip SCA* suggests that section 25(1) of the Constitution can have horizontal application.[1172]

The extent to which these sections can be applied horizontally is not settled in our law. In the Constitutional Court decision of *Modderklip*, the court found it unnecessary to address the issue.[1173] As explained above,[1174] the housing duty in section 26 of the Constitution can and has been placed on private parties through legislative and other measures. In this way, section 26(1) has found horizontal application. As for the horizontal application of section 25(1), despite the suggestion in *Modderklip SCA* that it might be applied horizontally, some regard its inability to be applied horizontally as a fact.[1175] Van der Walt argues that, despite the fact that the court referred to the section's horizontal application, the *Modderklip SCA* decision did not involve the horizontal application of section 25(1). According to Van der Walt, the fact that the court granted the order to provide relief against the state meant that it applied section 25(1) vertically.[1176] Moreover, in *Phoebus Apollo Aviation CC v Minister of Safety*

[1170] This suggests that an alternative accommodation order can be granted against private landowners. However, the reason for the infringement of the unlawful occupiers' right in terms of s 26(1) of the Constitution is to put an end to the infringement of its own right in terms of s 25(1) by the unlawful occupiers. Accordingly, a landowner should not have to compensate the unlawful occupiers for protecting its constitutional right. An exception might be where the landowner knowingly acquired the right to property despite the existing infringement for purposes of evicting the unlawful occupiers and thereby infringing upon their rights. In such a situation a landowner might be ordered to endure the infringement until the unlawful occupiers can find alternative accommodation themselves or through the state. The landowner might even be required to pay constitutional damages to the unlawful occupiers for the infringement in monetary for or in the form of housing. Nonetheless, it is highly unlikely that a court will make an alternative accommodation order against a private landowner. Rather, an offer by the landowner to assist with alternative accommodation might act to equalise the eviction order. See, *Changing Tides* para 33.

[1171] *Grootboom* para 34, referred to in Liebenberg (2002) *Law Democracy & Dev* 170.

[1172] *Modderklip SCA* para 21, 27.

[1173] *Modderklip* para 25.

[1174] See Section 3.1 above.

[1175] See the discussion in 46-6 – 46-8; referred to in 152- 153 fn 37. Currie and De Waal argue that s 25(1) has no horizontal application, in Currie & De Waal *The Bill of Rights Handbook* 553-554. See the discussion in T Roux "Property" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 46 46-6 – 46-8; referred to in A Van der Walt "The States Duty to Protect Owners v the State's Duty to Provide Housing: Thoughts on the Modderklip Case" (2005) 21 *South African Journal on Human Rights* 152- 153 fn 37. Currie and De Waal argue that s 25(1) has no horizontal application, in Currie & De Waal *The Bill of Rights Handbook* 553-554.

[1176] 152. Van der Walt (2005) *SAJHR* 152.

and Security,[1177] the Constitutional Court found section 25(1) of the Constitution irrelevant where someone was deprived of property by private persons.[1178] Nevertheless, Van der Walt does argue that actions by private persons that are not authorised by law,[1179] as is the case with an unlawful occupation, might amount to a deprivation or an expropriation.[1180]

However, similar to the Constitutional Court decision of *Modderklip*, it is unnecessary to settle the dispute regarding the horizontal application of these sections here. The purpose of this study is to determine when a court can hold the state liable solving a stalemate situation. Hence, this section explores the possible reasons for holding the state liable for violating these sections, even in situations where the primary the perpetrator may be a private party.

The limitations discussed above occur in terms of PIE. PIE sanctions the allowing, denying or delaying of an eviction, which might lead to the limitation of rights. PIE is legislation that was enacted by the state. Accordingly, it could be argued that the state, through PIE, sanctions the granting, denial and delaying of evictions. Hence, the state is liable for any limitation in terms thereof.[1181] However, PIE simply gives effect to section 26(3) of the Constitution. The power to allow, deny or delay an eviction is conferred upon the court by the Constitution, not the state. Moreover, it could be argued that the court-sanctioned delay does not cause the limitation of section 25(1). Rather, the unlawful occupation itself causes the deprivation. The occupation was not authorised by law and might amount to the horizontal violation of section 25(1).[1182] Therefore, additional justification, in terms of the existing legal framework, is necessary to hold the state liable.

[1177] . *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC).

[1178] Para 4. Van der Walt considers this finding as "the strongest indication" that section 25(1) does not operate horizontally, see 152-153 fn 37. Para 4. Van der Walt considers this finding as "the strongest indication" that section 25(1) does not operate horizontally, see Van der Walt (2005) *SAJHR* 152-153 fn 37.

[1179] Actions by private parties that are authorised by law may be ascribed to the state. See, 152-153 fn 37. See discussion below. Actions by private parties that are authorised by law may be ascribed to the state. See, Van der Walt (2005) *SAJHR* 152-153 fn 37. See discussion below.

[1180] 152-153 fn 37. Van der Walt (2005) *SAJHR* 152-153 fn 37.

[1181] For the idea that the state is liable for limitations done in terms of legislation, see M Tushnet "The issue of state action/horizontal effect in comparative constitutional law" (2003) 1 *International Journal of Constitutional Law* 7979; Van der Walt (2005) *SAJHR* 152-153 fn 37.

[1182] A counterargument is that the court order constitutes legal authority and means that the occupation is not unlawful anymore.

Justification can be found in the state's constitutional duty to protect both the landowner and the unlawful occupiers against interference with their human rights by others.[1183] The unlawful occupiers' loss of their homes or the landowner's loss of the use of its property could mean that the state failed to comply with its duty to protect. Nevertheless, the state cannot be found liable if a party can be found responsible for their own loss.[1184]

A question that arises is whether the state can be held liable even if no fault on its part is involved.[1185] Fault on the part of the state seems to play a big role in the decision in which alternative accommodation orders have been granted.[1186] To hold a person liable in terms of the common law, fault is usually a requirement.[1187] This includes negligence[1188] or intent.[1189] The Constitutional Court, in *K v Minister of Safety and Security*,[1190] confirmed that it is "a basic norm of our society that liability for harm should rest on fault, whether in the form of negligence or intent".[1191] However, this case involved a claim in delict.[1192] A distinction must be made between a common law delict and a constitutional infringement.[1193] Fault is not necessarily a requirement for liability due to the infringement of a constitutional right.[1194]

Nonetheless, it is unlikely that a court would grant a constitutional remedy against the state if the state was not blameworthy at all. Pienaar, in her discussion of the award of constitutional damages in *Modderklip*, supports this conclusion in stating that the court ordered the payment

---

[1183] S 7(2) of the Constitution. Van der Walt highlights the fact that *Modderklip* suggests the possibility of holding the state liable in terms of its duty to protect. See, Van der Walt (2005) *SAJHR* 161.

[1184] Arguably, persons who unlawfully occupy the land of another are always responsible for their own loss. Yet, unlawful occupiers might be so desperate that they cannot be held liable for their actions. See Chapter 3:4 and Chapter 4:3.6.

[1185] Kruuse (2011) *SALJ* 628.

[1186] See the discussions of the cases in Chapter 2:3.

[1187] J Van der Walt & J Midgley *Principles of Delict* 4 ed (2016) 39; J Neethling & J Potgieter *Visser Law of Delict* 7 ed (2015) 129; J Burchell *Principles of Delict* (1993) 30.

[1188] A person is negligent if a reasonable person would have foreseen the harm and would have taken reasonable steps to prevent it and the person failed to do so. Burchell *Principles of Delict* 30.

[1189] A person has intent if he aims to cause harm (*dolus directus*); he does not aim to cause harm but proceeds with his actions knowing that his actions will cause harm (*dolus indirectus*); he does not aim to cause harm but proceeds with his actions knowing that his actions might cause harm (*dolus eventualis*). See, Burchell *Principles of Delict* 30.

[1190] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

[1191] *K v Minister of Safety and Security* para 21, referred to in Kruger (2014) *SALJ* 341. See also, S Wilson "Breaking the tie: evictions from private land, homelessness and a new normality" (2009) 126 270 281.

[1192] *K v Minister of Safety and Security* para 1.

[1193] Neethling & Potgieter *Visser Law of Delict* 21; Van der Walt & Midgley *Principles of Delict* 6. See also, *Fischer v Unlawful Occupiers (Muni HoA)* para 81.

[1194] Van der Walt & Midgley *Principles of Delict* 8.

of constitutional damages because the state failed to fulfil its duty in assisting the landowner in executing the court order.[1195] No precedent suggests the court would grant a constitutional remedy against the state, where the state had not been blameworthy.[1196] Such an order would defeat one of the aims of such a constitutional remedy, which is to prevent future violations.[1197] An award for a constitutional remedy against the state could not attain this purpose if the infringement was not due to blameworthiness on the part of the state. That blameworthiness on the part of the state is a requirement for a constitutional remedy against it in eviction matters explains why the court, in *Ives v Rajah*, did not grant an alternative accommodation order, since it was satisfied that the municipality had acted reasonably.[1198]

Blameworthiness on the part of the state is not necessarily limited to a failure to assist in the execution of an eviction order, as was the case in *Modderklip.*[1199] Another example of blameworthiness on the part of the state is a failure to implement a reasonable short-term housing programme.[1200] This was the case in *Brookway.* Since the state did not implement a short-term programme and budget accordingly, there were no available resources to fulfil the short-term housing needs of those living in emergency housing situations. Accordingly, the state could not assist the unlawful occupiers facing eviction and, hence, prevent their loss of access to housing.[1201] This argument can only succeed if the unlawful occupiers would have benefited from the state's short-term housing programme, had the state implemented it.

A further example of blameworthiness on part of the state is unreasonably slow overall progress in housing delivery. If the pace of the realisation of this right had been appropriate,

---

[1195] Pienaar *Land Reform* 775.

[1196] In *Modderklip*, for example, the court criticised the state for not taking the steps needed to resolve the problem. See, *Modderklip* para 33. Similarly, constitutional damages have been granted against the Eastern Cape government in a number of cases due to its unreasonable delay in considering applications for social grants. This violated the applicants' rights to just administrative action in terms of s 33(1) of the Constitution. See, *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) para 17; *Mahambehlala v MEC for Welfare, Eastern Cape* 2002 (1) SA 342 (SE) at 353D-E; *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SE) at 370B-C. In *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) at 510D-G, the court granted constitutional damages against the City of Cape Town for the infringement of the applicant's right to just administrative action by allowing an unauthorised administrator to consider the tender.

[1197] Van der Walt & Midgley *Principles of Delict* 7.

[1198] It could nonetheless have ordered the municipality to apply for funding from the provincial government. See Chapter 3:6.3.

[1199] See Pienaar *Land Reform* 775.

[1200] In *Blue Moonlight SCA* 70-72 the state's responsibility is considered conditional upon its blameworthiness. See also, Kruger (2014) *SALJ* 340-341.

[1201] See the discussion of *Brookway* at the start of this Section.

the occupiers would not have been forced to occupy the land unlawfully.[1202] This argument can only succeed if the unlawful occupiers had been on the state's housing list and would have received housing, had the state acted reasonably. While this argument might be theoretically sound, it would be hard to prove. The party alleging that the state failed to fulfil its duty would have to prove that state's progress was unreasonable, the unlawful occupiers would have already received housing had the progress been reasonable and the unlawful occupation was due to the slow progress of the state.[1203]

The state could also be blameworthy in failing to respond reasonably to requests by the landowner for assistance in preventing the initial unlawful occupation of land. In *Modderklip*, the Constitutional Court criticised the state for not responding to the requests of the landowner for assistance in protecting its property against unlawful occupation.[1204] This assistance must be provided before the unlawful occupiers make the property their homes.[1205]

Moreover, the state's fault could lie in not attempting to engage meaningfully with the unlawful occupiers, who might face homelessness,[1206] to find a solution to the matter prior to it reaching the court. This requirement of meaningful engagement was established in *Olivia Road.*[1207] The municipality, in whose jurisdiction the unlawful occupation occurs, should foresee and plan for a potential emergency housing situations due to the eviction of the unlawful occupiers.[1208] It should engage meaningfully with the unlawful occupiers as soon as

---

[1202] See, Chenwi (2008) *Harv L Rev* for more on the idea that unlawful occupation can be forced. See also, Chapter 3:4 on unlawful occupation done out of need.

[1203] For this burden of proof, see *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* para 44; Woolman & Botha "Limitations" in *CLOSA* 34-3 – 34-4; Liebenberg *Socio-Economic Rights* 94.

[1204] See Chapter 2:2.3.

[1205] The state provided such assistance in *Fischer v Ramahlele* 2014 (4) SA 614 (SCA). The duty on the state is interfered by Van der Walt from the *Modderklip* decision. See Van der Walt (2005) *SAJHR* 158.

[1206] Muller (2011) *Stell LR* 743.

[1207] See the discussion of this case in Chapter 2:3.1. The requirement developed from the findings in *Grootboom* para 82-83, 87 and *PE Municipality* para 39 that municipalities are expected to engage with unlawful occupiers and that a court can order such engagement. It is linked to the reasonable measures that a court must take in terms of s 26(2) of the Constitution, see *Olivia Road* para 10, 17; Muller (2011) *Stell LR* 743; 94.Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 94. This corresponds with the United Nations Committee on Economic, Social and Cultural Rights *General Comment No 7* (para 15) finding that "genuine consultation" is necessary in eviction matters. For a critical analysis of this requirement and recommendations regarding the court's role in the engagement process, see Liebenberg (2012) *AHRLJ* 14-26.

[1208] This links to the requirement under the EHP that the municipality should foresee and plan for an emergency situation. See the Department of Human Settlements *EHP* (2009) Part A 2.3, 2.6.1.

it becomes aware of a potential eviction.[1209] An amicable solution should be found,[1210] instead of taking the matter to trial.[1211]

Meaningful engagement is a "two-way process" in which the state communicates with the unlawful occupiers.[1212] The state is required to act reasonably when engaging with unlawful occupiers. In *Olivia Road*, it was found that, even where unlawful occupiers are uncooperative, the state must make a reasonable effort to engage.[1213]

The court has also found that a lack of meaningful engagement will weigh in the balance against an eviction order (without alternative accommodation).[1214] However, the definition of *meaningful* engagement is unclear. In part, the uncertainty can be ascribed to the fact that what would constitute meaningful engagement would depend on the context.[1215] In *Joe Slovo*, Yacoob J states that the engagement need only meet the standard of reasonableness.[1216] There are realistic and practical limits to this duty.[1217] Yacoob J found that it was not realistic to expect the state to engage with each member of a large group individually.[1218] This contradicts *Olivia Road*, in which the court required individual and collective engagement. The court accepted the engagement by the city although the engagement was not structured and co-ordinated and it did not lead to a solution regarding relocation.[1219] This acceptance of the court of engagement that falls short of what is expected in *Olivia Road* has been subject to criticism.[1220] It is possible that the court accepted the watered-down engagement because

---

[1209] *Olivia Road* para 5. In *Joe Slovo* para 167 meaningful engagement is referred to as "a prerequisite of an eviction order". Mediation might also fulfil this function, although it is a more formal process. See, Van Wyk (2011) *PER/PELJ* 65.

[1210] *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands* para 33; Chenwi (2008) *Harv L Rev* 126; Wilson (2011) *Urban Forum* 273; Muller (2011) *Stell LR* 742; Van Wyk (2011) *PER/PELJ* 62.

[1211] *PE Municipality* para 39, 56, 57; *Olivia Road* para 54.

[1212] *Olivia Road* para 14. It is even averred to that unlawful occupiers can and should initiate the engagement when the state fails to initiate it and that if a private owner is involved in the eviction a tripartite engagement might be necessary. See, *Ives v Rajah* para 38, *Blue Moonlight* para 42.

[1213] *Olivia Road* para 15.

[1214] *Olivia Road* para 54, *Omar NO v Omar* para 34; *Wintertide Trading 89 CC v Thompson* para 37; *PE Municipality* para 47; *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands* para 37-38. See also, Chenwi (2008) *Harv L Rev* 126.

[1215] *Olivia Road* para 19; Liebenberg (2012) *AHRLJ* 16; Van Wyk (2011) *PER/PELJ* 62.

[1216] *Joe Slovo* para 116.

[1217] *Joe Slovo* para 116.

[1218] *Joe Slovo* para 116.

[1219] *Joe Slovo* para 116, 246.

[1220] Liebenberg criticised this condoning of an inadequate engagement process in Liebenberg (2012) *AHRLJ* 22-26.

overall it accepted the government's approach and its willingness to provide alternative accommodation as reasonable.

If the state responded reasonably[1221] to the unlawful occupation, implemented a reasonable housing programme, including a reasonable short-term housing programme and budget, but was still unable to assist the unlawful occupiers under the EHP, it would not be blameworthy. In such situations, the court would likely not be able to hold the state liable in terms of its duty to respect, protect, promote and fulfil human rights. In other words, its constitutional mandate would not allow it to grant an alternative accommodation based on the second ground. This does not mean that the unlawful occupiers must be evicted without alternative accommodation. It simply means that another solution must be found.

6 Conclusion

This chapter aimed to determine when alternative accommodation orders based on the second ground would adhere to existing legal framework. In other words, it explored the possibility of founding alternative accommodation orders on grounds other than the state's housing duty.

If a court finds that an eviction would not be just and equitable toward the unlawful occupiers and a delay of the eviction would not be just and equitable toward the landowner (or role players), it might want to grant an alternative accommodation order against the state. Justification for granting this order against the state might be found in the state's duty to respect and protect human rights.

This chapter explored situations in which a court might find that an eviction would not be just and equitable toward the unlawful occupiers but that a delay of the eviction would not be just and equitable toward the landowner (or role-players). This is referred to as a "stalemate situation". Circumstances that have caused stalemate situations are that there is a large group of unlawful occupiers, but the eviction was applied for by a private landowner, the land is needed for use and/or unsafe to occupy. Other circumstances that might cause stalemate situations are that the unlawful occupiers are vulnerable, not blameworthy and have lived on the land for a long time, but the land is privately owned and needed for use or unsafe to occupy. In fact, whenever the unlawful occupiers face homelessness, purely because the state

[1221] What constitutes "responding reasonably", in this regard, would depend on the specific situation.

does not have the resources to accommodate them within its short-term housing programme and the land is privately owned and to be used, a stalemate situation is created.

Subsequently, the chapter investigated which rights might be unconstitutionally limited in a stalemate situation. It was found that the landowner's right to property is likely to be unconstitutionally limited by an unreasonably long delay of the eviction order. While an eviction, with relatively immediate effect, may unconstitutionally limit the negative right of access to adequate housing of the unlawful occupiers, such a conclusion was found to be unlikely. Moreover, the potential limitation of other rights, such as the landowner's right to equality or of access to courts, should not be considered in lieu of the limitation of the landowner's right to property. This is because the effect of the limitation of these rights is that the landowner's right to property is limited.

Further, it was found that the state might be held liable for any unconstitutional limitation of these rights, based on its duty to respect and protect these rights. However, its liability is likely to be limited to the extent that the state is blameworthy. In holding the state liable, the right holder's loss can be remedied in terms of a constitutional remedy. An alternative accommodation order is an example of a possible constitutional remedy. However, if the court relies on this ground for granting alternative accommodation orders, PIE should be amended to allow for the attaching of conditions to any order in terms of PIE, In other words, PIE should not only those orders in which evictions are granted, but also those in which evictions are postponed or denied.

Despite this solution, some stalemate situations remain unsolved. If no fault is proved on the part of the state, it cannot be held liable and an alternative accommodation order cannot be made against it. This creates a problematic situation since the stalemate situation would remain.[1222]

[1222] For recommendations to solve this situation Chapter 7: 3.1.

PART TWO: RESPECT FOR THE FUNCTIONS OF GOVERNMENT

This part considers when alternative accommodation orders would comply with the second criterion – respect for the functions of government. A court respects the functions of government when, one, it acknowledges the separate functions of other branches of government and, two, it fulfils its own functions properly. The requirement to acknowledge the separate functions of other branches of government is explored in Chapter 5. This requirement involves respecting the fact that other branches of government have different functions and the court should not interfere with these functions. In other words, the court must respect the constitutional principle of the separation of powers.[1223]

In addition, acknowledging the separate functions of other branches of government relates to the notion of co-operative government. It requires respecting that, within those other branches, different entities have different functions and powers. In the context of alternative accommodation orders, this means that a court should not order one entity to perform the duties of another. Moreover, a court must also take into account the fact that the different spheres of government are required to co-operate with one another and assist each other. Hence, where more than one sphere is responsible for fulfilling the same function, a court should not place the duty to fulfil this function on only one of the spheres.

Part of the requirement that the court must respect the functions of government is that it must fulfil its own functions properly. This is examined in Chapter 6. The court's primary function is the administration of justice.[1224] To determine when alternative accommodation orders are just, the appropriate form of justice must be identified. Once the appropriate form is identified, it is possible to determine under what circumstances alternative accommodation orders are just. Moreover, the content of a just alternative accommodation order can be established.

[1223] Constitutional Principle VI of Schedule 4 of the Interim Constitution.

[1224] S 165(2) of the Constitution.

CHAPTER FIVE: RESPECT FOR THE FUNCTIONS OF THE LEGISLATIVE AND EXECUTIVE BRANCHES OF GOVERNMENT

1 Introduction

Two criteria are used in this thesis to determine when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of PIE would comply with the court's constitutional mandate.[1225] The first criterion – that the order must adhere to the existing legal framework – was discussed in Part 1. The second criterion is that the order must respect the functions of government. This involves acknowledging the separate functions of other branches of government, the legislative and executive branches, and fulfilling its own functions properly. This chapter considers what "respecting the functions of other branches of government" entails.

Broadly, it must be acknowledged that different branches of government have different functions and that the court should not unduly interfere with these functions. In other words, the court must respect the constitutional principle of the separation of powers.[1226] In addition, acknowledging the separate functions of other branches of government relates to the notion of co-operative government.[1227] It requires respecting that, within those other branches, different entities have different functions and powers. In the context of alternative accommodation orders, this means that a court should not order one entity to perform the duties of another. Moreover, a court must also take into account the fact that the different spheres of government are required to co-operate with one another and assist each other. Hence, where more than one sphere is responsible for the same matter a court should not focus on only one of the spheres.[1228]

Before the implication of the separation of powers and co-operative government on the granting of alternative accommodation orders can be examined, the structure of government

[1225] See Chapter 1:3.2.
[1226] Constitutional Principle VI of Schedule 4 of the Interim Constitution.
[1227] See Chapter 1:3.1.3.
[1228] See Chapter 1:3.2.2.

is set out. Thereafter, this structure is used to examine what it means when the court respects the other branches of government in granting alternative accommodation orders.

2 Separate powers of government

The separation of powers doctrine separates the government into three branches: the legislative, executive and judicial authority.[1229] Each branch must have its own personnel, powers and functions.[1230] One branch is not allowed to perform or interfere with the powers and duties allocated to another branch.[1231] In turn, each branch is required to keep the other branches in check to make sure that the performance of their powers and duties are constitutionally sound.[1232]

The executive and the legislative branches are further separated into national, provincial and municipal spheres.[1233] Each sphere has its own powers and functions.[1234] The provincial sphere consists of nine provincial governments, one for each province. The municipal sphere consists of 278 municipal governments, each with their own area of government.[1235] This ensures that government is in line with local demands and needs.[1236] Moreover, separation of

---

[1229] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-2, 12-10. This separation is largely based on Montesquieu's work, see Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-13. Seedorf and Sibanda refers to C Montesquieu *The Spirit of the Laws* (1989) 164. See also, Rautenbach & Malherbe *Constitutional Law* 84; Ngcobo (2011) *Stell LR* 37.

[1230] Gevers et al *South African Constitutional Law* 6. 041; Pieterse (2004) *SAJHR* 386; Currie & De Waal *The Bill of Rights Handbook* 18; Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-10.

[1231] Liebenberg *Socio-Economic Rights* 66-67; Bishop "Remedies" in *CLOSA* 9-73; S Seedorf & S Sibanda "Separation of powers" in 2 ed 12 12-10.

[1232] Langa (2006) *SAJHR* at 4; Liebenberg *Socio-Economic Rights* 66.

[1233] S 40(1) of the Constitution. The judiciary is not similarly separated into spheres. See, Department of Provincial and Local Government *15 Year Review* (2008) 6. The national, provincial and municipal authorities are called spheres, rather than levels. This is because levels suggest a central government and a hierarchy of authority, whereas spheres suggest a federal government and a division of tasks. Despite this naming, the spheres operate on a hierarchical basis. South Africa is seen to have neither a central, nor a federal government. Instead, the system of government has been described as "co-operative federalism" (De Villiers (1997) *SAPR/PL* 199). While provinces and municipalities may function separately, they must co-operate with one another, often to fulfil national goals. See, Woolman & Roux "Co-operative Government" in *CLOSA* 14-1 – 14-2, 14-9 – 14-10, 14-33 – 14-34; Rautenbach & Malherbe *Constitutional Law* 92. See also, s 4 of the Intergovernmental Relations Framework Act (hereinafter "IGRFA").

[1234] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-13.

[1235] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14. For information on the number of provinces and municipalities in South Africa, see Government Communications *South Africa Yearbook 2014/2015* (2015) 209-212.

[1236] It also allows for self-determination of the specific group(s) in the area. Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14.

government power into specific physical areas guarantees that government revenue is spent in every area of the country.[1237]

Alternative accommodation orders amount to duties imposed on the state by the court. Usually, the duty is imposed on a specific sphere of government. Both the entity making the alternative accommodation order (the court) and the one against which the order is made (the state) form part of the government. As far as alternative accommodation orders are concerned, the entity making the order forms part of the judicial authority and the entity against which the order is made forms part of the executive authority. These authorities have different functions and powers. For an alternative accommodation order to be in line with the separation of powers, the entity making the order must have the power to do so. Furthermore, the entity against which the order is made must have the duty and the capacity to comply with the order.[1238] The following section examines the composition and functions of the three branches of government to determine whether an alternative accommodation order would be in line with the judicial authority's duty to respect the functions of other branches of government.

2.1 The legislative authority

The primary function of the legislative authority is to prepare[1239] and pass legislation.[1240] Preparing legislation refers to the drafting of potential legislation, referred to as a "bill".[1241] For a bill to become binding legislation, it must be passed and signed.[1242] Passing legislation refers to voting on whether the bill should become binding law.[1243] The legislative authority

[1237] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14.

[1238] This also relates to the rule of law as formal protection, see Chapter 1:3.1.1.

[1239] Parliament can initiate or prepare legislation in terms of s 55(1)(b), 68(b) of the Constitution. The provincial legislatures can initiate or prepare legislation in terms of s 114(1)(b) of the Constitution. The municipal councils can initiate or prepare by-laws in terms of s 156(2) of the Constitution.

[1240] Parliament can pass legislation in terms of s 55(1)(a), 68(a) of the Constitution. The provincial legislatures can pass legislation in terms of s 114(1)(a) of the Constitution. The municipal councils can pass by-laws in terms of s 156(2) of the Constitution. See also, Liebenberg *Socio-Economic Rights* 66.

[1241] See, for example, s73 of the Constitution.

[1242] See, for example, the provision regarding the passing of ordinary national legislation not affecting provinces in s 75(1)(d) of the Constitution.

[1243] M Bishop & N Raboshakga "National legislative authority" in Woolman S and Bishop M (eds) *Constitutional Law in South Africa* 2 ed (2013) 1717-11.

has the exclusive power to pass legislation.[1244] Members of the legislative authority are voted into office by South African citizens through elections.[1245] They represent the people of South Africa.[1246]

The legislative authority comprises of the national, provincial and municipal spheres.[1247] Each sphere has the power to prepare and pass legislation for its jurisdiction. The legislative authority of the national sphere is vested in parliament.[1248] Parliament prepares and passes national legislation that is binding on the whole of South Africa.[1249]

The legislative authority of the provincial sphere is vested in the provincial legislatures.[1250] Each province has its own provincial legislature.[1251] The provincial legislatures prepare and pass provincial legislation that is binding within the respective provinces only.[1252]

The legislative authority of the local sphere is vested in municipalities.[1253] Each municipality has an area of jurisdiction within a province.[1254] Unlike the national and provincial spheres of

---

[1244] However, its power to prepare legislation is shared by the executive authority. In fact, 90% of bills are prepared by the executive authority, see Parliament of the Republic of South Africa *How a Law is Made* http://www.parliament.gov.za/live/content.php?Item_ID=1843 10-01-2017.

[1245] S 46(1) and s 47(1) of the Constitution. See also, Gevers et al *South African Constitutional Law* 196. Members of the provincial legislature are voted into power through national elections and are based on each province's segment of the voters roll. S 105(1)(b) of the Constitution. A segment of the voters roll in this context refers to the voters within the jurisdiction of that legislature. Members of municipal councils are chosen to represent parties voted for during a local government election. This is based on the municipality's segment of the national common voters roll, combined with a system of ward representation, where applicable. S 157(2) of the Constitution.

[1246] S 42(3) of the Constitution. See also, Bishop & Raboshakga "National Legislative Authority" in *CLOSA* 17-1.

[1247] S 40(1) of the Constitution.

[1248] S 43(a) of the Constitution. Parliament consists of the National Assembly and the National Council of Provinces (NCOP), s 42(1) of the Constitution. The National Assembly represents the people of South Africa, s 42(3) of the Constitution. The NCOP represents the provinces of South Africa, s 42(3) of the Constitution. It consists of the premier, as well as delegations from the provincial legislature of each province or persons eligible to be a member of the provincial legislature, see s 60, 62(1) of the Constitution. For more on the composition of parliament, see Bishop & Raboshakga "National Legislative Authority" in *CLOSA* 7-2 – 7-14.

[1249] S 55(1)(a), 68(a) of the Constitution. The powers of the national legislature are relatively unrestricted. Gevers et al *South African Constitutional Law* 8. They are only specified insofar as parliament shares the power to pass legislation on a certain matter with the provincial legislatures and insofar as parliament is excluded from passing legislation on the matters that fall within the exclusive legislative powers of the provincial legislatures, see S 44(1)(a)(ii) of the Constitution. Parliament may, however, set minimum standards for rendering services in respect of Schedule 5 matters. See, S 44(2)(d) of the Constitution.

[1250] S 43(b) of the Constitution.

[1251] S 104(1)(a) of the Constitution.

[1252] S 114(1)(a) of the Constitution.

[1253] S 43(c) of the Constitution.

[1254] S 151(1) of the Constitution.

government, the executive and legislative authorities of municipalities are not separated, but both vest in the municipal council of the relevant municipality.[1255] Municipalities prepare and pass by-laws that are only binding within their respective municipalities.[1256]

The existing legal framework for the first and the second possible grounds for alternative accommodation orders include the Housing Act 107 of 1997[1257] and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).[1258] These are national pieces of legislation since they were passed by parliament. Accordingly, the Housing Act and PIE bind the whole of South Africa, including the provincial and municipal spheres of government. This confirms the fact that courts, in granting alternative accommodation orders, cannot require municipalities to act outside these pieces of legislation.[1259]

2.2 The executive authority

The primary function of the executive authority is to govern the country. To govern the country, the executive authority must prepare plans (called policy)[1260] and implement these plans.[1261] The executive authority must also implement legislation.[1262]

Similar to the legislative authority, the executive authority is separated into three levels: the national, provincial and local sphere.[1263] The power of the national executive authority vests

---

[1255] S 151(2) of the Constitution. This shows a departure from the strict separation of powers regarding personnel and functions.

[1256] S 156(2) of the Constitution. Municipalities govern all parts of South Africa. This is called wall-to-wall municipalities. N Steytler & J De Visser "Local government" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 22-16, 22-36. The powers of provincial and municipal legislatures are strictly delineated. They may only pass legislation on specified matters Parliament shares the power to pass legislation with the provincial legislatures on matters listed in Schedule 4 of the Constitution. The law-making powers of the national and provincial legislatures are equal in these matters. The provincial legislature has exclusive power to pass legislation on matters listed in Schedule 5. The matters in this schedule relates specifically to provincial matters. See Gevers et al *South African Constitutional Law* 8. S 104(1)(b)(iii) of the Constitution. Nevertheless, legislation passed by another sphere may authorise them. Or matters "for which a provision of the Constitution envisages the enactment of provincial legislation", s 104(1)(b)(iv) of the Constitution. Hence, for provincial legislatures, national legislation can provide authority and for municipalities both national and provincial legislation can provide authority. For more on legislative competence, see V Bronstein "Legislative competence" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 5 5-1 – 5-21.

[1257] See Chapter 3:2.

[1258] See Chapter 4:2.

[1259] See Chapter 1:3.2.1.

[1260] For a comprehensive explanation of the term "policy", see Fuo (2013) *PER/PELJ* 5-7.

[1261] Liebenberg *Socio-Economic Rights* 66.

[1262] Liebenberg *Socio-Economic Rights* 66.

in the cabinet that is headed by the president.[1264] The power of the provincial executive authority vests in the executive councils of each respective province.[1265] Each executive council is headed by a premier. The power of the local executive authorities vests in the municipalities.[1266] Each municipality is headed by a mayor.[1267]

The heads of the national and provincial executive authorities are elected by and from the corresponding legislative body. Hence, the president is elected by and from parliament[1268] and the premier of the Western Cape, for example, is elected by and from the Western Cape provincial legislature.[1269] The other members of the cabinet and the executive councils are selected by the respective heads of the executive bodies. They must be selected mainly from the corresponding legislative body. Hence, the president selects the cabinet members from parliament[1270] and the premier of the Western Cape, for example, selects executive council members from the Western Cape provincial legislature.[1271]

Since the members of the legislative authority are democratically elected, the executive authority consists mostly of democratically elected members. However, these members would most likely all be members of the same political party, because the head of the executive body will choose members from his own party.[1272] As stated above, the executive and legislative authorities of municipalities are not separated, but both vest in the municipal council of the municipality.[1273] Members of municipal councils are chosen to represent parties voted for in local government elections.[1274] That the members of the executive authority have to be democratically elected means that they act on behalf of the people of South Africa.

[1263] S 40(1) of the Constitution.

[1264] S 83 and s 91(1) of the Constitution.

[1265] S 125(1) and (2) of the Constitution.

[1266] S 151(1) of the Constitution.

[1267] S 49 of Local Government: Municipal Systems Act 32 of 2000.

[1268] The national assembly. S 86(1) of the Constitution.

[1269] S 128(1) and s 132(1) of the Constitution.

[1270] S 91(2) of the Constitution.

[1271] S 128(1) and s 132(1) of the Constitution.

[1272] With the exception of up to two members who do not have to be chosen from the National Assembly; s 91(3)(c) of the Constitution.

[1273] S 151(2) of the Constitution.

[1274] Based on the municipality's segment of the national common voters roll, combined with a system of ward representation, where applicable. S 157(2)(a)-(b) of the Constitution.

The executive authority of each sphere shares the function of preparing legislation with the legislative authority.[1275] Once legislation is prepared, the legislative authority has the power to pass the proposed legislation.[1276] If the proposed legislation is passed, the head of the relevant executive body has the power to assent to and sign the legislation.[1277] The proposed legislation only becomes binding law if this process is completed.[1278] This back and forth process between the legislative and the executive authorities means that both branches must agree to any proposed legislation. In this way, each branch can ensure that the other complies with its duties, as is required in terms of the separation of powers doctrine.[1279] Moreover, unlike the executive authority, the legislative authority represents more than just the ruling party.[1280] Requiring the legislative authority to consent to all proposed legislation promotes participation of the citizenry and democracy.[1281] This means that the Housing Act and PIE are supported by both the executive and the legislative authorities.

An exclusive function of the executive authority is to implement policy and legislation.[1282] The implementation of policy requires the prior preparation and adoption thereof. Policies are plans by the executive authority for the fulfilment of its duties.[1283] Policies are only binding on other spheres of government insofar as legislation stipulates such.[1284]

The cabinet develops and implements national legislation and policy.[1285] The executive councils implement national legislation and policy. They also develop and implement their

---

[1275] The cabinet prepares national legislation to be applicable nationally, see s 85(2)(d) of the Constitution. The executive councils prepare provincial legislation for their respective provinces, see s 125(2)(f) of the Constitution. The municipal councils prepare by-laws for their respective municipalities, see s 156(2) of the Constitution. See also, Gevers et al *South African Constitutional Law* 8.

[1276] See Chapter 5:2.1.

[1277] The president must assent to national legislation, see s 79(1) and s 84(2)(a) of the Constitution, the premier must assent to provincial legislation, see s 121 (1) and 127(2)(a) of the Constitution. Since municipalities are not similarly separated, there are no requirements in the Constitution regarding passing and assenting to by-laws, see s 156(2) of the Constitution.

[1278] See, for example, the provision regarding the passing of ordinary national legislation not affecting provinces in s 75(1)(d) of the Constitution.

[1279] See Chapter 1:3.1.2.

[1280] Since the head of the executive authority selects the members of the executive authority, they are likely to all belong to the ruling party. See the discussion earlier in this section.

[1281] Bishop & Raboshakga "National Legislative Authority" in *CLOSA* 17-1.

[1282] Liebenberg *Socio-Economic Rights* 66.

[1283] For a comprehensive explanation on policies, see Fuo (2013) *PER/PELJ* 5-12.

[1284] Fuo (2013) *PER/PELJ* 7-8; Murray & Ampofo-Anti "Provincial Executive Authority" in *CLOSA* -1 20-11. See also, Chapter 1:3.2.1.

[1285] S 85(2)(a) of the Constitution.

own provincial legislation and policy.[1286] Municipal councils implement national and provincial legislation and policy. They also adopt and implement their own municipal policies and by-laws.[1287]

The National Housing Code (the Code),[1288] which includes the Emergency Housing Programme (EHP),[1289] is policy that was adopted by the national executive authority to give effect to the state's housing duty. Since the policy was adopted in terms of the Housing Act, it is binding upon the executive and municipal councils.[1290] Moreover, the executive councils and municipalities are required to adopt housing policies, specific to the needs of those within their jurisdictions, which are in line with the national policy.[1291]

The availability of resources is critical in implementing the National Housing Act and Code. It is the primary duty of the national executive authority to collect revenue and distribute it amongst the provincial and municipal authorities.[1292] Both the collection and distribution of revenue require the enactment of legislation. The preparation of such legislation falls within the exclusive powers of the executive authority.[1293] The fact that the collection of revenue falls primarily on the national executive authority means that the provincial and municipal spheres of government are reliant on the national sphere for finance. They have limited means to raise funds for providing alternative accommodation. [1294]

[1286] S 125(2)(a), (b) and (d) of the Constitution. See also, Gevers et al *South African Constitutional Law* 278-279.

[1287] Gevers et al *South African Constitutional Law* 8.

[1288] Department of Human Settlements *National Housing Code* (2009).

[1289] Department of Human Settlements *EHP* (2009)

[1290] See Chapter 3:2.

[1291] *Grootboom* para 68, 99. See also, Currie & De Waal *The Bill of Rights Handbook* 574-580.

[1292] The powers of the provincial and local spheres to collect taxes are restricted by the Constitution. Executive councils cannot collect income tax, value-added tax, general sales tax, rates on property or customs duties, while municipalities can only impose rates on property and surcharges on fees for services they provide, see s 228(1) and 229(1) of the Constitution. The division is made by means of the annual Division of Revenue Act. See also, Gevers et al *South African Constitutional Law* 305, 306.

[1293] S 213(1) of the Constitution. Gevers et al *South African Constitutional Law* 304. The legislative authority does not have the power to prepare legislation that authorises the collection of revenue. See s 55(1)(b), 68(b), 73(2), 77 of the Constitution.

[1294] See s 228(1) and 229(1) of the Constitution. The division is made by means of the annual Division of Revenue Act. See also, Gevers et al *South African Constitutional Law* 305, 306.

The Constitution requires the national sphere to divide the revenue that it collects equitably.[1295] In dividing the revenue, the need of the provincial and municipal spheres of government to provide basic services and perform functions must be taken into account.[1296] There must also be flexibility to respond to emergencies and temporary needs.[1297] Equitable division of revenue that is sufficiently flexible to respond to emergencies and temporary needs is of great importance for the fulfilment of the EHP regarding the provision of alternative accommodation to evictees.

Furthermore, to apply the funds allocated to it effectively, each executive body must prepare a budget.[1298] The state's fulfilment of socio-economic rights, including the fulfilment of its housing duty, is limited by the amount allocated in the budget for this purpose. As the entity with the power to draft the budget, the executive authority essentially has the power to decide which needs must be prioritised and how needs and socio-economic rights must be fulfilled, subject to confirmation by the legislative authority.[1299] The fact that the executive and legislative branches have the power to decide how revenue is collected, distributed and spent is in accord with the fact that they are democratically elected and should have the interests of the people at heart.

2.3 The judicial authority

The South African judicial authority is vested in the courts.[1300] Although a hierarchy of courts exists, the judicial authority does not have a similar structure to the other branches of government and do not operate in three specific spheres. Within the judiciary, there are four primary levels and types of courts.[1301]

[1295] S 214(1) of the Constitution.

[1296] S 214(2)(d) of the Constitution. Gevers et al *South African Constitutional Law* 307.

[1297] S 214(2)(j) of the Constitution. Gevers et al *South African Constitutional Law* 307.

[1298] S 215 of the Constitution.

[1299] S 215(2)(b) of the Constitution.

[1300] S 165(1) of the Constitution.

[1301] The Constitution also allows for other courts created or recognised by national legislation, which function on the same level as High or Magistrates' Courts, see s 166(e) of the Constitution.

On the highest level in the hierarchy, is the Constitutional Court, which has national jurisdiction and is the highest court in the country.[1302] The Constitutional Court can hear all constitutional matters and matters on appeal that are of importance to the general public.[1303] One level below the Constitutional Court is the Supreme Court of Appeal, which also has national jurisdiction.[1304] The Supreme Court of Appeal can hear matters on appeal from the High Court.[1305] On the level below the Supreme Court of Appeal is the High Court of South Africa, which is divided into nine divisions, one per province.[1306] Each division has jurisdiction over its respective province.[1307] The High Court can hear any constitutional or other matter not assigned to another court.[1308] On the entry level in the hierarchy are the Magistrates' Courts. They have jurisdiction within their specific district or region.[1309] Magistrates' Courts are the courts of first instance for smaller matters. Magistrate Court decisions are not reported and are not used in this analysis. Unlike the legislative and executive authorities, members of the judicial authority are not democratically elected by the citizens of South African.[1310]

The general function of the judicial authority is to administer justice "impartially and without fear, favour or prejudice".[1311] Courts are approached to interpret and enforce the law, usually for purposes of resolving a dispute between the parties before them. [1312] They have the power to order relief for the parties to remedy the matter. [1313] In respect of the state's duty to respect, protect, promote and fulfil housing-and-eviction rights, the court has the power to interpret

[1302] S 167(3)(a) of the Constitution. It consists of the chief justice, the deputy chief justice and nine other judges, see s 167(1) of the Constitution.

[1303] S 167(3)(b) of the Constitution.

[1304] It consists of the president of the SCA, the deputy president of the SCA and nine judges, see s 168(1) of the Constitution.

[1305] Or any other court with similar status, see s 168(3)(a) of the Constitution.

[1306] S 169(2) of the Constitution.

[1307] It consists of a judge president, a deputy judges president and a number of judges, see s 169(3) of the Constitution.

[1308] S 169(1) of the Constitution.

[1309] Regional Magistrates' Courts are higher up in the hierarchy than District Magistrates' Courts. The presiding officers of the Magistrates' Courts are called magistrates.

[1310] S 174 of the Constitution provides for the appointment of personnel within the judiciary.

[1311] S 165(2) of the Constitution. See also, Chapter 6 on how justice is to be administered in the granting of alternative accommodation orders.

[1312] Pieterse (2004) *SAJHR* 407-411; Liebenberg *Socio-Economic Rights* 66.

[1313] Pieterse (2004) *SAJHR* 411.

this duty, as well as the specific human right.[1314] In addition, it has the power to test whether the legislative and executive authorities have fulfilled this duty.[1315] The power of the court to test whether the other branches of government have fulfilled their duties provides an important check on these branches.[1316]

3 Alternative accommodation orders and the separation of powers

Due to the separation of powers, each branch is specialised to perform its own functions.[1317] Furthermore, branches are able to act as checks and balances for each other, meaning that they hold each other accountable for performing their functions properly.[1318] Both possible grounds for alternative accommodation orders involve holding the executive authority accountable for performing its functions properly.[1319]

Ideally, the legislative authority should hold the executive authority accountable. However, complete separation of powers does not occur between these branches.[1320] The majority of the members of the legislature support the dominant political party.[1321] The members of the executive authority, chosen from the ranks of the legislature, often belong exclusively to the dominant party. Hence, they have the same political agenda.[1322] This causes separation between the governing party and opposition parties, instead of between the three branches of government.[1323]

[1314] Pieterse (2004) *SAJHR* 407-411

[1315] Gevers et al *South African Constitutional Law* 3.

[1316] Liebenberg *Socio-Economic Rights* 66.

[1317] Liebenberg *Socio-Economic Rights* 67.

[1318] Currie & De Waal *The Bill of Rights Handbook* 20. Bishop explains that the separation of powers requires both the independence and the interdependence of branches. See, Bishop "Remedies" in *CLOSA* 9-73; S Seedorf & S Sibanda "Separation of powers" in 2 ed 12 12-11, 12-20. See also, Ngcobo (2011) *Stell LR* 38; Liebenberg *Socio-Economic Rights* 66, 67.

[1319] See Chapter 2:3.4.

[1320] Gevers et al *South African Constitutional Law* 4, 6. See also, *First Certification Judgment* paras 108-109; Pieterse (2004) *SAJHR* 386. Currie & De Waal *The Bill of Rights Handbook* 18; Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-39; Ngcobo (2011) *Stell LR* 38.

[1321] See Chapter 5:2.2.

[1322] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-15.

[1323] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-15.

Since the separation of powers is hampered by the government officials' membership to political parties,[1324] the checks and balances, to be achieved through the separation of powers, are less effective.[1325] When the majority of the legislature and the executive belong to the same political party, they are less likely to hold each other accountable. Under such circumstances, the media plays a role in holding the government accountable. It exposes abuse of power and self-interested conduct and has been referred to as the fourth branch of government.[1326]

In the context of evictions, the media has caused public outrage at evictions that cause homelessness. An example is the eviction by the South African National Roads Agency that resulted in the Minister of Human Settlement's request for a ministerial enquiry.[1327] Due to the media coverage and the ensuing public outrage, the executive authority was forced to address the matter concerning the provision of alternative accommodation upon eviction comprehensively.[1328] However, the media, especially social media, is a dangerous tool. It can spark public outrage and protests without the public knowing all of the facts or the applicable law. Hence, it is essential that an independent and objective entity, such as the judiciary, hold the executive accountable instead.[1329]

While interference of branches with each other's powers for the sake of checking and balancing power is necessary, interference must be limited. One branch should only interfere with the powers of another to the extent that it ensures that the other branch fulfils its functions.[1330] The extent to which interference should be allowed is often a topic of debate, especially in matters relating to the state's fulfilment of socio-economic rights, such as the right of access to adequate housing.[1331] In other words, there is debate about the extent to

---

[1324] See Chapter 5:2.2.

[1325] For more on the current imbalance of powers and insufficient separation, see Liebenberg *Socio-Economic Rights* 68. Liebenberg argues that the executive authority holds most of the power. In support of this arguments, she refers to R Calland & M Taylor "Parliament and the socio-economic imperative - what is the role of the national legislature" (1997) 1 *Law Democracy & Development* 193 198.

[1326] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-15 – 12-16.

[1327] See Chapter 1:1.

[1328] See Chapter 1:1.

[1329] Liebenberg *Socio-Economic Rights* 66.

[1330] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-11.

[1331] See, M Kende "The South African Constitutional Court's embrace of socio-economic rights: a comparative perspective" (2003) 6 *Chapman Law Review* 137 152; MS Kende "The South African Constitutional Court's construction of socio-economic rights: a response to critics" (2003) 19 *Connecticut Journal of International Law*

which a court should be allowed to dictate how the other branches of the state must fulfil their duties. Orders that place a positive duty on the state to fulfil the socio-economic rights of a party before the court, such as alternative accommodation orders, have been said to violate the separation of powers doctrine.[1332]

In *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996*,[1333] it was argued that socio-economic rights should not be included in the Bill of Rights. In adjudicating socio-economic rights, courts would encroach on the powers of the other branches of government and this would violate the separation of powers doctrine.[1334] The court found that it would not allow a rigid and formalistic view of the separation of powers doctrine, which prevents courts from issuing orders that affect state policy or budget. Without elaborating on this finding, the court said that, at least, socio-economic rights may be negatively protected.[1335] From this judgment, it is clear that, although courts should be cautious not to interfere unduly with the powers of the other branches of government, it does have the power to make decisions that affect the policies and budget of the executive authority. An alternative accommodation order is an example of a decision that can severely affect the policies and budget of the executive authority. The provision of accommodation is financially costly and might detract from the funds budgeted for the implementation of policies.

3.1 Arguments that alternative accommodation orders violate the separation of powers doctrine

Arguments that alternative accommodation orders violate the separation of powers doctrine can be divided into three main categories. The first argument is that courts do not have the institutional and technical capacity to make orders that affect policy and budget. Second, the judicial officers are not democratically elected and, therefore, should not decide on policy

617 617-618. See also, Bishop "Remedies" in *CLOSA* 9-73; S Seedorf & S Sibanda "Separation of powers" in 2 ed 12 12-46, 61.

[1332] Currie & De Waal *The Bill of Rights Handbook* 21, 182; Mbazira *Litigating Socio-Economic Rights* 5.

[1333] *First Certification Judgment* (hereinafter "*First Certification Judgment*"). *First Certification Judgment* (hereinafter "*First Certification Judgment*").

[1334] *First Certification Judgment* para 76-78.

[1335] *First Certification Judgment* para 78. See, Liebenberg (2002) *Law Democracy & Dev* 162.

and budgetary matters. Third, such orders might have far-reaching budgetary implications and the executive authority might not be able to implement them.

In the remainder of this section, these problems are discussed in more detail. Importantly, any investigation into whether conduct violates the separation of powers doctrine must consider the separation of powers doctrine as manifested in the Constitution and developed by the courts and not an abstract idea of the doctrine. This is because there are many different conceptions and interpretations of the doctrine, to which the South African Constitution does not subscribe.[1336]

3.1.1 Technical capacity to decide on polycentric issues

As stated, the first potential problem with alternative accommodation orders is that courts do not have the institutional and technical capacity to make such orders.[1337] Courts themselves have referred to their lack of technical expertise and the fact that their position makes it difficult for them to access and process information.[1338] In fact, in the High Court decision of *Hlophe v City of Johannesburg Metropolitan Municipality*,[1339] Satchwell J admitted to having no "knowledge of town planning, urban development, provision of housing or budgeting".[1340]

The matter is exacerbated when the issues before the court are so-called "polycentric issues".[1341] A polycentric issue requires the court to consider several different "interlocking and interacting" interests,[1342] including the interests of others who are not before the court.[1343]

[1336] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-20, 12-35 – 12-36, referring to *S v Dodo* 2001 (3) SA 382 (CC) para 17; *Van Rooyen v S* 2002 (5) SA 246 (CC) para 34. See also, Rautenbach & Malherbe *Constitutional Law* 87; Ngcobo (2011) *Stell LR* 38 referring to *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC) para 60.

[1337] For this argument, see Gevers et al *South African Constitutional Law* 18; Liebenberg *Socio-Economic Rights* 72; Pieterse (2004) *SAJHR* 394; D Brand "Judicial deference and democracy in socio-economic rights cases in South Africa" (2011) 22 *Stellenbosch Law Review* 614 616; Mbazira *Litigating Socio-Economic Rights* 6.

[1338] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) paras 29 and 58; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 180. See also, Gevers et al *South African Constitutional Law* 27; Pillay (2002) *Law Democracy & Dev* 259. See also, Currie & De Waal *The Bill of Rights Handbook* 22, 69; Bishop "Remedies" in *CLOSA* 75.

[1339] 2013 (4) SA 212 (GSJ).

[1340] *Hlophe HC2* para 27.

[1341] Fuller refers to this term in relation to adjudication. See, LL Fuller & KI Winston "The forms and limits of adjudication" (1978) 92 *Harvard Law Review* 353 394. He borrowed the concept from M Polanyi *The Logic of Liberty Reflections and Rejoinders* (1951). See also, Steinberg (2006) *SALJ* 270; Kotze *Effective Relief* 43.

[1342] P Cane *Administrative Law* (2011) 274.

An alternative accommodation order requires the executive authority to use its resources for the provision of housing to a specific group of persons. This affects the rights of others to have their rights respected, protected and fulfilled.[1344] Compliance with the order would leave fewer resources for meeting their needs.

The contention is that other branches of government are in a better position to make decisions on polycentric issues, such as the provision of alternative accommodation in eviction matters.[1345] The executive authority, for example, is specialised in fulfilling the function of providing housing. It is in a better position to know what emergency housing situations exist within its jurisdiction and what resources it has to address these situations.[1346]

A counterargument can be made that all matters before the court are polycentric and require technical expertise. Yet, this does not prevent courts from deciding other matters.[1347] Furthermore, other branches of government are not necessarily better at making decisions regarding respecting, protecting and fulfilling human rights.[1348] Liebenberg states that the argument that decisions regarding the fulfilment of socio-economic rights should be left to the other branches of government relies on the (possibly flawed) notion that the legislative and executive branches care about the poor, have the expertise to set up perfect programmes and do so.[1349] While this argument is sound, it does not justify transferring the power to the courts. The executive might not have the requisite compassion and expertise, but this does not mean that the judiciary does.

[1343] See Pieterse (2004) *SAJHR* 392; DM Davis "Adjudicating the socio-economic rights in the South African Constitution: towards deference lite" (2006) 22 301 323; Steinberg (2006) *SALJ* 270; Currie & De Waal *The Bill of Rights Handbook* 565. In *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), the court refuse to dictate to the state how it should comply with its duty to provide diplomatic protection, because of the polycentricity of the issue, referred to in Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-66 – 12-68. For the idea that the court should consider how its order would affect those not before the court, see Liebenberg *Socio-Economic Rights* 71, 72. *TAC* para 38; Mbazira *Litigating Socio-Economic Rights* 6; Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 43.

[1344] Liebenberg *Socio-Economic Rights* 72-73.

[1345] Pieterse (2004) *SAJHR* 388; Brand (2011) *Stell LR* 618-619. Viljoen confirms that the provision of housing is a polycentric issue, in S Viljoen "The systemic violation of section 26 (1): An appeal for structural relief by the judiciary" (2015) 30 *Southern African Public Law* 42 57.

[1346] Liebenberg acknowledges the problem faced by court with not having all the information, in Liebenberg *Socio-Economic Rights* 73.

[1347] Liebenberg *Socio-Economic Rights* 72-74; Pieterse (2004) *SAJHR* 395. However, Currie and De Waal argued that the polycentricism in socio-economic rights matters is higher in Currie & De Waal *The Bill of Rights Handbook* 566.

[1348] Pieterse (2004) *SAJHR* 39; Brand (2011) *Stell LR* 620.

[1349] Liebenberg *Socio-Economic Rights* 74.

Another counterargument, for saying that the courts should not make decisions relating to technical, polycentric issues, is that courts should be able to make these decisions if it has all the necessary information before it.[1350] Instead of refusing to decide matters where they lack the requisite information, courts should engage with other interested groups, like organs of civil society or the other branches of government, to gather the information.[1351] To some extent, courts have done this in eviction matters by relying on information provided by *amici curiae* or by requiring the state to report on its policies and budgets.[1352] Nonetheless, some of the eviction decisions do not seem to take into account the polycentrism of the issues.[1353] This first problem can only be addressed if the court has all the relevant information before it and appreciates the polycentrism of the matter before it.

3.1.2 The counter-majoritarian dilemma

The second problem with alternative accommodation orders is that the courts are not democratically elected, while the executive and legislative authorities are.[1354] This is called the counter-majoritarian dilemma,[1355] which describes the issue that important decisions are placed in the hands of a few unelected judges who might not be wiser, more moral or more principled than the other branches of government.[1356] The court itself has referred to its lack of democratic accountability.[1357]

[1350] Pieterse (2004) *SAJHR* 395-396; Liebenberg *Socio-Economic Rights* 73-74.

[1351] Brand (2011) *Stell LR* 632, 634; Woolman & Botha "Limitations" in *CLOSA* 34-110.

[1352] See the cases of *Absa Bank bpk v Murray* para 41; *Blue Moonlight HC* para 64; *Changing Tides* para 40; *Hlophe* para 4, 5. See also, Muller & Liebenberg (2013) *SAJHR* 565-568; See also, Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 27; Van Wyk (2011) *PER/PELJ* 57-59; Wilson (2011) *Urban Forum* 272.

[1353] Such as the distributive effect of its order. The court granting of an alternative accommodation order in *Hlophe* after expressly finding that it does not want information on others who might be affected by its order shows a disregard for the polycentricism of the issue. On the need to consider the distributive effect of alternative accommodation orders, see Chapter 6.

[1354] The CC mentions this problem in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61. See also, Davis (2012) *PER/PELJ* 3; Mbazira *Litigating Socio-Economic Rights* 5-6.;

[1355] Gevers et al *South African Constitutional Law* 18; Liebenberg *Socio-Economic Rights* 63. Brand (2011) *Stell LR* 616, 624.

[1356] Liebenberg *Socio-Economic Rights* 63; Currie & De Waal *The Bill of Rights Handbook* 566; Bishop "Remedies" in *CLOSA* 9-110.

[1357] The CC refers to this lack in *Soobramoney* para 29, 58. See also, Gevers et al *South African Constitutional Law* 27; Pieterse (2004) *SAJHR* 390.

The counterargument is that those averse to placing important decisions in the hands of an unelected few are interested in protecting democracy.[1358] However, democracy is not simply majority rules.[1359] It is not simply institutional.[1360] Democracy means that every person has a voice. Courts provide a way for minorities to participate and give them a mechanism to protect their rights.[1361]

Another counterargument is that checks and balances do not amount to a battle between the branches. All branches of government have the same task, to uphold the Constitution. Ngcobo argues that checks and balances should resemble a constitutional dialogue whereby the branches work together to ensure that the Constitution is upheld.[1362] The court should provide guidance as to how another branch of government must comply with their duties, instead of dictating how it should fulfil its duties.[1363] Ngcobo refers to *Government of the Republic of South Africa v Grootboom*[1364] (hereinafter "*Grootboom*") as an example of such a dialogue, since the court allowed the state to respond to its findings that the housing programme was not constitutionally sound.[1365]

This seems like an argument against alternative accommodation orders. This is because alternative accommodation orders do not allow the executive the opportunity to react to a finding that it did not comply with its constitutional duties and to decide how it would rectify the matter.[1366] However, this constitutional dialogue is impossible if all the parties do not participate.[1367] The Constitutional Court's attempt at a constitutional dialogue is evident from the decisions discussed in Chapter 2. In *Grootboom*, the court simply stated that the executive authority did not fulfil its housing duty properly and then allowed the executive authority to

[1358] Brand (2011) *Stell LR* 625.

[1359] T Koelble & A Reynolds "Power-sharing democracy in the new South Africa" (1996) 24 *Politics & Society* 221 226-227.

[1360] Brand (2011) *Stell LR* 625.

[1361] Pieterse (2004) *SAJHR* 387; Brand (2011) *Stell LR* 629. Liebenberg *Socio-Economic Rights* 167.

[1362] Ngcobo (2011) *Stell LR* 40-41; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 205. Liebenberg refers to this as co-operation between the branches in Liebenberg *Socio-Economic Rights* 68-69.

[1363] Dyzenhaus (2007) *SALJ* 249.

[1364] 2001 (1) SA 46 (CC).

[1365] Ngcobo (2011) *Stell LR* 46-47.

[1366] Ngcobo (2011) *Stell LR* 42; Woolman *The Selfless Constitution* 205.

[1367] Woolman & Botha "Limitations" in *CLOSA* 34-107.

react and rectify its omission.[1368] In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*,[1369] the court stated that the executive authority has a duty toward the unlawful occupiers and allowed the executive authority to engage with the unlawful occupiers to find a solution.[1370]

It is evident in the subsequent cases where alternative accommodation orders were granted that the court grew less enthusiastic about entering into a dialogue with the executive authority. The decline in enthusiasm appears to be related to the executive's failure to participate. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[1371] (hereinafter "*Blue Moonlight*"), the court criticised the executive authority for not acknowledging responsibility toward the unlawful occupiers and for not participating by providing sufficient information regarding its available resources.[1372] The court, in *City of Johannesburg Metropolitan Municipality v Hlophe*[1373] (hereinafter "*Hlophe*"), gave the executive authority the opportunity to identify those unlawful occupiers who qualify under the EHP, but the executive authority failed to do so in the stipulated time.[1374]

In situations where the executive authority is unwilling to participate properly, a constitutional dialogue is not feasible. Such situations justify the court dictating to the executive authority on how to perform its functions. However, a court must not interpret a genuine inability on the part of the executive authority as an unwillingness to participate and to fulfil its functions. Similarly, a court must not require the executive authority to participate in a way that does not fall within its duties. In *Blue Moonlight*, for example, the court required the municipality to report on its general budget.[1375] The municipality is not required

[1368] See the discussion of *Grootboom* in Chapter 2:2.1. Liebenberg is of the opinion that a declaratory order was granted, instead of a mandatory interdict, to facilitate constitutional dialogue in Liebenberg *Socio-Economic Rights* 407.

[1369] 2008 (3) SA 208 (CC).

[1370] See the discussion of this case in Chapter 2:3.1.

[1371] 2012 (2) SA 104 (CC).

[1372] See the discussion of this case in Chapter 2:3.1.1.

[1373] [2015] 2 All SA 251 (SCA).

[1374] See the discussion of this case in Chapter 2:3.1.2.2.

[1375] See the discussion of this case in Chapter 2:3.1.1.

to use resources outside its emergency housing budget to provide emergency housing.[1376] Hence, the participation of reporting on its general budget would fall outside its duties.

3.1.3 Far-reaching budgetary implications

As indicated above, the third problem with alternative accommodation orders is that they might have far-reaching budgetary implications and that the state might not be able to implement them.[1377] In *Minister of Health v Treatment Action Campaign*[1378] (hereinafter "*TAC*"), the Constitutional Court found that, while courts should not rearrange the state's budget, it should not refrain from making orders simply because it has budgetary implications.[1379] "[G]overnment is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so".[1380] This case involved an order that the state must provide a drug that prevents transmission of HIV from mother to baby to all HIV-positive pregnant women. It has been argued that the court's distinction between *actively rearranging* the state's budget and making an order that *necessarily interferes* with the state's budget is merely a fiction aimed at allowing rearrangement without admitting it.[1381] Importantly, although this case is often used to show how the court has granted a remedy with far-reaching budgetary implications, the manufacturers of the drug, in this case, had offered to provide the drug gratis.[1382] This substantially lessened the financial burden on the state.

A counterargument to the assertion that courts should not issue alternative accommodation orders since it has far-reaching budgetary effects is that even decisions that do not require the fulfilment of socio-economic rights might have far-reaching budgetary effects.[1383] The

---

[1376] It must budget separately for emergency housing situations and if its resources are insufficient if must apply to the provincial authority for assistance. See, Department of Human Settlements *EHP* (2009) Part B 3.1.

[1377] Brand (2011) *Stell LR* 616; Mbazira *Litigating Socio-Economic Rights* 5. See also, Smith (2014) *De Rebus* 40.

[1378] 2002 (5) SA 721 (CC).

[1379] *TAC* para 38. See also, Currie & De Waal *The Bill of Rights Handbook* 182.

[1380] *TAC* para 99.

[1381] Gevers et al *South African Constitutional Law* 720.

[1382] *TAC* para 48.

[1383] Liebenberg *Socio-Economic Rights* 55, 191; Pieterse (2004) *SAJHR* 389. DM Davis "Adjudicating the socio-economic rights in the South African Constitution: towards deference lite" (2006) 22 301 305; Kende (2003) *Chap L Rev* 156; CR Sunstein *Designing Democracy: What Constitutions Do* (2002) 222-223. See also, Currie & De Waal *The Bill of Rights Handbook* 183.

decision that capital punishment is unconstitutional,[1384] for example, did not relate to the fulfilment of socio-economic rights. Still, it had far-reaching budgetary effects, since the sentences of all those awaiting execution had to be adapted.[1385]

Nevertheless, the executive's duty to provide housing is limited by the Constitution to the extent that it need only be within its available resources. Moreover, the executive has the exclusive power to budget and decide what amount of resources is spent on fulfilling this duty. Hence, where the executive has a short-term housing budget, the court must either make decisions concerning the provision of emergency housing that adheres with this budget or it must declare the budget unconstitutional.[1386] Where the alternative accommodation order is based on the second possible ground, the state's duty is not similarly limited to its available resources.[1387] However, it could be argued that a short-term housing budget is necessarily also the state's budget for the protection of the rights of the landowner and the unlawful occupiers.[1388] Moreover, even if a separate budget is used, since the function of planning and budgeting for the respect and protection of rights falls within the powers of the executive authority, the court should respect such a budget, unless it finds to be unreasonable.[1389] What is considered reasonable would depend on the circumstances.

Furthermore, the decision in *TAC* took into account all poor, HIV-positive, pregnant women. The order was for the benefit of all of these women. An alternative accommodation order should similarly take into account all persons in similar situations. This would reduce further similar violations.[1390] From a budgetary perspective, it would also ensure that the executive authority does not spend all its available resources on complying with one alternative accommodation order and then it cannot comply with any subsequent alternative accommodation orders. A court should not grant orders with which the executive authority is unable to comply.[1391]

[1384] *S v Makwanyane*.

[1385] Liebenberg *Socio-Economic Rights* 73.

[1386] See Chapter 1:3.2.1.

[1387] *Jaftha v Schoeman; Van Rooyen v Stoltz* para 31.

[1388] For more on this argument, see Chapter 4:5.2 and Chapter 6:4.2.1.

[1389] See Ch5 S 2.2.

[1390] For more on this argument, see Chapter 6.

[1391] Pieterse (2004) *SAJHR* 406; Bishop "Remedies" in *CLOSA* 9-76; Smith (2014) *De Rebus* 42. See also, Van Wyk (2011) *PER/PELJ* 67; Pillay (2007) *Int'l J Const L* 555.

3.2 Alternative accommodation orders that adhere to the separation of powers doctrine

To adhere to the separation of powers doctrine, alternative accommodation orders must be granted as last resort. Where a court finds that the executive authority did not comply with its short-term housing duty or its duty to protect the rights of the landowner or the unlawful occupiers, it should engage in constitutional dialogue with the executive authority.[1392] This involves allowing the executive authority to decide how to rectify its omission.[1393]

Where the executive authority is unwilling to participate in the dialogue, the court may be more prescriptive. In prescribing to the executive authority how it should fulfil its duties, the court must take cognisance of the polycentrism of eviction matters.[1394] This requires that the court has all the relevant information before it.[1395] Moreover, it must employ the services of experts to ensure that it is able to understand the technical aspects of the matter.[1396] It must also consider how its order would affect others that are not before the court.[1397]

If the alternative accommodation order is based on the state's failure to fulfil its short-term housing duty or its failure to protect the unlawful occupiers' negative housing right, the court should consider whether the executive authority has a short-term housing budget.[1398] The existence of such a budget means that a court must adhere to this budget unless it finds it unreasonable. Furthermore, whether there is a budget or not, before granting an alternative accommodation order a court must ensure that it does not prevent the executive authority from being able to assist others, in a similar position to the unlawful occupiers, who are not before the court by exhausting its available resources.[1399]

[1392] Ngcobo (2011) *Stell LR* 40-41; Woolman *The Selfless Constitution* 205; Liebenberg *Socio-Economic Rights* 68-69.

[1393] Ngcobo (2011) *Stell LR* 46-47.

[1394] D Brand "Judicial deference and democracy in socio-economic rights cases in South Africa" 614 632, 634.

[1395] Brand (2011) *Stell LR* 632, 634.

[1396] Pieterse (2004) *SAJHR* 395-396; Liebenberg *Socio-Economic Rights* 73-74.

[1397] Liebenberg *Socio-Economic Rights* 71, 72. *TAC* para 38; Mbazira *Litigating Socio-Economic Rights* 6; Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 43. See also, Chapter 6.

[1398] Or another budget adopted for the purpose of respecting, protecting or fulfilling the landowner or unlawful occupiers' rights in eviction matters.

[1399] For more on this, see Chapter 6.

4 Alternative accommodation orders and co-operative government

In all the cases, in Chapter 2, where alternative accommodation orders were granted, the orders were granted against municipalities.[1400] Placing the primary duty to provide alternative accommodation has been met with objection from municipalities.[1401] In *Blue Moonlight*, the municipality argued that it does not have the duty or the competence to fund the provision of alternative accommodation. This objection relates to the principle of co-operative government. The court rejected this argument.[1402]

This section considers when alternative accommodation orders would adhere to the principle of co-operative government. The discussion is focused on co-operative government in respect of the state's housing duty. This relates directly to the first ground for alternative accommodation orders. The reason for this focus is that there are specific laws and policies dealing with housing in which the duty to co-operate can be assessed. However, this focus on the first ground should not be seen as an exclusion of the second. The conclusions relating to co-operative government and the state's housing duty should be equally applicable to the second ground. This is because the laws and policies on housing are merely illustrations of how the branches of government have interpreted their duty to co-operate. Their interpretation of their duty to co-operate in complying with their duty to fulfil rights should be no different from their interpretation of their duty to co-operate in complying with their duty to respect and protect the same, or similar, rights.[1403]

In determining when alternative accommodation orders would adhere to the principle of co-operative government, the general purpose of co-operative government is explained. Thereafter, the special role afforded to municipalities in terms of the Constitution is discussed. The special duties of executive councils toward municipalities are also explored.

[1400] See Chapter 2:3.

[1401] As was the case in *Blue Moonlight* para 51-54.

[1402] See the discussion of *Blue Moonlight* in Chapter 2:3.1.1.

[1403] In addition, it can be argued that the EHP can be considered the state's plan to protect persons against their loss of access to housing, which relates to the state's short-term housing duty. Moreover, if fault is considered a requirement for holding the state liable in terms of the second ground and fault relates to the state's failure to fulfil its housing duty, then housing is relevant.

In addition, the state's housing legislation and emergency housing policies are examined to determine whether they require co-operation between the spheres of government.

4.1 General duty to co-operate

Unlike the branches of government, the different spheres of government within a branch are not to function in a vacuum.[1404] Section 40(1) of the Constitution provides that the spheres are distinct, interdependent and interrelated.[1405] Spheres must each fulfil their own functions but must work toward the same goal.[1406] This is where the principle of co-operative government comes into play.[1407] There must be both vertical and horizontal co-operation within the spheres of government.[1408]

Despite being assigned specific powers, the different spheres of government within a branch must assist and support each other in performing their functions.[1409] They must inform and consult each other on matters of common interest and coordinate their actions and legislation.[1410] One sphere cannot undermine the functioning of another sphere.[1411]

Prior to the Interim Constitution, the notion of co-operative government was foreign to South African law.[1412] There is no explicit direction in the Interim Constitution on how co-operation is to be effected.[1413] In contrast, the final Constitution has more detailed rules for co-operative government than any other constitution worldwide.[1414] Amongst others, it requires that legislation must be enacted to achieve co-operative government.[1415] In response, several

[1404] S 40(1) of the Constitution.

[1405] In this, see Davis (2012) *PER/PELJ* 4.

[1406] *Independent Electoral Commission v Langeberg Municipality* para 26, referred to in Woolman & Roux "Co-operative Government" in *CLOSA* 14-9.

[1407] Chapter 3 of the Constitution deals with co-operative government. See also, Gevers et al *South African Constitutional Law* 9.

[1408] Woolman & Roux "Co-operative Government" in *CLOSA* 14-7. See also, Steytler "Local Government in South Africa" in *Local Government in Federal Systems* 204.

[1409] S 41(1)(h)(ii) of the Constitution.

[1410] S 41(1)(h)(iii) and (iv) of the Constitution.

[1411] Woolman & Roux "Co-operative Government" in *CLOSA* 14-8.

[1412] De Villiers (1997) *SAPR/PL* 197-198.

[1413] De Villiers (1997) *SAPR/PL* 199.

[1414] De Villiers (1997) *SAPR/PL* 200-201.

[1415] S 41(2) of the Constitution.

pieces of legislation have been enacted and several institutions have been created,[1416] including the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA).

The IGRFA indicates a substantive dimension of co-operative government. It provides that co-operative government is necessary for the realisation of constitutional rights and that spheres must work together to alleviate poverty.[1417] Hence, the realisation of constitutional rights and the alleviation of poverty are common goals that the spheres must work towards achieving. The provision of alternative accommodation concerns both the realisation of constitutional rights[1418] and the alleviation of poverty. Accordingly, the spheres of government must co-operate in providing alternative accommodation.

4.2 Special role of municipalities

Municipalities are best placed to address the needs of the people within their respective jurisdictions since they are closest to the people.[1419] The Constitution gives municipalities specific obligations toward those within their jurisdiction. The general purpose of a municipality is to govern the local government affairs of its community.[1420] This includes ensuring the provision of services, promoting socio-economic development, promoting a safe and healthy environment and encouraging community involvement in local government matters.[1421] The provision of services forms an integral part of the provision of housing and, hence, the fulfilment of the right of access to adequate housing.[1422] Moreover, the provision of housing to the indigent evictees or those living in squalor promotes a safe and healthy environment, as well as socio-economic development.

[1416] These include the National Council of Provinces, the Intergovernmental Forum, the Presidential Co-ordinating, Statutory and non-Statutory MINMECs (Ministers and Members of Executive Council), the Forum for South African Directors' General, the Fiscal and Financial Commission, Intergovernmental Fiscal Relations Act 97 of 1997, the Division of Revenue Act, Public Finance Management Act 1 of 1999, Provincial Tax Regulation Process Act 53 of 2001, Borrowing Powers of Provincial Government Act 48 of 1996, the Medium Term Budget Statement and provincial intervention in local government. See, Woolman & Roux "Co-operative Government" in *CLOSA* 14-24.

[1417] Preamble of Intergovernmental Relations Framework Act.

[1418] S 25(1) and s 26(1) of the Constitution.

[1419] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14.

[1420] S 151(3) of the Constitution.

[1421] S 152 of the Constitution. This duty is confirmed in S 4(2)(d) and (j) of the Local Government: Municipal Systems Act.

[1422] *Grootboom* para 35.

Municipalities also have a constitutional duty to budget and plan in such a way that they prioritise the basic needs of communities.[1423] In the context of housing and evictions, this suggests that they must focus their resources on ensuring that homeless persons or those facing homelessness because of eviction have alternative accommodation. Nonetheless, provision of alternative accommodation requires substantial resources. Municipalities are limited in their ability to raise revenue themselves.[1424] Accordingly, the provision of alternative accommodation by municipalities is dependent on receiving an equitable portion of the national revenue.[1425] Some municipalities have argued that they do not have the resources to provide alternative accommodation to unlawful occupiers.[1426] In such situations, municipalities have looked to executive councils for assistance.[1427] The following section considers the special duties of executive councils toward municipalities.

4.3 Special duties of executive councils toward municipalities

The Constitution specifically requires co-operation between executive councils and municipalities. Executive councils must provide support to and monitor municipalities within their respective provinces.[1428] They may intervene if a municipality cannot or does not meet its obligations.[1429] In doing so, they must either issue a directive to the municipal council[1430] or take on the obligations themselves.[1431] If the municipality's failure to meet its obligations is due to financial constraints, the executive council must devise a recovery plan. In this way, the executive council ensures that the municipality can fulfil its obligations and assume responsibility for the recovery plan to the extent that the municipality has failed to assume

[1423] S 153(a) of the Constitution. The Constitutional Court confirmed this in *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 34. See also, Gevers et al *South African Constitutional Law* 12.

[1424] The powers of the provincial and local spheres to collect taxes are restricted by the Constitution. Executive councils cannot collect income tax, value-added tax, general sales tax, rates on property or customs duties, while municipalities can only impose rates on property and surcharges on fees for services they provide, see s 228(1) and 229(1) of the Constitution. The division is made by means of the annual Division of Revenue Act. See also, Gevers et al *South African Constitutional Law* 305, 306.

[1425] See Chapter 5:2.2. Van Wyk argues that there is a lack of financial and administrative capacity at municipal level in Van Wyk (2007) *JS Afr L* at 3, referring to *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village* para 92.

[1426] For example, *Modderklip*; *PE Municipality*; *Blue Moonlight*, see the discussion of these cases in Chapter 1:2. See also, Steytler "Local Government in South Africa" in *Local Government in Federal Systems* 197.

[1427] *Blue Moonlight*; *Skurweplaas*, see the discussion of these cases in Chapter 2:3.1.1 and 3.2 respectively.

[1428] S 155(6) of the Constitution. See also, Gevers et al *South African Constitutional Law* 301.

[1429] S 139(1) of the Constitution.

[1430] S 139(1)(a) of the Constitution

[1431] S 139(1)(b) of the Constitution.

responsibility itself.[1432] Moreover, if the municipality's failure is due to a lack of budgeting, the executive council must intervene to ensure that a budget is approved.[1433] Practically, this intervention is crucial since annual audits indicate that municipalities often fail to meet their responsibilities.[1434]

Each executive council, therefore, has a duty to assist its municipalities to provide alternative accommodation and to take the responsibility upon itself where municipalities are failing to meet its responsibility. This contradicts the finding of the court in *Blue Moonlight* that the provincial authority need not be joined, despite the municipality's failure to fulfil its duties.[1435]

4.4 Housing and the duty to co-operate

The provision of housing falls within the exclusive competencies of the national and provincial spheres of government[1436] and not the competencies of municipalities.[1437] In terms of section 156(1)(b) of the Constitution, these functions can be assigned to a municipality by national or provincial legislation.[1438] The National Housing Act and the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act)[1439] assign this matter to municipalities.[1440]

[1432] It might also dissolve the municipality under certain circumstances. S 139(5) of the Constitution. See also, Gevers et al *South African Constitutional Law* 14.

[1433] S 139(5) of the Constitution.

[1434] 748-749. As evidence, Pienaar refers to the 24-25 that only 13 out of the 243 municipalities received clean audits for the period of 2010-2011. This improved in the 6-14, in which 54 municipalities received clean audits. Pienaar *Land Reform* 748-749. As evidence, Pienaar refers to the Consolidated General Report on the Audit Outcomes of Local Government 2010-2011 (2012) 24-25 that only 13 out of the 243 municipalities received clean audits for the period of 2010-2011. This improved in the Consolidated General Report on the Audit Outcomes of Local Government 2014-2015 (2016) 6-14, in which 54 municipalities received clean audits.

[1435] *Blue Moonlight* 45.

[1436] The national and provincial executives have concurrent power over matters stipulated in Schedule 4 of the Constitution. Housing falls within this schedule. See, s 44(1)(a)(ii), 104(1)(b), 125(2)(b) of the Constitution.

[1437] Steytler "Local Government in South Africa" in *Local Government in Federal Systems* 197.

[1438] Muller & Liebenberg (2013) *SAJHR* 560.

[1439] Local Government: Municipal Systems Act.

[1440] *Skurweplaas (4th Resp HoA)* para 39. S 9 of the National Housing Act reads:

"Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to-

(a) ensure that-

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;"

Section 9(1)(a)(i) of the Housing Act requires municipalities to ensure access to adequate housing to those within its jurisdiction on a progressive basis.[1441] Section 23(1) of the Municipal Systems Act requires municipalities to "undertake developmentally-orientated planning" to contribute to the realisation of section 26 of the Constitution, together with the other organs of state.

Placing a housing obligation on municipalities is in line with the constitutional objects and duties of municipalities. That is, their duties to promote socio-economic development;[1442] to prioritise the basic needs of the community within its jurisdiction;[1443] and to participate in national and provincial development programmes.[1444] Such development programmes include the national and provincial housing programmes.

In fact, under the "suggestions on how to undertake emergency housing projects" in the EHP, it is recommended that municipalities first assess whether it would be able to provide emergency assistance from its own resources, before applying for funding from the provincial authority.[1445] The court has interpreted this to mean that, to the extent they are able to, municipalities have a duty to provide alternative accommodation from their own resources in emergency housing situations.[1446]

Nevertheless, all of these instruments require co-operation from the other spheres of government. Section 7(2)(c) and (e) of the Housing Act requires the provincial government to "take all reasonable and necessary steps" to support municipalities and to strengthen their capacities to fulfil their housing duties.[1447] The constitutional duty on provincial authorities to intervene when a municipality cannot or does not fulfil its duties is strengthened in the

---

Moreover, the fact that PIE requires the court to consider whether the municipality can provide alternative accommodation, confirms that this matter has been assigned to municipalities. See, s 4(7) and s 6(3) of PIE. See also, Steytler "Local Government in South Africa" in *Local Government in Federal Systems* 197-198.

[1441] Pillay argues that this is to ensure that "government functions should be performed at the lowest possible sphere" in Pillay (2002) *Law Democracy & Dev* 266.

[1442] S 152(1)(c) and 153(a) of the Constitution.

[1443] S 153(a) of the Constitution.

[1444] S 153(b) of the Constitution.

[1445] Department of Human Settlements *EHP* (2009) Part B 3.1.

[1446] *Blue Moonlight* para 66-67.

[1447] Muller & Liebenberg (2013) *SAJHR* 560. General support for co-operative government is also found in s 2(1)(h)(ii) of the National Housing Act. On the requirement to co-operate in the Housing Act, see Strydom & Viljoen (2014) *PER/PELJ* 1216.

Housing Act.[1448] The Constitution states that executive councils *may* intervene if a municipality cannot or does not perform its functions, whereas the Housing Act states that executive councils *must* intervene.[1449] Similarly, the national authority must assist provinces and municipalities in fulfilling their housing duties.[1450] Co-operative government is similarly required in section 3 and 24 of the Municipal Systems Act. The EHP requires the spheres of government to co-operate and support one another.[1451] The EHP provides for a procedure by which the municipality can apply for a grant to fund the provision of alternative accommodation in emergency housing situations.[1452] Nonetheless, only where the municipality does not have the available resources, should the provincial authority be involved.[1453]

The Constitutional Court, in *Grootboom*, confirmed this duty to co-operate. It stressed that national government has the ultimate duty to ensure that emergency housing is provided.[1454] There must be nationwide planning, budgeting and monitoring of fulfilment.[1455] Without national support, municipal plans cannot succeed.[1456] This relates strongly to the need for sufficient resources to provide emergency housing. After the *Grootboom* decision, the National Department of Housing suggested that 1% of the state's budget be reserved for emergency housing situations. The national treasury refused, stating the provision of emergency accommodation is a provincial matter. As a result, provinces were allowed to spend 0.5% to 0.75% of their annual revenue on such situations.[1457] This allocation to provinces is not ideal since provinces do not have the same emergency housing needs.[1458] The refusal of the national treasury is also not in line with co-operative government.

[1448] S 7(2)(f) of the National Housing Act. Similarly, the national authority may intervene of executive councils cannot or do not fulfil their duties. See s 100(1) of the Constitution. See also, Pillay (2002) *Law Democracy & Dev* 266.

[1449] S 7(2)(f) of the National Housing Act *versus* s 139(1) of the Constitution.

[1450] S 3(2)(d) and (e) of the National Housing Act.

[1451] "The roles and functions of national, provincial and local government are based on the principles of co-operative governance", Department of Human Settlements *EHP* (2009) Part A 2.6.

[1452] Department of Human Settlements *EHP* (2009) Part A 2.5.2, Part B 3.2. See also, *Skurweplaas (2nd Resp HoA)* para 14.

[1453] *Blue Moonlight* para 66-67.

[1454] *Grootboom* para 66, referred to in Pillay (2002) *Law Democracy & Dev* 266.

[1455] *Grootboom* 68, referred to in Pillay (2002) *Law Democracy & Dev* 267.

[1456] *Grootboom* para 68.

[1457] Pillay (2002) *Law Democracy & Dev* 267.

[1458] Pillay (2002) *Law Democracy & Dev* 268.

4.5 Alternative accommodation orders that adhere to co-operative government

Municipalities have a special role, assigned to it by the Constitution, to ensure that the needs within its jurisdiction are met.[1459] Similarly, the Housing Act and the EHP indicate municipalities as the first port of call for the fulfilment of general and emergency housing needs, respectively.[1460] For this reason, an alternative accommodation order can be made against a municipality.

In fact, in matters where a private eviction might leave the unlawful occupiers homeless,[1461] the requirement has developed that the relevant municipality must be joined as a party to the proceedings.[1462] This is because the municipality has a direct and substantial interest in the outcome of the case.[1463] If the eviction leaves the unlawful occupiers homeless, the emergency housing duty of the municipality is triggered. In terms of the laws of procedure, all parties with a direct and substantial interest in the matter should be joined to the proceedings.[1464]

Once joined,[1465] the municipality should report on its ability to provide alternative accommodation to the unlawful occupiers.[1466] The report should indicate its ability, within its available resources, to provide alternative accommodation to the unlawful occupiers.[1467] It should not be general but should address the specific circumstances of the unlawful occupiers.[1468] Courts have been very critical of reports that merely describe the state's housing

---

[1459] S 152 of the Constitution.

[1460] S 9(1)(a)(i) of the Housing Act; Department of Human Settlements *EHP* (2009) Part B 3.1.

[1461] Pienaar *Land Reform* 739-741.

[1462] *Olivia Road*; *Sailing Queen Investments v Occupants La Colleen Court*; *Shorts Retreat*; *Cashbuild (South Africa) (Pty) Ltd v Scott*; *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands*; *Chieftain Real Estate Incorporated in Ireland v City of Tshwane Metropolitan Municipality*. See also, Van Wyk (2011) *PER/PELJ* 60; Wilson (2009) *SALJ* 284; Muller & Liebenberg (2013) *SAJHR* 557; Pienaar *Land Reform* 735-739.

[1463] Muller & Liebenberg (2013) *SAJHR* 558. Muller and Liebenberg refer to *Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997 (4) SA 635 (O) 644A–B. They also state that this test is not very strict because a court only has to satisfy itself that the possibility of such an interest exists and not that this interest in fact exists. See, *Abrahamse v Cape Town City Council* 1953 (3) SA 855 (C) para 859.

[1464] *Shorts Retreat* para 11-12; Van Wyk (2011) *PER/PELJ* 61.

[1465] Or if the state is already a party, as, for example, the applicant.

[1466] *Sailing Queen Investments v Occupants La Colleen Court* para 6, 8, 19, 20; *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* (30782/05) [2006] ZAGPHC 6 para 13; *Absa Bank bpk v Murray* para 41-42; Wilson (2009) *SALJ* 283; Pienaar *Land Reform* 741.

[1467] *Sailing Queen Investments v Occupants La Colleen Court* para 9.

[1468] *Changing Tides* para 40-41. Smith (2014) *De Rebus* 40-41; Pienaar *Land Reform* 755-756.

programme.[1469] Reports should explain what has been done to assist the unlawful occupiers and what can be done in the future.[1470]

In some circumstances, a municipality might report that it is unable to provide alternative accommodation to the unlawful occupiers. A municipality cannot provide alternative accommodation if it does not have the available resources. When a municipality does not have the resources to provide alternative accommodation, the provincial government must support it and must intervene if the municipality does not fulfil its duties.[1471] Moreover, if neither the municipal nor the provincial authority can comply, the national authority must assist.[1472]

This means that an investigation into the available resources of the state must not end at municipalities. Since the duty to co-operate is justiciable,[1473] the court can require the provincial and even the national authorities to be joined to the matter and to report on their available resources.[1474] Nonetheless, an approach that would be more in line with the separation of powers would be to postpone the matter to allow the municipality to apply for funding from the provincial authority.[1475]

The fact that the provincial and national authorities must assist municipalities does not necessarily mean that an alternative accommodation order must be made against them. Technically, even if an order is made against the municipality alone, the other spheres must assist them in complying with the orders. However, it is evident from the executive council's attitude, in *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd*,[1476] that the other spheres of government are not likely to assist a municipality if they are not cited in the

---

[1469] *PE Municipality* para 29; *Hlophe HC2* para 21; Van Wyk (2011) *PER/PELJ* 59. Smith (2014) *De Rebus* 1.

[1470] *Changing Tides* para 40-41; Van Wyk (2011) *PER/PELJ* 59.

[1471] S 139(1), 154(1), 155(6) of the Constitution; s 7(2)(c), (e), (f), 3(2)(d), (e) of the Housing Act; Department of Human Settlements *EHP* (2009) Part A 2.6.

[1472] S 154(1) of the Constitution; s 3(2)(d), (e) of the Housing Act, Department of Human Settlements *EHP* (2009) Part B 3.4.1.

[1473] Steytler "Local Government in South Africa" in *Local Government in Federal Systems* 202-203.

[1474] As the court aimed to require in *Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952, Johannesburg Situated at 124 Kerk Street, Johannesburg In re: Unidentified Occupants of Erf 952, Johannesburg Situated at 124 Kerk Street, Johannesburg v City of Johannesburg* (0/04599) [2011] ZAGPJHC 3 para 50-57. It required the provincial and national governments to file reasons why they should not be joined. For a discussion of the case, see, For a discussion of the case, see, Pienaar *Land Reform* 745-747.

[1475] This relates to the constitutional dialogue, see Chapter 5:3.1.2.

[1476] 2012 (4) BCLR 382 (CC).

order.[1477] Accordingly, an alternative accommodation order must specifically bind the other spheres of government.

The question arises whether the other spheres of government must be joined and required to comply with an alternative accommodation order if the municipality was at fault or whether the municipality's fault justifies holding it exclusively liable. An example of fault on the part of the municipality lies in the fact that the municipality did not adopt and implement a short-term housing programme or did not assist the landowner in protecting his land against unlawful occupation. The Constitution provides that if a municipality has failed to adopt a budget the executive council would have a duty to intervene to ensure that the duties of the municipality are fulfilled, regardless of the reason for the failure.[1478] Executive councils are required to monitor municipalities.[1479] This implies that they would be equally liable if they had not addressed any fault or failure on the part of the municipalities within its jurisdiction. Furthermore, while the Constitution stipulates that executive councils *may* intervene if municipalities fail to perform their functions (for whatever reason), the Housing Act states that they *must* intervene. Hence, a failure to intervene would place liability on executive councils.[1480]

In respect of national government, the Constitutional Court in *Grootboom* found that the national government has the ultimate duty to ensure that emergency housing is provided.[1481] It is required to monitor the other spheres of government to ensure that they fulfil their functions in this regard.[1482] Hence, the national authority might be liable for not preventing the harm caused by the municipality, regardless of whether the municipality was at fault.

5 Conclusion

This chapter considered the duty of the court to respect the functions of other branches of government. An alternative accommodation order respects the functions of other branches of

[1477] *Skurweplaas (4th Resp HoA)* para 39.

[1478] 139(4) of the Constitution.

[1479] S 155(6)(b) of the Constitution; Department of Human Settlements *EHP* (2009) Part B 2.6.2, 2.13.2.

[1480] S 7(2)(f) of the National Housing Act *versus* s 139(1) of the Constitution.

[1481] *Grootboom* para 66, referred to in Pillay (2002) *Law Democracy & Dev* 266.

[1482] S 3(2)(c) of the National Housing Act; Department of Human Settlements *EHP* (2009) Part B 2.6.3; *Grootboom* 68, referred to in Pillay (2002) *Law Democracy & Dev* 267.

government if it does not unduly interfere with their functions and does not place the duty to comply with the order on a sphere that does not have the power or the capacity to do so. These requirements relate to the separation of powers doctrine and the principle of co-operative government.

A court respects the functions of other branches if it only grants an alternative accommodation order in situations where the executive authority is unwilling to participate in a dialogue and rectify its failures itself. In this case, the court must take cognisance of the polycentrism of eviction matters. It must have all the relevant circumstances before it and must take cognisance of how its order would affect those who are not before the court. An alternative accommodation order is based on the executive authority's duty to respect, protect and fulfil the housing rights of the unlawful occupiers or the right to property of the landowner. The parties before the court are usually not in a unique situation and that same duty that the executive authority owes them, it owes toward others in similar situations. For this reason, an alternative accommodation order should not negatively affect the ability of the executive to fulfil its duty toward those other persons.

A court respects the functions of the different spheres of government if it only grants an alternative accommodation order against a municipality in situations where the municipality is able to comply with the order. If the municipality does not have the available resources, the court should allow it to apply to the executive council for assistance. Where a municipality had already applied to the executive council and it was unwilling to assist, a court can require the executive authority to be joined and to report on its available resources. A finding that the executive authority has the requisite resources necessitates that any alternative accommodation order must not only be granted against the municipality, but also against the executive authority. Similarly, if the executive authority does not have the available resources, a court should allow it to apply to the national authority for assistance. If the national authority is unwilling to assist, a court can order it to be joined and to report on its available resources. An availability of resources on the part of the national authority means that the court must require it to assist the municipality if an alternative accommodation order is granted. Such co-operation is required even if there was fault on the part of the municipality. That is because the national and provincial spheres are required to monitor municipalities and ensure that they fulfil their duties properly.

CHAPTER SIX: ADMINISTRATION OF JUSTICE

1 Introduction

The general function of the judicial authority is to administer justice.[1483] The dictionary defines justice as fairness and reasonableness.[1484] While this seems simple, there are several forms and theories of justice, which makes for some complication.[1485] Forms of justice relate to the different contexts within which justice must be served.[1486] Justice in the distribution of resources is different from justice in the allotment of punishment.[1487] Theories of justice concern the content of these forms of justice and the theoretical basis underlying each form.[1488] Depending on the form and the theory applied, different court orders might be considered "just".[1489] Hence, under some forms and theories of justice, alternative accommodation orders may be considered just, whereas under other forms and theories it may not.

This chapter explores two forms of justice, distributive and corrective justice.[1490] They are often considered the primary forms of justice.[1491] Distributive justice is applicable since alternative accommodation orders dictate how the state must distribute its resources. If the alternative accommodation order relates to a violation of rights, corrective justice is involved. Corrective justice requires that a person who has been wronged be put in the position he was in before the violation occurred.[1492]

[1483] S 165(2) of the Constitution.

[1484] See, English Oxford Living Dictionaries *Justice* . This idea of justice as fairness comes from Rawls' notion of justice, see Rawls *A Theory of Justice* 10. See also, Jenkins *The American Courts* 4; Aristotle *Nicomachean Ethics* 72; Weinrib (1991) *Iowa L Rev*404.

[1485] Konow (2003) *JEL* 1189-1190; Jenkins *The American Courts* 4, 10-11.

[1486] Jenkins *The American Courts* 5; Cook & Hegtvedt (1983) *Annu Rev Sociol* 219-220; Weinrib (1991) *Iowa L Rev* 407, 413.

[1487] These forms of justice are called distributive and retributive justice respectively.

[1488] Barry defines a theory of justice as "a theory about the kinds of social arrangement that can be defended." See, Barry *Theories of Justice* 3.

[1489] Mbazira *Litigating Socio-Economic Rights* 137.

[1490] These are the two forms of justice identified by Aristotle, see Aristotle *Nicomachean Ethics* 75. See also, Jenkins *The American Courts* 5; EJ Weinrib "Corrective justice in a nutshell" (2002) 52 *University of Toronto Law Journal* 349349.

[1491] Weinrib (1991) *Iowa L Rev* 416.

[1492] Jenkins *The American Courts* 10.

The purpose of the discussion is to determine when which form of justice would be most appropriate and what the effect on the granting of alternative accommodation orders would be if the most appropriate form of justice is applied. Importantly, this entails determining whether different forms of justice might be more applicable to the different grounds for alternative accommodation. This might result in different remedies being appropriate depending on the ground for alternative accommodation. Such is a situation should be avoided since it creates parallel systems, which creates uncertainty in the law.[1493] In the discussion of the two forms of justice, the theories underpinning each form are examined. To determine which theory of justice the court should apply in eviction matters, the theory that most aligns with the Constitution is identified.

2 Distributive justice

In granting an alternative accommodation order, the court dictates to the state how the state should distribute its resources. Distributive justice requires a fair distribution of goods amongst members of a specific group.[1494] A decision regarding the distribution of resources must take into account the interests of all members of the group.[1495]

Disagreement exists around how it should be determined who deserves what and what constitutes a fair distribution.[1496] Essentially, no distribution should involve arbitrary distinctions between persons.[1497] A decision regarding distribution cannot simply rely on the intuition of the decision maker.[1498] This is especially important when judges make decisions. Without clear principles, different judges, relying solely on their intuition, might make contradictory decisions and create uncertainty.[1499] To ensure certainty, distribution must be based on non-arbitrary principles.[1500] Four possible principles of distribution can be identified:

[1493] This violates the rule of law. See Chapter 1:3.1.1.

[1494] Cook & Hegtvedt (1983) *Annu Rev Sociol* 218.

[1495] Mbazira *Litigating Socio-Economic Rights* 113, 139.

[1496] Rawls *A Theory of Justice* 4, 5, 10; Aristotle *Nicomachean Ethics* 76; Weinrib (1991) *Iowa L Rev* 411-412.

[1497] Rawls *A Theory of Justice* 5; A Sen *The Idea of Justice* (2011) 16.

[1498] Rawls *A Theory of Justice* 36, 39.

[1499] Rawls *A Theory of Justice* 36, 39.

[1500] Rawls *A Theory of Justice* 5, 6; Sen *The Idea of Justice* 16, 17. See also, M Deutsch "Equity, equality, and need: what determines which value will be used as the basis of distributive justice?" (1975) 31 *Journal Social Issues* 137138; Weinrib (1991) *Iowa L Rev* 408.

utility, equality, need and equity.[1501] The remainder of this section discusses the meaning of each of the possible principles of distribution.

The first possible principle of distribution is utility.[1502] In terms of this principle, a distribution is just if it achieves the greatest good for the greatest number of people.[1503] It is about the greatest aggregate happiness of the group in question.[1504] Rawls rejects utility, as a principle of distribution, on the basis that persons possess inherent "inviolability".[1505] Utilitarianism ignores this since it does not require attention to individuals. Resources might be distributed unequally, as long as the highest average satisfaction of the group is ensured.[1506] For example, a group of a 100 people, where the happiness level of every member is 5 out of 10, will be ranked lower than a group of a 100, where 51 people have a happiness level of 10 and 49 people have a happiness level of 0.[1507] In the housing context, this could mean that a distribution where 51% of the homeless people receive permanent housing[1508] and 49% are left homeless is preferred to a distribution where all homeless persons receive emergency housing.[1509]

Rawls' rejection of utilitarianism based on the inherent "inviolability" of persons is in accord with the constitutional right and value of human dignity.[1510] The entrenchment of human dignity in the Constitution recognises that every person has inherent worth.[1511] This means

---

[1501] Equality, equity and need are often grouped together. See, for example, Deutsch (1975) *JSI*; GF Wagstaff "Equity, equality, and need: Three principles of justice or one? An analysis of "equity as desert"" (1994) 13 *Current psychology* 138; Cook & Hegtvedt (1983) *Annu Rev Sociol*.

[1502] Mbazira *Litigating Socio-Economic Rights* 9, 111.

[1503] J Bentham *A Fragment on Government* (2001) 33; Rawls *A Theory of Justice* 20; RA Posner "Utilitarianism, economics, and legal theory" (1979) 8 *Journal of Legal Studies* 103104; J Troyer "Introduction" in Troyer J (ed) *The Classical Utilitarians Bentham and Mill* (2003) vii xi; JH Burns "Happiness and utility: Jeremy Bentham's equation" (2005) 17 *Utilitas* 4646.

[1504] Posner (1979) *J of Legal Stud* 104.

[1505] Rawls *A Theory of Justice* 3, 24-25.

[1506] Rawls *A Theory of Justice* 22; Troyer "Introduction" in *The Classical Utilitarians* xi.

[1507] Troyer "Introduction" in *The Classical Utilitarians* xi.

[1508] In line with the higher standards of permanent housing. See Department of Human Settlements *National Norms and Standards* (2009). See also Chapter 3:5.1.

[1509] In line with the lower standards under the Department of Human Settlements *EHP* (2009). See also Chapter 3:5.1.

[1510] The value of human dignity is entrenched in s 1 of the Constitution. The right to human dignity is entrenched in s 10 of the Constitution.

[1511] See, Fick *Consenting to Objectifying Treatment* 31. Fick finds that inherent worth means that people are equally important regardless of their actions, capabilities or potential. Hence, they should not be discriminated against. See also, CJ Friedrich *The Philosophy of Law in Historical Perspective 135* (1963) 21. See also, UM

that the interests of one person cannot be sacrificed for the greater good of the group. The Constitutional Court, in *Government of the Republic of South Africa v Grootboom*[1512] (hereinafter "*Grootboom*"), confirmed this rejection. It found that, in realising the right of access to adequate housing, the distribution of resources, which is statistically the most effective, might not be just if it ignores the neediest in the group. The Constitution requires that the interests of each individual be considered.[1513]

In defence of utilitarianism, it has been argued that utilitarianism can be interpreted to incorporate equality.[1514] Both the level of happiness and the number of people enjoying it must be maximised.[1515] While in some circumstances the outcome of applying this type of utilitarianism might amount to justice, it cannot be used as a principle of distribution.[1516] The inherent worth of each individual is still not recognised[1517] and individuals can still be sacrificed for the good of the group. Extreme inequalities could still be accepted if the aggregate happiness of the group was maximised.[1518] Instead of trying to incorporate equality within the principle of utilitarianism, equality can be considered as a standalone principle.

The fact that state distributions must adhere to the principle of equality is in accord with the language of the Constitution that entrenches socio-economic rights for all.[1519] Moreover, equality as a principle for distribution is in line with the value of[1520] and right to[1521] equality recognised in the Constitution. It also acknowledges the inherent worth of all persons.[1522] What must be determined is the effect of applying the principle of equality to a group whose members do not have equal resources. In an unequal group, should the distributed shares be equal or should the distribution seek to achieve equality among the group members? If the

---

Lauchli "What distributive justice? The legal theories of Rawls and Nozick" (1994) 4 *Tilburg Law Review* 169171-172; Mbazira *Litigating Socio-Economic Rights* 112.

[1512] 2001 (1) SA 46 (CC).

[1513] *Grootboom* para 44.

[1514] Troyer "Introduction" in *The Classical Utilitarians* xiii.

[1515] Troyer "Introduction" in *The Classical Utilitarians* xii-xiii.

[1516] Rawls *A Theory of Justice* 22.

[1517] This is not in line with the right to human dignity in terms of s 10 of the Constitution.

[1518] Troyer "Introduction" in *The Classical Utilitarians* xii-xiii.

[1519] Mbazira *Litigating Socio-Economic Rights* 133.

[1520] S 1 of the Constitution.

[1521] S 9 of the Constitution.

[1522] As recognised by the right to human dignity in terms of s 10 of the Constitution. This is because the fact that people have inherent worth means that they have equal worth and must not be discriminated against. See, Fick *Consenting to Objectifying Treatment* 31.

distributed shares are equal, inequality amongst the members remains. However, unequal shares that seek to address the inequality amongst the members of the group might ensure an equal outcome.

Rawls argues that unequal distributions can be considered just if they "are to the greatest benefit of the least advantaged".[1523] Sen and Nussbaum argue that the focus should be on the outcome of the distribution.[1524] Just distribution should ensure equal capabilities,[1525] not equal resources, because not everyone's needs and abilities are equal.[1526] Capabilities refer to the ability to do certain basic things, such as the ability to have shelter, clothing and food.[1527] To achieve equal capabilities, prioritisation should not be based on the level of poverty alone. Prioritisation should also be based on factors such as disability, age or gender since that could influence the person's ability to convert the resources into capabilities.[1528] Application of the equality principle to ensure an equal outcome is consistent with the Constitutional Court's preference of substantive equality above formal equality.[1529]

The capabilities approach and ensuring distributions that result in substantive equality relate to "need" as a possible principle of distributive justice. The principle of need requires that each person receives according to his need.[1530] Distribution based on the principle of need is especially important in situations where the resources are scarce and cannot be distributed

---

[1523] This is part of Rawl's second principle in Rawls *A Theory of Justice* 266.

[1524] Nussbaum, in fact, relies on Sen's arguments to form her own in this regard. This is evident in M Nussbaum "Capabilities as fundamental entitlements: Sen and social justice" (2003) 9 *Feminist economics* 33 35. See also, M Nussbaum *Creating Capabilities* (2011) 17.

[1525] The concept of "basic capability equality" was coined by Sen, see Sen (1980) *The Tanner Lecture* 218.

[1526] A Sen "Justice: means versus freedoms" (1990) *Philosophy & Public Affairs* 111 114, 116; Nussbaum (2003) *Perspectives* 35. See also, Wagstaff (1994) *Current psychology* 142. Van der Berg supports the idea of using the capabilities approach in the realisation of socio-economic rights in Van Der Berg (2015) *SAJHR* 332.

[1527] Sen (1980) *The Tanner Lecture* 218. See also, Nussbaum (2003) *Feminist economics* 33; Nussbaum *Creating Capabilities* 18.

[1528] Sen (1990) *Philosophy & Public Affairs* 114, 116. See also, Nussbaum (2003) *Feminist economics* 35.

[1529] Substantive equality means advantaging someone to remedy an inequality. See, *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 33, 79, 93; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* para 60-62; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 27, 31, 32, 73; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 104, 112; *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) para 162. Liebenberg and Goldblatt confirms that access to resources plays an important role in substantive equality, see S Liebenberg & B Goldblatt "The Interrelationship between equality and socio-economic rights under South Africa's transformative Constitution" (2007) 23 *South African Journal on Human Rights* 335 342-343.

[1530] Wagstaff (1994) *Current psychology* 144.

amongst all members of the group.[1531] This is the case in South Africa, where everyone's socio-economic rights cannot be realised immediately.[1532] The Constitutional Court in *Grootboom* supported the notion that special attention must be paid to the neediest in society. In the distribution of resources to realise the right of access to adequate housing, the needs of the most desperate must be considered.[1533]

It has been argued that "need" should only attract advantage if the "need" is blameless.[1534] A distribution should not advantage someone based on need if he is responsible for his own need. In the context of eviction, this implies that someone who deliberately causes his unlawful occupation or his inability to secure his own alternative accommodation should not be provided with alternative accommodation since he is responsible for his own need. This is in accord with the exclusions in the Emergency Housing Programme (EHP)[1535] and the court's consideration of this relevant circumstance to determine whether an eviction would be just and equitable.[1536] A counterargument to excluding persons who created their own need would be that withholding necessary resources is not the appropriate way to hold them liable. Instead, if they committed an unlawful act in creating their own need, such as selling drugs from their rented premises,[1537] these actions must be dealt with in terms of the laws that prohibit the act.[1538] Moreover, it can be argued that what is done out of need is blameless.[1539] Accordingly, the poor group of persons that occupied the land out of desperation, in *Port Elizabeth Municipality v Various Occupiers*,[1540] was not blamed for creating their unlawful occupation.[1541]

[1531] Cook & Hegtvedt (1983) *Annu Rev Sociol* 223.

[1532] Mbazira *Litigating Socio-Economic Rights* 134, 162.

[1533] Grootboom 44.

[1534] Wagstaff (1994) *Current psychology* 144. Referring to J Feinberg *Doing & Deserving; Essays in the Theory of Responsibility* (1970) 94.

[1535] Department of Human Settlements *EHP* (2009).

[1536] In respect of the EHP, see Chapter 3:4. On blameworthiness of the unlawful occupiers as relevant circumstance in eviction matters, see Chapter 4:3.6.

[1537] As was the case in *Daniels*. See the discussion of the case in Chapter 3:4 and Chapter 4:3.6.

[1538] Wagstaff (1994) *Current psychology* 149.

[1539] Wagstaff (1994) *Current psychology* 144. For the idea that unlawful occupation by the poor is "forced", see also, Chenwi (2008) *Harv L Rev* 111.

[1540] 2005 (1) SA 217 (CC).

[1541] See the discussion of *PE Municipality* in Chapter 2:2.2. See also the discussion on need *versus* greed in Chapter 3:4.

The notion that one's actions must determine how much one receives speaks to the principle of equity. In terms of this principle, each person should enjoy the fruits of their own labour. What they receive must be directly correlated to their input.[1542] Hence, the person who contributes most gets most.[1543]

While Rawls supports distribution of resources based on need, he also supports compensation for labour. Equal pay for all work is not required but can differ based on factors like the effort, potential hazard of the work and training undergone to do the work.[1544] However, persons who receive an income from their labour must pay taxes. The tax revenue must be used to assist those in need.[1545] Moreover, the burden of taxation must be carried equally.[1546] This suggests that the continued unlawful occupation of land cannot be considered a just distribution even if the unlawful occupiers are needy since the burden would be carried by the landowner alone. This confirms the finding that an unreasonable delay would be an arbitrary deprivation in terms of section 25(1) of the Constitution.[1547]

Nozick is a more uncompromising advocate of equity as a principle of distribution. He opposes the imposition of taxes since it takes away from what a person deserves.[1548] According to Nozick, a person is entitled to everything obtained through just means. Only if a person obtained something by an unjust means must this be corrected.[1549] Hence, past injustices in distribution can mean that the current holding is unjust.[1550] In South Africa, due to the forced removals of black people during Apartheid, a lot of property holding can be classified as unjust.[1551] However, the correction of this unjust holding is more complicated than Nozick suggests. The unjust dispossession during Apartheid was done on a large scale and occurred years ago.[1552] It is difficult to determine who dispossessed whom of what so that the unjust holding can be corrected. Moreover, often the person currently holding the

---

[1542] Wagstaff (1994) *Current psychology*138; Cook & Hegtvedt (1983) *Annu Rev Sociol* 218.
[1543] Wagstaff (1994) *Current psychology* 138.
[1544] Rawls *A Theory of Justice* 269.
[1545] Rawls *A Theory of Justice* 245.
[1546] Rawls *A Theory of Justice* 246.
[1547] See Chapter 4:5.1.1.
[1548] R Nozick *Anarchy, State and Utopia* (1974) 169-170.
[1549] Nozick *Anarchy, State, and Utopia* 152.
[1550] Nozick *Anarchy, State, and Utopia* 152.
[1551] See Chapter 1:2.
[1552] See Chapter 1:2.

property was not the one who caused the injustice.[1553] Due to these complications, land reform and restitution are only effected in terms of specialised legislation.[1554] Moreover, unjust possession cannot be rectified by unjust means. Hence, an unlawful occupation cannot be considered just because the initial holding of the landowner was unjust.[1555]

Where a person obtained property in a just manner, Nozick argues that he is entitled to such holding regardless of whether his social position or talents played a role in obtaining the thing.[1556] Rawls differs from Nozick on the basis that people cannot choose or deserve their talents or the social position in which they are born and are not entitled to the things they receive because of their social position or talents.[1557] Hence, effort should be the only equity ground upon which distribution is based.[1558]

Nevertheless, Rawls does not advocate for interfering with a person's property holding to correct injustice based on social position or talents to any extent further than collecting taxes.[1559] This seems to be the position in South Africa. The Constitution allows for taxation, which indicates that Nozick's view on equity is not supported.[1560] Other than by means of tax collection, the Constitution does not allow for redistribution of property by the state, unless compensation is paid to the person who loses the property.[1561]

While the four potential principles of distribution seem contradictory, it is evident from the discussion above that they can be used in conjunction with one another.[1562] Alternative accommodation orders amount to the distribution of state resources to private persons. Taxation can be used to raise revenue. In distributing the revenue, the primary consideration should be substantive equality. This means, advantaging the neediest in society to increase equality amongst the members of the group. If the neediest are too many to assist

---

[1553] Nozick *Anarchy, State, and Utopia* 152.

[1554] Such as the Restitution of Land Rights Act.

[1555] Generally, there is no rational link between the occupation and the identity of the landowner. See, Kruger (2014) *SALJ* 344.

[1556] Nozick *Anarchy, State, and Utopia* 151.

[1557] Rawls *A Theory of Justice* 274. See also, Lauchli (1994) *TLR* 176.

[1558] Rawls *A Theory of Justice* 274. See also, Wagstaff (1994) *Current psychology* 143. Even if effort is the only ground for measuring equity, a person is more likely to put in effort if he has talent or better social position.

[1559] And prohibiting certain transfers. See, Rawls *A Theory of Justice* 245.

[1560] See Chapter 13 of the Constitution.

[1561] S 25(2) of the Constitution.

[1562] Deutsch (1975) *JSI* 139-140.

immediately, equity considerations, such as effort, might be taken into account. Effort, in this context, might refer to applying for housing and waiting for housing. Other equity considerations could include the blameworthiness of the unlawful occupiers.

3 Corrective justice

The previous section considered the fact that alternative accommodation orders involve the distribution of state resources, which concerns distributive justice. This section explores the relevance of corrective justice in the context of eviction matters.[1563] Where an alternative accommodation order is granted to remedy a limitation of a right, such as the landowner's right to property or the unlawful occupiers' right of access to adequate housing, corrective justice might be applicable. Corrective justice concerns interference with existing rights.[1564] The focus in this section is on two potential limitations – that of the landowner's right to property by continued unlawful occupation and that of the unlawful occupiers' right of access to adequate housing by an eviction.

According to Aristotle, corrective justice requires the rectification of an inequality because of something that one party did to another.[1565] Aristotle asserts that corrective justice is relevant in civil and criminal law, but not in public law.[1566] For example, if X steals Y's car, corrective

[1563] It has been argued that corrective justice does not constitute an independent form of justice, but is merely a remedial arm of distributive justice. It corrects unjust distributions. A counterargument is that it only restores lost distribution caused by persons. If it really remedied unjust distributions, it would also relate to lost distribution due to, for example, natural disasters. Moreover, if corrective justice simply corrected unjust distribution then no remedy would be available to someone whose initial holding was unjust. Furthermore, a so-called "Robin Hood defence" would have had the potential to trump a corrective justice claim. This involves claiming that the subsequent distribution is fairer than the initial one. This argument could only succeed if the justness of initial distribution is presumed. However, this is a weak argument since it does not explain why the justness of the initial distribution can be presumed, whereas that of the resulting distribution cannot. Even if it is seen as an arm of distributive justice, the Robin Hood defence would not succeed, because distributive justice is not about interfering with private relationships. D Klimchuk "On the autonomy of corrective justice" (2003) 23 *Oxford Journal of Legal Studies* 49 52-57; Weinrib (1991) *Iowa L Rev* 408 419-420; S Perry *On the relationship between corrective and distributive justice* (2000)269; EJ Weinrib The Idea of Private Law (2012) 79, 408-408; P Benson "Basis of Corrective Justice and Its Relation to Distributive Justice, The" (1991) 77 Iowa L. Rev. 531-532.

[1564] Weinrib (2002) *UTLJ* 352; Mbazira *Litigating Socio-Economic Rights* 9, 163.

[1565] Aristotle *Nicomachean Ethics* 77. See also, M Modak-Truran "Corrective justice and the revival of judicial virtue" (2000) 12 *Yale Journal of Law and the Humanities* 249 252, 256; K Roach "The limits of corrective justice and the potential of equity in constitutional remedies" (1991) 33 *Arizona Law Review* 859 867.

[1566] Aristotle *Nicomachean Ethics* 75. See also, Friedrich *The Philosophy of Law in Historical Perspective 135* 21; Lauchli (1994) *TLR* 171-172; Klimchuk (2003) *OJLS* 49; Roach (1991) *Ariz L Rev* 868.

justice requires X to return the car to Y. X is obliged to repair the harm he caused.[1567] The requirements of Aristotelian corrective justice are that there must be two parties, [1568] one party must be responsible for the loss of the other,[1569] the loss must be wrongful[1570] and the remedy must be to restore the *status quo ante*.[1571] The remainder of this section discusses these requirements in more detail.

The first requirement of corrective justice is that there must be two parties involved,[1572] the party that caused the harm and the party that suffered the harm. No other party can be involved.[1573] A consequence of limiting corrective justice to two parties is that the interests of others are not taken into account.[1574] The impact of the remedy on others is not considered.[1575] Whether the remedy will detract from the money earmarked for fulfilling the rights of others is not examined, even if those other persons are needier than the parties before the court are.[1576]

In eviction matters, the two parties directly involved seem to be the landowner and the unlawful occupiers. Continued occupation of the land potentially amounts to interference with the landowner's right to property, by the unlawful occupiers. Similarly, an eviction sought by the landowner amounts to interference with the unlawful occupier's existing access to housing by the landowner. An eviction itself involves corrective justice toward the landowner. In a private eviction,[1577] the state seems to be a third party. If so, its involvement would be inconsistent with the requirements of corrective justice. If a causal link can be drawn between the state's actions and the party that suffered the harm, corrective justice

[1567] Klimchuk (2003) *OJLS* 56.

[1568] Roach (1991) *Ariz L Rev* 868.

[1569] Roach (1991) *Ariz L Rev* 860, 867, 871.

[1570] Aristotle *Nicomachean Ethics* 83-84. See also, RA Posner "The concept of corrective justice in recent theories of tort law" (1981) 10 *Journal of Legal Studies* 187 190, 195-196, 200; J Coleman "Corrective justice and wrongful gain" (1982) 11 *The Journal of Legal Studies* 421 436.

[1571] It puts the person in the position he would have been but for the violation. Mbazira *Litigating Socio-Economic Rights* 8; Roach (1991) *Ariz L Rev* 859, 860, 867; Weinrib (1991) *Iowa L Rev* 410.

[1572] Roach (1991) *Ariz L Rev* 868.

[1573] Weinrib (1991) *Iowa L Rev* 410.

[1574] Roach (1991) *Ariz L Rev* 871.

[1575] Mbazira *Litigating Socio-Economic Rights* 8; Weinrib (2002) *UTLJ* 350.

[1576] Weinrib (2002) *UTLJ* 352.

[1577] One where it is not the landowner or the entity seeking the eviction.

might justify the involvement of the state. This relates to the second requirement of corrective justice.

The second requirement of corrective justice stipulates that there must be a causal link between the actions of the one person and the loss of the other.[1578] The one party must be responsible for the loss of the other. Only the responsible party can be made to bear the burden of correcting the injustice.[1579] This means that, if the state is not responsible for the eviction, it cannot be required to remedy any harm suffered because of the eviction.[1580] If the state is not responsible for the violation of the rights of the landowner or the unlawful occupiers, corrective justice cannot justify an alternative accommodation order against the state.

The important question is how it can be argued that the state is responsible for the limitation of either the rights of the landowner or the rights of the unlawful occupiers? The state's responsibility might lie in its duty to respect, protect, promote and fulfil both the landowner and the unlawful occupiers against interference with their human rights by others.[1581] The unlawful occupiers' loss of their homes or the landowner's loss of the use of its property might have been caused by the state's failure to comply with its duty.[1582]

The third requirement of corrective justice is that the loss must be wrongful. A wrongful loss, in this context, refers to loss caused by another's fault.[1583] Aristotle does not support corrective justice if there is no fault on the side of the person who caused the loss.[1584] In fact, he requires that the loss must be intentionally caused. Negligence is not enough.[1585] Requiring wrongfulness means that the state can only be held liable if there was fault on its side in failing to protect the rights of the parties. Hence, for the state to be liable its failure to protect

---

[1578] Roach (1991) *Ariz L Rev* 860, 867, 871.

[1579] Roach (1991) *Ariz L Rev* 859.

[1580] Roach (1991) *Ariz L Rev* 869-870.

[1581] S 7(2) of the Constitution. See Chapter 3.4.

[1582] Corrective justice also applies to omissions. See, DA Fischer "Causation in fact in omission cases" (1992) *Utah Law Review* 1335 1381; MU Walker "Restorative justice and reparations" (2006) 37 *Journal of Social Philosophy* 377 378. The state would, however, not be liable if the party can be found responsible for their own loss.

[1583] Coleman (1982) *J of Legal Stud* 424.

[1584] Aristotle *Nicomachean Ethics* 83-84. See also, Posner (1981) *J of Legal Stud* 190, 195-196, 200; Coleman (1982) *J of Legal Stud* 436.

[1585] Posner (1981) *J of Legal Stud* 201-202.

the rights of either the unlawful occupiers or the landowner must have been intentional (or possibly negligent).[1586]

That the loss must be wrongful is not supported by all. For example, Gardner argues that, even where there was no fault in causing the loss, the loss becomes wrongful if it is not corrected afterwards.[1587] In contrast, Roederer contends that, without fault on the part of the person who caused the loss, distributive justice applies.[1588] In respect of evictions, this means that an unlawful occupier, who is homeless after an eviction, must be treated like any other homeless person under the EHP. If the court were applying corrective justice in granting alternative accommodation orders, the fact that the court focused on the blameworthiness of the state[1589] indicates that it considers fault as a requirement for holding someone responsible for correcting another's loss.

The fourth requirement for corrective justice is that the remedy must restore the *status quo ante*.[1590] The purpose and effect of the remedy must be to put the victim in the position he would have been, but for the violation.[1591] The remedy is backwards-looking and focuses on repairing past wrongs.[1592] In respect of the rights of the landowner, it involves evicting the unlawful occupiers and returning possession of the land to the landowner. In respect of the rights of the unlawful occupiers, a literal correction would be to allow reoccupation of the land after an eviction.

However, in a stalemate situation, such a correction is not possible. If the court decides to evict the unlawful occupiers immediately and this limits their rights, this cannot be corrected by allowing reoccupation. This is because reoccupation would limit the rights of the landowner. Gardner argues, "Most transactions cannot literally be reversed."[1593] Instead, the

---

[1586] For a discussion of wrongfulness on the part of the state, see Chapter 4:5.2.

[1587] J Gardner "Corrective justice, corrected" (2012) 12 *Diritto & questioni pubbliche* 9 35.

[1588] CJ Roederer "Wrongly conceiving wrongful conception: distributive vs corrective justice" (2001) 118 *South African Law Journal* 347 359.

[1589] See the case discussion in Chapter 2. See also the discussion on the blameworthiness of the state in Chapter 5:5.3.

[1590] Roach (1991) *Ariz L Rev* 859, 860, 867; Weinrib (1991) *Iowa L Rev* 410.

[1591] Mbazira *Litigating Socio-Economic Rights* 8; Roach (1991) *Ariz L Rev* 859, 860, 867; Weinrib (1991) *Iowa L Rev* 410.

[1592] Roach (1991) *Ariz L Rev* 867, 868; Weinrib (1991) *Iowa L Rev* 410; Weinrib (2002) *UTLJ* 352.

[1593] Gardner (2012) *Diritto & questioni pubbliche* 28-29.

wrong could be corrected through compensation or restitution.[1594] The provision of alternative accommodation can be considered a form of restitution in kind. Moreover, Gardner argues that it is not the loss that must be undone, but the wrong.[1595] In eviction matters, the wrong is sometimes not only a failure to protect the rights of the parties before the court. Often the wrong amounts to a failure to implement a programme that protects the rights of everyone within the municipality's jurisdiction in a position similar to that of the parties before the court. In these matters, correcting the wrong would be to implement such a programme.

4 Most appropriate form of justice

Where an eviction order would leave the unlawful occupiers homeless, courts have granted alternative accommodation orders. Since this involves distributing the resources of the state, distributive justice is applicable. It might also involve remedying an unconstitutional limitation of a right, which makes corrective justice applicable.

A cursory observation is that a finding that corrective justice is most appropriate means that the court need not consider the distributive effect of its order before granting an alternative accommodation order. This might make it easier to succeed with a demand for an alternative accommodation order, than if distributive justice were applied. Consequently, a finding that the different grounds for alternative accommodation orders require the application of different forms of justice might cause parties to base their case on the ground that provides them with the most favourable remedy. This would create parallel systems of law and legal uncertainty. The purpose of this section is to determine which form of justice is more appropriate in eviction matters that cause homelessness, whether the appropriate form of justice differs depending on the ground for the alternative accommodation order and what the effect of these findings is on the justness of alternative accommodation orders.

[1594] Gardner (2012) *Diritto & questioni pubbliche* blind or be blinded.
[1595] Gardner (2012) *Diritto & questioni pubbliche* 32.

4.1 Establishment of the most appropriate form of justice

Mbazira argues that, where the court has granted alternative accommodation orders, it applied corrective justice.[1596] In granting alternative accommodation orders, the court did not consider whether other persons within the jurisdiction of the state entity were needier than the unlawful occupiers before the court were.[1597] This would explain the fact that the court did not always find it necessary to ascertain whether the state had the resources to provide the alternative accommodation.[1598] In addition, it would explain the court's emphasis on the blameworthiness of the state.[1599]

Nevertheless, applying this form of justice in eviction matters might not be appropriate. For one, it is inconsistent with Constitutional Court jurisprudence. Second, it is inconsistent with the nature of eviction matters. These reasons are discussed below.

4.1.1 Constitutional Court jurisprudence

The application of distributive justice in matters of constitutional rights violations is in line with Constitutional Court jurisprudence. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[1600] the court found that constitutional litigation "has a wider public dimension".[1601] This is reflected in the Constitutional Court's interpretation of its mandate under section 172(1)(b) to grant remedies that are just and equitable in constitutional matters. The Constitutional Court interprets section 172(1)(b) to require remedies that balance interests, rather than maximise rights.[1602] "Interest balancing" allows a court to grant a remedy that does not fully correct the violation of a specific right. This deficient correction is

[1596] Aimed at realising individual rights. See, Mbazira *Litigating Socio-Economic Rights* 9, 163.

[1597] Mbazira *Litigating Socio-Economic Rights* 8; Weinrib (2002) *UTLJ* 350. See also the discussion of the cases in Chapter 2:3.

[1598] As was the case in *Skurweplaas*, *Changing Tides* and *Hlophe*. See the discussion of these cases in Chapter 2:3.

[1599] As was the case in *Blue Moonlight*, *Changing Tides* and *Hlophe*. See the discussion of these cases in Chapter 2:3.1.

[1600] 2000 (2) SA 1 (CC).

[1601] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* para 82, referred to in Liebenberg *Socio-Economic Rights* 381.

[1602] Bishop "Remedies" in *CLOSA* 9-59.

justified by the involvement of other factors, such as the interests of others not before the court or the availability of resources.[1603]

Moreover, in several matters involving the distribution of state resources, the Constitutional Court has applied distributive justice, by considering the distributive effects of its remedies.[1604] In *Soobramoney v Minister of Health (Kwazulu-Natal),*[1605] the court found that it could not grant a remedy forcing the state to use its resources to ensure that the claimant alone receives renal dialysis. If such a remedy were to be granted, it could not be limited to the claimant but would have to extend to others in similar positions.[1606]

In *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development*,[1607] the claimants argued that, as permanent residents, they should benefit from the state's social assistance grants.[1608] The court rejected an out-of-court settlement that would have only advantaged the parties before the court and granted a remedy to extend the grants to all permanent residents.[1609]

Minister of Health v Treatment Action Campaign[1610] (hereinafter "*TAC*") involved the government's decision not to make Nevirapine available at all public hospitals.[1611] The Constitutional Court ordered the state to devise and adopt a plan within its available resources to make Nevirapine available at all public hospitals and clinics. Hence, the remedy considered the interests of all persons in a similar position, that is, all HIV-positive pregnant

[1603] P Gewirtz "Remedies and resistance" (1983) 92 *Yale Law Journal* 585 591, referred to in Bishop "Remedies" in *CLOSA* 9-59.

[1604] These cases include: *Soobramoney, Khosa, TAC, Grootboom.* See the discussion below.

[1605] 1998 (1) SA 765 (CC).

[1606] *Soobramoney* para 28. See discussion of *Soobramoney* n Chapter 5:3.1.

[1607] 2004 (6) SA 505 (CC).

[1608] The old-age grant (s 3(c) of the Social Assistance Act 59 of 1992), the child care grant and the care dependency grant (s 4(b)(ii) and s 4B(ii) of the Welfare Laws Amendment Act 106 of 1997). See, *Khosa* para 1.

[1609] *Khosa v Minister of Social Development; Mahlaule v Minster of Social Development* 2004 (6) SA 505 (CC) para 35, 98. See also, Mbazira *Litigating Socio-Economic Rights* 138-139.

[1610] 2002 (5) SA 721 (CC).

[1611] This drug is used to prevent the transfer of HIV from mother to baby while the mother is pregnant. See, *TAC* para 2.

women.[1612] In *Grootboom*, the Constitutional Court similarly ordered the state to implement a programme that would take into account all affected persons.[1613]

4.1.2 Nature of eviction matters

In considering the most appropriate form of justice, it can be argued that distributive justice is most appropriate in matters based on the first ground for alternative accommodation and corrective justice is most appropriate in matters based on the second ground for alternative accommodation orders. This is because the first ground deals with the fulfilment of rights (which involves distribution), whereas the second ground deals with the remedying of harm caused (which involves correction). Based on this argument, it might be easier to succeed with a request for alternative accommodation based on the second ground since the distributive effect of the order need not be considered. However, this distinction is superficial since the first ground also deals with remedying of harm (corrective justice) and the second ground also deals with distribution of resources (distributive justice). The first ground is also corrective since it remedies state's failure to implement a reasonable short-term housing programme. The second ground is also distributive since it amounts to the state's fulfilment of its short-term housing duty toward the unlawful occupiers. Moreover, the nature of eviction matters requires that distributive justice must be applied regardless of the ground relied upon.

By nature, eviction matters often involve large groups of people.[1614] There are numerous evictions in each municipality every year.[1615] The provision of alternative accommodation to all evictees facing homelessness requires considerable resources, of which the state has a limited amount. Any resources spent on the provision of alternative accommodation to a specific group of evictees cannot be spent on the fulfilment of other needs.

Based on the nature of evictions, several reasons for finding that distributive justice is the most appropriate form of justice in eviction matters can be identified. For one, distributive

---

[1612] *TAC* para 125, 135. See also, Mbazira *Litigating Socio-Economic Rights* 163.

[1613] See the discussion of *Grootboom* in Chapter 2:2.1. See also, Mbazira *Litigating Socio-Economic Rights* 158-163.

[1614] *Grootboom*, *PE Municipality*, *Modderklip*, *Olivia Road*, *Blue Moonlight*, *Changing Tides*, *Hlophe*, *Skurweplaas.* See also, Chenwi (2008) *Harv L Rev* 107.

[1615] In 2016, eviction applications were enrolled over 600 times for the Western Cape High Court alone and often the high court is not the court of first instance in eviction matters. For the Western Cape High Court rolls see Southern African Legal Information Institute *Court Roll: Western Cape High Court (Cape Town)* (2016).

justice requires that the distributive effect of any remedy be taken into account.[1616] This involves taking cognisance of the fact that an order for the state to use its resources to assist those before the court might prevent it from using its resources to assist others, who might be even needier than those before the court are. In contrast, corrective justice does not require the consideration of other parties or the distributive effect of the remedy.[1617] If the state does not have sufficient resources to provide alternative accommodation to all persons facing homelessness due to eviction within its jurisdiction, granting an alternative accommodation order without considering the distributive effect of such order might amount to queue jumping.

As mentioned, it is often argued that an alternative accommodation order would result in queue jumping.[1618] Two counterarguments are that, one, it was not the intention of the occupiers to jump the queue and,[1619] two, the state's short-term housing duty exists in conjunction with the state's long-term housing duty and that compliance with the one should not interfere with the other. Hence, when temporary emergency housing is provided, the queue for permanent housing is not jumped.[1620]

In terms of the first counterargument, it is unclear why the intention of the occupiers is considered since the effect of the unlawful occupation would still be that they are prioritised.[1621] As for the second counterargument, this assertion carries merit in that the state should have an emergency housing programme and budget that is separate from that of permanent housing. However, if a municipality cannot resolve all *emergency* housing situations as they occur, ordering it to provide for one emergency and not another, purely based on the fact that one group is before the court, would cause the *short-term* housing queue to be jumped. Accordingly, to prevent the short-term housing queue to be jumped the court must consider the distributive effect of its orders. This involves considering the interests of all affected parties and applying the principles of distributive justice to determine priority.

[1616] Weinrib (2002) *UTLJ* 351-352.

[1617] Weinrib (2002) *UTLJ* 351-352.

[1618] See Chapter 2:3.1 and Chapter 3:4.

[1619] See discussion of *PE Municipality* in Chapter 2:2.2.

[1620] Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 48.

[1621] Moreover, the priority is usually gained against other persons who live in emergency circumstances.

In addition to ensuring that the unlawful occupiers before the court are not prioritised based on unjust reasons, such as that they are before the court, distributive justice is the most appropriate form of justice since it allows for ways in which the state's limited resources can be maximised. It also allows for ways in which the negative effects of a lack of resources can be minimised. For one, distributive justice allows for a delay in the execution of a remedy until the state is able to comply with the order, whereas corrective justice does not allow for such a delay.[1622] Second, distributive justice might allow lower standards of alternative accommodation, to ensure that more people are assisted. Similarly, a court may decide to deny or delay the eviction and compensate of the landowner for its loss.[1623] To limit the resources spent, such compensation may be less than the market value of the property.[1624] Compensation below market value is not possible in terms of corrective justice, which requires that the victim must be placed in the same position it was in before the violation.[1625] Finally, distributive justice allows for judicial deference. Since a court may not be the appropriate branch of government to decide on the distribution of resources, deference to the executive branch may be more appropriate. The executive branch is supposed to have more information and expertise at its disposal regarding such distributions. Corrective justice does not allow for judicial deference.[1626]

Another reason for finding that distributive justice is the most appropriate form of justice, in eviction matters, is that corrective justice is only appropriate to once-off wrongs with easily identifiable victims.[1627] If the harm is likely to continue, distributive justice is more appropriate.[1628] The nature of eviction matters lies there-in that there are several matters yearly, even within a single municipality's jurisdiction.[1629] Hence, these are not once-off

---

[1622] Roach (1991) *Ariz L Rev* 880.

[1623] Similar to what was done in *Modderklip*, see Chapter 2:2.3.

[1624] For an explanation of such compensation may be determined, see Chapter 7:3.1.4.1.

[1625] Mbazira *Litigating Socio-Economic Rights* 8; Roach (1991) *Ariz L Rev* 859, 860, 867; Weinrib (1991) *Iowa L Rev* 410.

[1626] Roach (1991) *Ariz L Rev* 881.

[1627] Roach (1991) *Ariz L Rev* 870.

[1628] Roach (1991) *Ariz L Rev* 870.

[1629] In 2016, eviction applications were enrolled over 600 times for the Western Cape High Court alone and often the high court is not the court of first instance in eviction matters. For the Western Cape High Court rolls see Southern African Legal Information Institute *Court Roll: Western Cape High Court (Cape Town)* (2016). Chilemba reports on the large number of evictions in 2014 alone. For example, it was reported that there are between 10 and 20 evictions in the inner city of Johannesburg every month. See, Chilemba (2014) *CLC* 64. See also, Sosibo K at Mail & Guardian *City of Jo'burg Blamed For Not Providing Homes for Evictees* (2014).

matters with easily identifiable victims. In fact, where the state's failure to provide alternative accommodation is due to official misconduct and comprehensive institutional reform is required, corrective justice is not appropriate.[1630]

Finally, that the likely remedy under the second ground for alternative accommodation is a constitutional remedy,[1631] suggests that the application of corrective justice is inappropriate. This is because constitutional remedies are not only aimed at correcting past wrongs, it is also forward-looking and aimed at preventing future violations.[1632] This is characteristic of distributive justice and not corrective justice.[1633]

4.2 Application of distributive justice in granting alternative accommodation orders

The previous section found that distributive justice is the most appropriate form of justice in the context of eviction matters. In this section, the implications of this finding are explored. Distributive justice requires a fair distribution of goods amongst members of a specific group.[1634] A decision regarding the distribution of resources must take into account the interests of all members of the group.[1635] Hence, before determining the implication for applying distributive justice in eviction matters, membership to the group must be established.

4.2.1 Identification of the group

To determine membership to the group, one can look at the resources to be distributed. The group includes everyone for whom the resources are earmarked since they have an interest in receiving a just share of the resources.

[1630] Roach (1991) *Ariz L Rev* 865. See also, Trengove (2004) *ESR Review* 9, as referred to in Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-62 - 33-63.

[1631] See Chapter 5:5.2.

[1632] In the context of constitutional damages, see also Kotze *Effective Relief*115, 118. Van der Walt & Midgley *Principles of Delict* 7.

[1633] Mbazira *Litigating Socio-Economic Rights* 113, 115; Roach (1991) *Ariz L Rev* 867, 868; Weinrib (1991) *Iowa L Rev* 410; Weinrib (2002) *UTLJ* 352.

[1634] Cook & Hegtvedt (1983) *Annu Rev Sociol* 218.

[1635] Mbazira *Litigating Socio-Economic Rights* 113, 139.

It is likely that the resources to be distributed would come from the state's short-term housing budget.[1636] This seems more obvious when the order is based on the state's short-term housing duty (first ground for alternative accommodation orders)[1637] than when it is based on the state's duty to respect and protect human rights (the second ground for alternative accommodation orders).[1638] However, the state's short-term housing programme and budget is just as much its measure for fulfilling the right of access to adequate housing as it is for respecting and protecting this right. This is because it is used to ensure that unlawful occupiers, who have access to housing, do not lose access entirely. Even where the alternative accommodation order is granted to address the loss of the landowner caused by the violation of its right to property, such an order is often actually aimed at respecting, protecting and fulfilling the right of access to adequate housing of the unlawful occupiers, despite the fact that the housing may be less than adequate.[1639] Similarly, evictions are denied and landowners compensated to ensure that the unlawful occupiers retain their access to housing. If this were not the case, the eviction would be granted without an alternative accommodation order. Accordingly, regardless of the ground for the alternative accommodation order, the group is likely to comprise those persons who qualify to benefit from the municipality's short-term housing programme.

There are situations in which membership of the group might not be determined in terms of the EHP. This is because the resources to be distributed would not come from the state's short-term housing budget. This includes scenarios where the state does not have a reasonable short-term housing budget or where the alternative accommodation order is made to prevent social disorder and not the homelessness of unlawful occupiers.[1640] In such situations, membership of the group might differ since more people's rights are affected. The following section considers membership of the group based on the municipality's short-term housing budget, whereas the subsequent section considers membership of the group in these other situations.

[1636] And if it does not have sufficient resources the provincial.

[1637] See Chapter 3.

[1638] See Chapter 4.

[1639] See the discussion on *Modderklip*, in Chapter 2:2.3 and Chapter 4:5.1.3.

[1640] See the discussion of such orders in 5.1.

4.2.1.1 Group in terms of the EHP

If the municipality's short-term housing budget is to be used to fund an alternative accommodation order, everyone who qualifies to benefit from the municipality's short-term housing programme, within the relevant budget cycle, is included in the group. Hence, not only are those included who qualify under the programme at the time the matter is heard, but also those who might qualify later on in the budget cycle since the budget needs to cover all emergency housing situations within the cycle.[1641]

Since the EHP sets national standards for short-term housing programmes,[1642] the requirements of the EHP are used to determine who would qualify under the municipality's short-term housing programme. In addition to persons facing evictions,[1643] the EHP caters for a range of persons living in emergency housing situations.[1644] These include persons who have lost their homes due to a natural or industrial disaster or live in conditions that are prone to disasters, like fire or flood.[1645] Persons living in the way of established or proposed engineering services, such as services for water, power or roads, including property reserved for this purpose, are included.[1646] Further included are those persons whose homes are demolished, as well as those persons who face such fates.[1647] Persons who are displaced due to civil conflict are also included.[1648] Lastly, two broad catchall categories of persons are mentioned: those living in conditions that threaten their lives, health or safety and those who have an exceptional housing need "that can reasonably be addressed only by resettlement or other appropriate assistance, in terms of this Programme".[1649]

From this list, it is evident that the EHP casts the net very wide regarding which persons might be considered living in emergency housing situations.[1650] Clarity on just how wide this

---

[1641] As is argued in *Fischer v Unlawful Occupiers, Erf 150, Philippi (Applicant's Head of Argument)* (9443/14) 61.2.

[1642] *Grootboom* para 68, 99. See also, Currie & De Waal *The Bill of Rights Handbook* 574-580.

[1643] Department of Human Settlements *EHP* (2009) Part A 2.3.1(e)-(f).

[1644] Department of Human Settlements *EHP* (2009) Part A 2.3.1.

[1645] Also a declared state of disaster, see Department of Human Settlements *EHP* (2009) Part A 2.3.1(a)-(c).

[1646] Department of Human Settlements *EHP* (2009) Part A 2.3.1(d).

[1647] Department of Human Settlements *EHP* (2009) Part A 2.3.1(e)-(f).

[1648] Department of Human Settlements *EHP* (2009) Part A 2.3.1(g).

[1649] Department of Human Settlements *EHP* (2009) Part A 2.3.1(h)-(i).

[1650] Obviously, the qualifications within the EHP, such as that the persons did not cause their own emergency housing situations, still applies. See Chapter 3:4.

net is cast might be found in case law. Since the EHP was drafted in response to *Grootboom*,[1651] it makes sense that persons living in similar conditions, to the group who approached the court, in that case, should be considered as living in an emergency housing situation under the EHP.[1652]

That they had previously been evicted was not what classified the group as living in an emergency housing situation. Rather they were considered to be living in emergency based on their current living conditions. They were living on a sports field, with scant protection against rain because their building materials had been destroyed.[1653] If one were to identify to which emergency housing situation listed in the EHP this would be designated three situations come to mind. One, they were living in dangerous conditions. Two, they were living in conditions that threatened their lives, health and safety. Three, their situation fell within the broad category of an exceptional housing need.[1654]

That the living conditions of the occupiers in *Grootboom* must be considered an emergency housing situation under EHP is indicative of the types of beneficiaries that are catered for by the programme. It suggests that the range of situations and beneficiaries is very wide.[1655] The category of persons who live in situations that threaten their health and safety alone can include many different kinds of persons. For example, if the bad-building cases discussed in Chapter 2 are used as precedent, all persons who live in such buildings form part of the group.

Moreover, the EHP includes all persons living on dolomitic land since this constitutes a dangerous living condition.[1656] Dolomite stone dissolves in water and can cause the land to subside.[1657] Hence, the unlawful occupiers, in *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd*,[1658] were living in an emergency housing situation regardless of whether they faced eviction.[1659] Around a quarter of people who live in Gauteng, live on

---

[1651] Socio-Economic Rights Institute of South Africa *A Resource Guide to Housing* (2011) 44.

[1652] Liebenberg *Socio-Economic Rights* 403-404.

[1653] See the discussion of *Grootboom* in Chapter 2:2.1.

[1654] See conditions in Department of Human Settlements *EHP* (2009) Part A 2.3.1.

[1655] Liebenberg *Socio-Economic Rights* 404-405.

[1656] *Pheko v Ekurhuleni Metropolitan Municipality* para 6.

[1657] Also known as "sinkholes". SABC *Almost a Quarter of Gauteng Built on Dolomitic Land* (2011).

[1658] 2012 (4) BCLR 382 (CC).

[1659] See the discussion of *Skurweplaas* in Chapter 2:3.2.

dolomitic land. This includes informal settlements and indicates a great number of persons living in emergency housing situations.[1660]

In fact, several, if not all, persons living in informal settlements could be considered as living in emergency housing situations.[1661] For one, informal settlements are often prone to flooding, which is identified as an emergency housing situation in the EHP.[1662] Wallacedene, the informal settlement from which the persons, in *Grootboom*, had moved was described as permanently flooded during winter.[1663] This is not a unique feature of informal settlements.[1664] Two, conditions in informal settlements often create health and safety risks. For example, informal settlements are often prone to fires.[1665] Three, the occupiers in *Grootboom* were considered to be living in an emergency housing situation and they were living in an informal settlement. It is not clear what distinguishes them from persons living in other informal settlements, other than the fact that some persons living in other informal settlements might have better building materials.[1666]

The High Court's decision in *City of Cape Town v Rudolph*[1667] (hereinafter "*Rudolph*") confirms that courts recognise that the EHP must cater for situations other than evictions. In this case, heard three years after *Grootboom*, several families had unlawfully erected informal housing on a public playground in Valhalla Park.[1668] They justified the unlawful occupation by arguing that the municipality had not met its housing obligations in terms of section 26(2) of the Constitution, as interpreted in *Grootboom*.[1669] Before they occupied the playground, they allegedly lived in emergency housing situations. They slept in cars, on the street, on

---

[1660] SABC *Almost a Quarter of Gauteng Built on Dolomitic Land* (2011).

[1661] See, *Joe Slovo* para 334 fn 11. Referred to in Kruger (2014) *SALJ* 335. Cf. *Nokotyana v Ekurhuleni Metropolitan Municipality* para 19 in which it was found that the people before the court could not be beneficiaries under the EHP despite living in an informal settlement because they had access to basic services. Referred to in Liebenberg *Socio-Economic Rights* 405.

[1662] Department of Human Settlements *EHP* (2009) Part A 2.3.1(b).

[1663] *Grootboom* para 59.

[1664] K Musungu, S Motala & J Smit "Using multi-criteria evaluation and GIS for flood risk analysis in informal settlements of Cape Town: the case of Graveyard Pond" (2012) 1 *South African Journal of Geomatics* 92 78.

[1665] ENCA *Emergency Units Target Informal Settlements to Reduce Winter Fire Deaths* (2016) https://www.enca.com/south-africa/emergency-unit-readies-for-winter-fire 26-07-2016.

[1666] Since theirs had been destroyed during the eviction. See the discussion of *Grootboom* in Chapter 2:2.1.

[1667] 2004 (5) SA 39 (CPD).

[1668] More than 23 structures. The playground was owned by the local authority. See, *City of Cape Town v Rudolph* 2004 (5) SA 39 (CPD) 3-4.

[1669] *Rudolph* 59.

school grounds and in bushes.[1670] The municipality failed to prioritise their needs through the implementation of a short-term emergency housing programme.[1671]

The court found that the municipality had not adopted or implemented a short-term housing programme as required by *Grootboom*.[1672] Accordingly, the court found that the municipality had failed to fulfil its housing duty.[1673] The court rejected the municipality's argument that the unlawful occupiers had not been living in emergency housing situations before their occupation of the playground.[1674] It found that people, like the unlawful occupiers, who sleep wherever they find shelter and do not have anywhere they can lawfully live, live in emergency housing situations.[1675] As a result, they should be included in the municipality's short-term emergency housing programme. The municipality's housing programme should not only consider the time spent waiting in the housing queue but should give priority to "the degree and extent of the need".[1676]

From this, it is clear that, not only persons who are evicted fall under the EHP but also others living in dire circumstances.[1677] In fact, the implication of *Rudolph* is that all persons who do not have a place to live lawfully must be accommodated under the EHP. However, this was a High Court decision. Accordingly, its precedent value is limited to the Western Cape.[1678] Nevertheless, it is indicative of just how wide courts interpret the net to be cast and of whom would form part of the group for purposes of distributive justice.

4.2.1.2 Other groups

A decision regarding the distribution of resources must take into account the interests of all members of the group.[1679] To determine membership of the group, one can look at the resources to be distributed. The group includes everyone for whom the resources are earmarked since they have an interest in receiving a just share of the resources. The previous

[1670] *Rudolph* 67-68.
[1671] *Rudolph* 54.
[1672] *Rudolph* 64.
[1673] *Rudolph* 64.
[1674] *Rudolph* 64.
[1675] *Rudolph* para 64.
[1676] *Rudolph* para 2.1.4 of the order.
[1677] See, *Joe Slovo* para 334 fn 11. Referred to in Kruger (2014) *SALJ* 335.
[1678] For a discussion on the hierarchy of courts, see Chapter 5:2.3.
[1679] Mbazira *Litigating Socio-Economic Rights* 113, 139.

section considered the membership of the group if the resources came from the municipality's short-term housing budget. This section considers the membership of the group if the resources for complying with the alternative accommodation order came from elsewhere.

Two situations can be identified in which resources for complying with an alternative accommodation might not come from the state's short-term housing budget. The first relates to where the municipality does not have a reasonable short-term housing budget or is unable to assist the unlawful occupiers within its short-term housing budget. In such situations, the resources within the provincial authority's short-term housing budget should be used, failing which the national authority's resources must be used.[1680] If this is the case, the group would comprise of all the persons within the province (or the country) who qualify for short-term housing.[1681]

If, as was the case in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,[1682] the court finds that the municipality must spend its surplus budget on the unlawful occupiers,[1683] this will affect the membership to the group. The group would comprise of all persons within its jurisdiction that qualify under the EHP, as well as all persons who might have a claim in respect of that money, such as persons in other types of emergencies. A finding that the municipality must reprioritise money allocated to other causes, would also affect membership to the group.[1684] In this regard, the group would comprise of all persons within the municipality's jurisdiction that qualify under the EHP, as well as the group of persons who would have benefited from the money that must be reprioritised.

The second situation in which resources to provide alternative accommodation might come from somewhere other than the municipality's short-term housing budget is where the unlawful occupiers do not qualify to benefit under the EHP. Nonetheless, the court grants an alternative accommodation order, since, due to the large size of the group, an eviction

[1680] Based on the principle of co-operative government and the stipulations within the EHP. See Chapter 5:4.

[1681] The same would apply to a situations where the provincial authority has not budgeted reasonably nor has insufficient available resources.

[1682] 2012 (2) SA 104 (CC). See discussion in Chapter 2:3.1.1 and Chapter 3:6.3.

[1683] Van der Berg supports this approach, see Van Der Berg (2015) *SAJHR* 335.

[1684] The EHP allows for the reprioritisation of resources by the state. See Chapter 3:2.4.

without alternative accommodation would disturb the social order.[1685] In such situations, the remedy for the landowner is not to prevent the homelessness of the unlawful occupiers, but to prevent social disorder. If the unlawful occupiers do not qualify under the EHP, that budget cannot be used to compensate the landowner.[1686] This makes identifying the group difficult. If the state does not have a separate budget to address such issues relating to social order, it would have to repurpose funding meant for other purposes. The group, for distributive justice purposes, would then include all persons who would have benefitted from the funding under its original purpose.

Nevertheless, in practice, it is unlikely that a court would refuse to order the eviction without alternative accommodation of a large group solely to protect the social order. Instead, a combination of the unlawful occupiers' emergency housing needs and the social order would motivate such an order. This is because, for one, with large groups, it is difficult to consider the individual circumstances of all unlawful occupiers, to determine if they would qualify under the EHP. Two, it is unlikely that, in a large group, none of the unlawful occupiers qualifies under the EHP. Since the housing needs of the unlawful occupiers is a consideration and because it is unlikely that a decision would be based solely on the protection of social order, the municipality's short-term housing budget would probably still be used in these situations. Hence, as with the group identified in the previous section, the group would probably be limited to all persons who qualify to benefit under this programme. This means that, in drafting its short-term housing budget, the municipality must take into account the fact that it would have to fund the safeguarding of social order, in eviction matters, from this budget.

From this, it is evident that the group, whose interests must be considered before granting an alternative accommodation order, is likely to include a large number of people. In most situations, all persons who qualify for short-term housing under the EHP within the municipality would be included. As is clear from the EHP, as well as the jurisprudence, this net is cast very wide and is not limited to persons facing evictions. For practical purposes, therefore, one can conclude that the group at least encompasses all persons living in

[1685] As was the case in *Modderklip* and possibly also Skurweplaas. See the discussions of these cases in Chapter 2:2.3 and 3.2 respectively. For a general discussion of such situations, see also Chapter 4:5.1.
[1686] See Chapter 3:4.

emergency housing situations in the jurisdiction of the municipality within the relevant budget cycle.

4.2.2 Application of the principles

To illustrate how the principles of distributive justice are to be applied to a group, this, more practically determined, group is used – those who qualify under the EHP within the jurisdiction of the municipality in the relevant budget cycle. For a court to determine whether an alternative accommodation order would adhere to distributive justice, it must have knowledge of the personal circumstances of all those within the relevant group, as well as the available resources of the state. If it finds that the state has the available resources to assist all the persons within the group (including the unlawful occupiers before the court) it would be just to grant an alternative accommodation order. For example, if the municipality has a reasonable short-term housing programme and it is able to accommodate the unlawful occupiers, as well as all others within its jurisdiction that qualify under the EHP, the alternative accommodation order would be just.

Accordingly, a critical question is whether the municipality has the means to provide accommodation to every person qualifying for assistance under the EHP, within its jurisdiction, in the relevant budget cycle. If that is the case, then a court can grant an alternative accommodation order without concerning itself further with those not before the court. If it is not the case, the principles of distributive justice must be applied to determine whether it would be just to prioritise the unlawful occupiers before the court. This means, advantaging the neediest in society. If the neediest are too numerous to assist immediately, equity considerations, such as effort, might be taken into account.

Several factors can be considered to determine which persons living in emergency housing situations should be given priority based on need. This includes the financial means of the persons living in emergency housing situations. Priority must be given to the "poorest of the poor".[1687] Another crucial factor is the vulnerability of the persons since this affects their ability to secure their own alternative accommodation. Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) lists certain indicators

[1687] *Grobler* para 116. See also, *Grootboom* para 44.

of vulnerability. Woman-headed households, children, disabled persons and elderly persons are identified as especially vulnerable.[1688]

Despite these distinguishing factors, there might still be too many persons, who should be prioritised based on need, to assist immediately. As a result, priority cannot depend solely on need. Equity considerations such as how long a person had been waiting in the housing queue[1689] or whether he is responsible for his unlawful occupation might also be taken into account.[1690] Care must be taken to determine whether a person can really be blamed for his actions and whether he acted solely out of desperation.[1691]

Another possible interpretation of using "need" as a principle of distribution is to consider the urgency of the emergency housing matters. Compare: (1) a person living on dolomitic land in Johannesburg, (2) a group of indigent persons, left homeless after their building burnt down, (3) an unlawful occupier occupying another person's home, and (4) a group of unlawful occupiers occupying land earmarked for private development. The need of the persons who have been left homeless due to the fire might be greater than the need of the others since there is no way to postpone the emergency housing situation. The need of the person living on the dolomitic land might be less than that of the other persons if no damage due to the dolomite is predicted in the near future. The need of the person who is occupying another's home is greater than the need of those occupying the land to be developed since the eviction in the prior situation is more urgent, especially if the developer bought the land, knowing that it was unlawfully occupied.

Moreover, a court can consider the possibility of making the emergency housing situation less urgent by ordering the state to compensate the landowner, in the form of constitutional damages, and postponing the eviction. In such situations, the compensation of the landowner is taken from the available resources of the state. Hence, in terms of distributive justice, the distributive effect of the compensation order, on the state's ability to address emergency

---

[1688] S 4(6) and s 4(7) of PIE. Muller (2014) *SAJHR*, 46. This is confirmed in United Nations *Basic Principles on Evictions* (2013) para 31. See also, Sen (1990) *Philosophy & Public Affairs* 114, 116.

[1689] This relates to the consideration of effort. See, Rawls *A Theory of Justice* 274.

[1690] This relates to the idea that "need" should only attract advantage if the "need" is blameless. Wagstaff (1994) *Current psychology* 144. Referring to Feinberg *Doing and Deserving* 94. For more on the blameworthiness of the unlawful occupiers, see Chapter 4:3.6.

[1691] See Chapter 4:3.6 and Chapter 6:2.

housing situations that are more urgent, must be considered. For this reason, the compensation might be less than the market value of the property.[1692]

Need-based on urgency is in line with the idea that homelessness should not be more acceptable for some people than for others since all people have inherent human dignity.[1693] An exception might be that the person is to blame for their homelessness.[1694] Vulnerability should rather play a role in determining whether a person would be able to secure alternative accommodation for themselves.[1695]

Should the state not have the available resources to address even the most urgent needs, a possible solution could be to lower the standards of the housing provided. If even this standard of housing is unaffordable, the persons living in emergency housing situations might be prioritised based on their income and their vulnerability. Thereafter, equity considerations such as those that have been waiting longest can be considered.

4.2.3 Difficulties in applying distributive justice in granting alternative accommodation orders

Certain practical problems when applying distributive justice exist. One is that there are often factors, other than the principles identified above, that influence the court's decision regarding distribution. The proximity of the potential beneficiaries to the judicial officer deciding upon the distribution is an example of such a factor. The unlawful occupiers in a specific matter are before the judicial officer, whereas the judicial officer has no contact with others in a similar position. A judicial officer might be more likely to distribute resources to people in close proximity to him.[1696] This might explain why courts have prioritised those before it and granted alternative accommodation orders that only benefit them.[1697] It might be due to their proximity to the judicial officer and the sympathy he feels toward them.

Another factor that influences the court's decision regarding distribution is the difficulty of determining a just distribution. The court needs to have information regarding all interested

[1692] On the calculation of quantum, see Chapter 7: 3.1.4.1.

[1693] On the importance of shelter in recognising dignity, see *Grootboom* para 23.

[1694] See Chapter 3:4, Chapter 4:3.6 and Chapter 7:2.1.1.

[1695] For more on the ability to secure alternative accommodation, see Chapter 7:3.1.1.

[1696] Cook & Hegtvedt (1983) *Annu Rev Sociol* 226.

[1697] See cases discussed in Chapter 2:3.

persons before it.[1698] This is very difficult in eviction matters, where the number of interested persons might be extremely high.[1699] It might difficult for a court to determine whether there are needier persons who are not before it. This could explain why alternative accommodation orders require distribution only to the unlawful occupiers in the specific matter.[1700]

A solution to the difficulty in determining the distribution lays in the type of remedy the court grants. Any remedy that leaves scope for the executive authority to decide how to comply with a duty is preferable. The executive authority is the branch of government that should have the knowledge and expertise to be able to apply the principles of distribution effectively. It is better placed to know the needs of other persons within its jurisdiction.[1701]

A declaratory order[1702] is an ideal remedy in distributive justice matters since it states the rights of the parties,[1703] but allows the state to decide how best to implement them.[1704] The court is not tasked with calculating distributions, something that falls within the functions and knowledge of the state.[1705] Moreover, a declaratory order is forward-looking and does not aim to correct the wrongs suffered in the past, as is the nature of remedies in terms of distributive justice.[1706] The problem with a declaratory order is that there is no penalty if the order is not observed.[1707] Hence, if it is evident that the state will not comply with an order, a court can order a mandatory interdict instead.[1708] In *TAC*, an interdict was granted instead of a declaratory order.[1709] Accordingly, it was possible to force the state to comply with the court order in *TAC* but not the order in *Grootboom* since a declaratory order was granted.[1710] Note,

---

[1698] See the discussion on separation of powers and the court's lack of technical expertise in Chapter 3:3.1.1.

[1699] Cook & Hegtvedt (1983) *Annu Rev Sociol* 226. See discussion on the interested persons in Chapter 6:4.2.1.

[1700] See cases discussed in Chapter 2:3.

[1701] See Chapter 5:3.1

[1702] As was made in *Grootboom.* See, Chapter 2:2.1.

[1703] Mbazira *Litigating Socio-Economic Rights* 156.

[1704] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 107, referred to in Mbazira *Litigating Socio-Economic Rights* 156.

[1705] See Chapter 5:3.1.

[1706] A Chayes "The role of the judge in public law litigation" (1976) *Harvard Law Review* 1281 1298.

[1707] Liebenberg *Socio-Economic Rights* 397; Mbazira *Litigating Socio-Economic Rights* 160; Swart (2005) *SAJHR* 220; Dugard (2014) *CCR* 278; Viljoen (2015) *SAPR/SAPL* 45.

[1708] Mbazira *Litigating Socio-Economic Rights* 160-161. This can be in the form of a structural interdict in which the court continues to supervise the implementation of the order and the state has to report on its progress on a regular basis. See, Swart (2005) *SAJHR* 226; Liebenberg (2002) *Law Democracy & Dev* 9-10.

[1709] See *TAC* para 135.

[1710] Mbazira *Litigating Socio-Economic Rights* 172; Viljoen (2015) *SAPR/SAPL* 45-46.

however, that the content of the order in *TAC* was similar to that of *Grootboom*.[1711] Both orders required the state to adopt and implement a reasonable programme to ensure the realisation of rights and left room for the state to decide how to comply with its duty.

Another solution to the difficulty of courts having to apply the principles of distributive justice and to determine a just distribution is to argue that the alternative accommodation order should not be seen as a distribution but as a deterrent.[1712] Such an order should deter the state from further neglecting its duties. Compensation as a deterrent is consistent with the characteristics of distributive justice. [1713] However, the court, in *Fose v Minister of Safety and Security*,[1714] found that there is no real proof that compensation acts as a deterrent.[1715] Moreover, in matters concerning socio-economic rights, such as housing, ordering the state to use its resources in this way is counterproductive since it takes away from the resources the state has to fulfil its duties toward others.[1716] Instead of spurring the state to fulfil its duties toward those in similar positions, such an order may cripple any existing housing programme already adopted by the state.[1717] Those in similar positions are, in fact, prejudiced.[1718]

Hence, another type of order is needed to deter the state from neglecting its duties or to force the state to fulfil its duties properly. Such an order might be a structural interdict. The term "structural interdict" refers to a mandatory interdict of which adherence to is monitored or supervised by the court.[1719] Often, structural interdicts require the party bound by the order (in this instance the state) to report to the court on its progress periodically.[1720] By retaining jurisdiction over the matter in this way, the court has more power to ensure that the state

[1711] See *TAC* para 135; *Grootboom* para 99.

[1712] Mbazira *Litigating Socio-Economic Rights* 144-145.

[1713] Mbazira *Litigating Socio-Economic Rights* 144-145.

[1714] 1997 (3) SA 786 (CC).

[1715] *Fose v Minister of Safety and Security*. Mbazira *Litigating Socio-Economic Rights* 150.

[1716] *Fose v Minister of Safety and Security*. Mbazira *Litigating Socio-Economic Rights* 150. Mbazira *Litigating Socio-Economic Rights* 153.

[1717] Mbazira *Litigating Socio-Economic Rights* 164.

[1718] Mbazira *Litigating Socio-Economic Rights* 150.

[1719] Kotze *Effective Relief* 36-37.

[1720] See, Swart (2005) *SAJHR* 226; Liebenberg (2002) *Law Democracy & Dev* 9-10; Kotze *Effective Relief* 38. Kotze also highlights that there are many different forms of structural interdicts. She discusses these forms at 47-57.

complies with the order.[1721] This might place a great burden on the court.[1722] Instead, other measures of ensuring accountability and transparency could be employed.[1723]

5 Conclusion

This chapter considered which form and theory of justice are most appropriate in creating remedies in eviction matters where the unlawful occupiers face homelessness. The discussion was structured around two forms of justice, distributive justice and corrective justice.[1724] On the one hand, an alternative accommodation order dictates how the state must distribute its resources. Hence, distributive justice might be the most appropriate form of justice.[1725] On the other hand, where an alternative accommodation order is to remedy the limitation of a right, corrective justice might be the most appropriate form of justice.[1726]

It was found that distributive justice is the most appropriate form of justice in eviction matters. This has certain consequences. In distributing resources, substantive equality must be ensured. This includes prioritising persons based, first, on need, and, second, on equity factors, such as blameworthiness and time spent waiting in the housing queue. A court must consider others, not before the court, and the distributive effect of any remedy on them. Even where the remedy is based on the failure of the state to protect the rights of the landowner, distributive justice requires the court to take into account the interests of those living in emergency housing situations who are not before the court.

A distribution based on need requires prioritisation of the most urgent emergency housing situation. An eviction might be made less urgent by postponing the execution of the eviction order. If this amounts to an unconstitutional limitation of the landowner's right to property, a court can require the state to compensate the landowner. In considering this approach, the court must take into account the distributive effect of the compensation order. In other words, the compensation is seen as part of the state's fulfilment of its short-term housing duty. If the

---

[1721] Kotze *Effective Relief* 38. For a further discussion on structural interdicts, see Viljoen (2015) *SAPR/SAPL* 58-61.

[1722] For an in depth discussion on structural interdicts, see Kotze *Effective Relief* 28-103.

[1723] See recommendations regarding this body in Chapter 7:3.1.4.3.

[1724] These are the two forms of justice identified by Aristotle, see Aristotle *Nicomachean Ethics* 75. See also, Jenkins *The American Courts* 5; Weinrib (2002) *UTLJ*349.

[1725] Mbazira *Litigating Socio-Economic Rights* 111; Klimchuk (2003) *OJLS*50.

[1726] Jenkins *The American Courts* 10.

state does not have the available resources to address the most urgent emergency housing situations, the standards of housing provided might be lowered. If the resources are still too little, priority of those living in emergency housing situations might be based on income and vulnerability. Thereafter, equity considerations, such as those that have been waiting longest, can be considered.

A judicial officer should be careful not to prioritise those before it because of their proximity to him. Moreover, since matters that call for the state to provide accommodation are polycentric, it is preferable that the state is allowed to decide how this duty is fulfilled. Where the state is uncooperative, an alternative accommodation order might be granted. However, the court must ensure that it has all the relevant information before it. If there is a possibility that the state would continue to disregard its duties toward people in similar situations, it is recommended that an order must be granted to ensure the fulfilment of its duties. Such an order could be granted in the alternative to or in addition to an alternative accommodation order. It might be in the form of a supervisory order by the court or by another independent body.

PART THREE: CONCLUSIONS AND RECOMMENDATIONS

This part consists of a single chapter. It summarises the findings of the thesis and provides concluding remarks. The primary aim of this chapter is to clarify the conditions under which courts should grant alternative accommodation orders in eviction matters. Hence, when would alternative accommodation orders adhere to the law, respect the functions of government and pursue justice? Some recommendations are also made regarding the key issues identified in the granting of alternative accommodation orders.

CHAPTER SEVEN: CONCLUDING REMARKS AND RECOMMENDATIONS

1 Introduction

In an eviction matter, the court is required to consider all relevant circumstances and grant an order that is just and equitable.[1727] An important relevant circumstance to be considered is whether the unlawful occupiers have alternative accommodation.[1728] Courts are reluctant to grant an eviction order that would leave the unlawful occupiers homeless.[1729] In fact, the Constitutional Court has stated that such an order would not be just and equitable.[1730] In matters where unlawful occupiers are unable to secure their own alternative accommodation, courts often look to the state to provide alternative accommodation.[1731] This thesis sought to determine when an alternative accommodation order as a condition to the eviction of unlawful occupiers in terms of PIE would comply with the court's constitutional mandate.

Two criteria were identified against which to test whether an alternative accommodation order would comply with the court's constitutional mandate. These criteria are based on constitutional principles that dictate, limit and inform the court's constitutional mandate. The criteria are that any alternative accommodation must adhere to the existing legal framework and must respect the functions of government. This last criterion can be separated into two parts. First, an alternative accommodation order must respect for the functions of the other branches of government, the executive and the legislative authority. Second, an alternative accommodation order must fulfil its own functions properly, its main function being the administration of justice.

To determine whether an alternative accommodation order adheres to the existing legal framework, the legal ground for such an order must be established. A court can only order the

---

[1727] S 26(3) read with s 172(1)(b) of the Constitution.

[1728] *PE Municipality* (hereinafter "*PE Municipality*"); *Olivia Road* (hereinafter "*Olivia Road*"); *Joe Slovo* (hereinafter "*Joe Slovo*"); *Blue Moonlight* (hereinafter "*Blue Moonlight*"); *Skurweplaas* (hereinafter "*Skurweplaas*"); *Changing Tides* (hereinafter "*Changing Tides*"); *Hlophe* (hereinafter "*Hlophe*"). See also, Muller (2014) *SAJHR* 42; Strydom & Viljoen (2014) *PER/PELJ* 1211.

[1729] *PE Municipality* para 28.

[1730] *Occupiers of Erven 87 and 88 Berea* para 57.

[1731] *PE Municipality*; *Olivia Road*; *Blue Moonlight*; *Skurweplaas*; *Changing Tides*; "); *Hlophe.*

state to provide alternative accommodation if there is a valid ground for placing this duty on the state.[1732] The first Constitutional Court decisions, in which alternative accommodation orders were granted, were examined in Chapter 2 to determine the grounds on which the courts based the orders. Two possible grounds for holding the state liable were identified. Both relate to the state's constitutional duty to respect, protect, promote and fulfil human rights.[1733] The first possible ground, discussed in Chapter 3, relates to the state's duty to fulfil the unlawful occupiers' right of access to adequate housing by implementing reasonable short-term housing programmes.[1734] A relevant circumstance considered by courts in eviction matters is whether the state has a duty to accommodate the unlawful occupiers within its short-term housing programme. Since alternative accommodation weighs so heavily, a finding that the state has a duty to accommodate the unlawful occupiers immediately is likely to lead to an eviction with an order against the state to provide alternative accommodation, regardless of the other circumstances.[1735]

If the state does not have a duty to accommodate the unlawful occupiers immediately in terms of its duty to fulfil human rights, the second possible ground for holding the state liable to provide alternative accommodation, discussed in Chapter 4, might be relied on. In terms of the second ground, the state's liability to provide alternative accommodation might be founded on its duty to respect and protect human rights.[1736] This is because, under some circumstances, the granting of an eviction order that results in homelessness might violate the rights of the unlawful occupiers, whereas a delay of the eviction might violate the rights of the landowner.[1737] Placing the duty on the state to prevent or mitigate the violation by addressing the loss of the parties could be justified due to the state's duty to respect and protect human rights.[1738] Such a loss could be addressed through the creation of a constitutional remedy. Constitutional damages in favour of the landowner could be granted or a constitutional remedy in the form of alternative accommodation to the unlawful occupiers.

[1732] As per the rule of law as formal protection, see Chapter 1:3.1.1.
[1733] S 7(2) of the Constitution. See Chapter 2:3.4.
[1734] As learnt from *Grootboom* (Chapter 2:2.1).
[1735] Chapter 2:3.4.
[1736] S 7(2) of the Constitution. See Chapter 2:3.4.
[1737] See Chapter 4:5.
[1738] See Chapter 4:5.

These two possible grounds for alternative accommodation orders were analysed to determine when alternative accommodation orders based on these grounds would adhere to the existing legal framework and respect the functions of the branches of government. From the analysis, it can be concluded that the two grounds would likely reach the same outcome regarding whether an alternative accommodation order should be granted. In addition, it is evident that certain key issues must be revisited and re-imagined to create certainty and ensure that the laws are applied justly. One issue is the fact that the state has limited resources that must be used to respect, protect, promote and fulfil the human rights of many people in need. Another issue is the fact that the court requires a considerable amount of information to grant an alternative accommodation and there is uncertainty regarding which entity must place this information before the court. The remainder of the chapter, firstly, explains how the analysis in this thesis indicates that the two grounds are likely to reach the same outcome. Second, it explores how the analysis can address the identified issues and makes recommendations in this regard.

2 Similar outcome of the grounds

It is evident from the analysis that reliance on either of the two grounds is likely to reach the same outcome regarding whether an alternative accommodation order should be granted. In other words, if, based on the first ground, the court denies an alternative accommodation order it would likely also have denied the order if the case was based on the second ground. This section explains why these grounds are likely to have the same outcome and makes recommendations based on this conclusion.

2.1 Reasons for similar outcome

The reason for concluding that reliance on either of the two grounds is likely to have a similar outcome is that the same factors strongly influence the granting of an alternative accommodation order in respect of both grounds. These factors are the blameworthiness of the unlawful occupiers; the blameworthiness of the state; and the limited resources of the state and its duty to realise the rights of others.

2.1.1 Blameworthiness of the unlawful occupiers

Unlawful occupiers are not automatically considered blameworthy since they are not necessarily responsible for their unlawful occupation. Hence, the blameworthiness considered by the court goes beyond mere unlawful occupation. On the one hand, unlawful occupiers can be blameworthy to the extent that they are responsible for the fact that they are facing eviction. On the other hand, they can be blameworthy to the extent that they did not attempt to procure alternative accommodation for themselves.[1739] Both grounds for alternative accommodation orders exclude blameworthy unlawful occupiers as beneficiaries.

The Emergency Housing Programme (EHP)[1740] excludes persons as beneficiaries who were responsible for their emergency housing situation.[1741] This relates to the blameworthiness of the unlawful occupiers. If they can be blamed for their situation, then they cannot benefit. Since the first ground for alternative accommodation orders involves adherence to the EHP,[1742] an alternative accommodation order based on this ground cannot be in favour of unlawful occupiers that are blameworthy.

In terms of the second ground, the blameworthiness of the unlawful occupiers as a relevant circumstance has also carried considerable weight. Unlawful occupiers have been evicted without alternative accommodation due to their blameworthiness.[1743] Only where the group had been extremely large so that its eviction would disturb the social order, had blameworthiness not resulted in an eviction without an alternative accommodation order.[1744] If the recommendations below are followed,[1745] this difference would be kept at a minimum.

The Constitutional Court's statement, in *Occupiers of Erven 87 and 88 Berea*, challenges the idea that the blameworthiness of the unlawful occupiers might bar an alternative accommodation order. In this matter, the court stated that the municipality has a duty to provide alternative accommodation where an eviction leaves unlawful occupiers homeless. This statement is not qualified to include only unlawful occupiers who are not to blame. It

[1739] For these grounds, see Chapter 3:4.
[1740] Department of Human Settlements *EHP* (2009).
[1741] Department of Human Settlements *EHP* (2009) Part A 2.3.1.
[1742] See Chapter 3:2.
[1743] Chapter 4:3.6.
[1744] As was the case in *Modderklip*. See Chapter 4:3.2 and 3.6.
[1745] See Section 3.1 below.

could, however, be argued that a court must consider all relevant circumstances when granting an order in eviction matters. Relevant circumstances, such as the blameworthiness of the unlawful occupiers might challenge the absoluteness of the court's statement.

In light of the court's statement, blameworthiness as such might not justify refusing an alternative accommodation order. The extent of the blameworthiness and the leeway granted to correct it must be compelling enough to support an eviction without alternative accommodation. In respect of unlawful occupiers that are responsible for their evictions, this thesis considered two situations: where someone does something knowing that it jeopardises their continued lawful occupation and when someone unlawfully occupies land out of greed.

The example used, of someone who knowingly jeopardises their continued lawful occupation, is that of a person who illegally sells drugs from a rented home, contrary to the lease agreement. This, in itself, is blameworthy. However, to justify an eviction without alternative accommodation additional measures might be required. This may include giving the occupier a reasonable opportunity to cease with their actions;[1746] addressing the unlawful conduct through other channels, such as through criminal law; and not ascribing the blameworthiness of one member of the household to those not involved in the conduct. In the *Malan* case, for example, the municipality was to provide alternative accommodation to the innocent mother of the alleged drug dealer.[1747]

In respect of someone being responsible for their unlawful occupation since they occupied the land out of greed, cognisance must be taken of the fact that the blameworthiness of an unlawful occupier might be difficult to determine. A person that unlawfully occupies land might be acting out of need rather than greed. This can be described as an "unforced" occupation.[1748] Since fault cannot be ascribed to the unlawful occupier, he cannot be considered blameworthy.[1749]

Moreover, even if some greed is involved, an unlawful occupier who cannot secure alternative accommodation is needy.[1750] If he unlawfully occupied land out of frustration with

[1746] As was done in *Daniels* para 7.
[1747] *Malan* para 15.
[1748] See Chenwi (2008) *Harv L Rev* 111.
[1749] See Chapter 3:4 and Chapter 4:3.6. On fault, see Chapter 4:5.2.
[1750] Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 87.

the slow progression in housing provision, he was possibly already living in an emergency housing situation prior to the unlawful occupation.[1751] While unlawful occupation due to frustration with the state is not ideal, it is often the only way persons living in emergency housing situations can force the municipality to take notice of them.[1752] It is submitted that an unlawful occupier, however greedy, must be considered needy if he cannot secure alternative accommodation. If the matter is dealt with speedily, a person who acted out of greed might be able to return to his previous home or secure accommodation elsewhere.

The second type of blameworthiness on the part of unlawful occupiers relates to the failure of attempting to procure alternative accommodation. Unlawful occupiers cannot remain on the land indefinitely, under the auspices that they have not been able to secure alternative accommodation, if they make no effort to find alternative accommodation. Nevertheless, for this type of blameworthiness to bar an alternative accommodation order, they must have a reasonable perspective of securing accommodation elsewhere.[1753] In addition, a court should afford them enough time to secure accommodation prior to the eviction order being executed. In some circumstances, a court may postpone the matter to allow the unlawful occupiers to secure alternative accommodation. This would ensure that an unlawful occupier, who is not blameworthy but uses the time to seek for alternative accommodation in vain, is not evicted without alternative accommodation.

2.1.2 Blameworthiness of the state

Another factor that influences the granting on an eviction order, regardless of the ground for the order, is the blameworthiness of the state. In eviction matters, the state has been found to be blameworthy on several grounds. The state can be blameworthy if it did not adopt a reasonable short-term housing programme and budget[1754] or did not implement it reasonably.[1755] Failure to assist the landowner in preventing unlawful occupation[1756] or to

[1751] In both *Modderklip* and *Skurweplaas*, for example, some of the unlawful occupiers had previously been evicted from land. See the discussion of *Modderklip* and *Skurweplaas* in Chapter 2:2.3 and 3.2 respectively.

[1752] Since an eviction matter would go to court.

[1753] This seems to have been the approach in *Omar*. However, as explained in Chapter 4:3.1, the court did not ensure that the accommodation would actually be available.

[1754] As was the case in *Grootboom* and *Blue Moonlight*. See Chapter 2:2.1 and 3.1.1 respectively.

[1755] As was the case in *Skurweplaas*. See Chapter 2:3.2.

[1756] As was the case in *Modderklip*. See Chapter 2:2.3.

respond reasonably to an unlawful occupation[1757] indicates blameworthiness on the part of the state. Further, the state is blameworthy if it does not co-operate with the court.[1758] It is argued in Chapters 3 and 4 that both grounds for alternative accommodation orders require blameworthiness on the part of the state as a condition for the granting of an alternative accommodation order.

Where the alternative accommodation order is based on the state's short-term housing duty, a court should not grant an alternative accommodation order if the state has adopted and implemented a reasonable short-term housing programme and budget. This would violate the separation of powers doctrine.[1759] Only where the state either did not adopt or implement a reasonable short-term housing programme and budget should the court grant an alternative accommodation order.[1760] The question arises whether the state would always be blameworthy if it fails to provide alternative accommodation to persons who qualify under the EHP. Its short-term housing duty states that it must assist persons in emergency housing situations. However, emergency housing situations must be prioritised based on need.[1761] Hence, it might have a duty toward the unlawful occupiers, but the duty might not be immediate.

Similarly, in respect of the second ground, the state can only be held responsible for failing to protect the rights of the unlawful occupiers or the landowner if it was blameworthy. Where there is no fault on the part of the state, it should not be held responsible.[1762] Hence, an alternative accommodation order based on the second ground should not be granted against the state if it was not blameworthy.

In respect of both grounds, the separation of powers requires a court to engage in constitutional dialogue with the state. If it finds that the state was blameworthy, it should allow it to choose how to correct its mistake. Only where the state is blameworthy in not participating in the constitutional dialogue should the court grant an alternative

[1757] As was the case in *Olivia Road* and *Skurweplaas*. See Chapter 2: 3.1 and 3.2 respectively.

[1758] As was the case in *Blue Moonlight* and *Hlophe*, see Chapter 2:3.1.1 and 3.1.2.2 respectively. See also the discussion on constitutional dialogue in Chapter 5:3.1.2.

[1759] Since this is part of the functions of the executive government and should not be interfered with unless it is unconstitutional. The Constitution prescribes that the programme must be reasonable in S 26(2) of the Constitution. See Chapter 5:3.2.

[1760] See Chapter 3:6.3.

[1761] See Chapter 6.

[1762] See Chapter 4:5.2.

accommodation order.[1763] Participation in such a dialogue would involve the state being joined to the proceedings and it filing comprehensive reports regarding its ability to provide alternative accommodation to the unlawful occupiers.[1764]

The conclusion that there must be blameworthiness on the part of the state is in accord with the court's emphasis on the state's blameworthiness in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue*[1765] (hereinafter "*Blue Moonlight*"),[1766] *City of Johannesburg Metropolitan Municipality v Hlophe*[1767] and *President of the Republic of South Africa v Modderklip Boerdery*[1768] (hereinafter "*Modderklip*").[1769] Moreover, it also explains why an alternative accommodation order was not granted in *Ives v Rajah*,[1770] where the state was found to have acted reasonably.[1771]

The finding that the court should not grant an alternative accommodation order if the state was not blameworthy does not mean that the court must grant an eviction without alternative accommodation. It simply means that the court's means of solving the problem should not be to grant an alternative accommodation order but rather to allow the state to participate in finding a solution.

2.1.3 Limited resources and the rights of others

The third factor that influences the granting of an alternative accommodation order, regardless of the ground on which it is based, is the limited resources of the state and the rights of others. Considering the rights of others, within the state's jurisdiction, means recognising that there are other people in a position similar to those before the court. They could similarly succeed in proving that the state must provide them with alternative accommodation. However, the state has limited resources. The state might not be able to

[1763] See Chapter 5:3.1.2 and 3.2.
[1764] See Chapter 5:4.5.
[1765] 2012 (2) SA 104 (CC).
[1766] See Chapter 2:3.1.1.
[1767] [2015] 2 All SA 251 (SCA). See Chapter 2:3.1.2.2.
[1768] 2005 (5) SA 3 (CC).
[1769] See Chapter 2:2.3.
[1770] 2012 (2) SA 167 (WCC).
[1771] Nevertheless, the size of the group might also have made the difference. See discussion below.

assist all the persons in positions similar to those before the court immediately. Hence, a just measure for determining priority amongst these persons is needed.[1772]

The measure to be used is the need of the persons in a similar position.[1773] It is recommended that the "need" to be considered is the urgency of the matter. When matters are equally urgent, those who are more vulnerable must be prioritised, followed by those who have been waiting longest in the short-term housing queue.[1774]

That the court must consider the rights of others means that it cannot grant an alternative accommodation order if the state has limited resources and there are other, needier (or equally needy but more deserving)[1775] persons within the state's jurisdiction on whom the state should spend the resources instead. This distributive form of justice is more easily attributed to the first ground for alternative accommodation orders (which requires compliance with the duty to fulfil socio-economic rights through the distribution of resources) than it is to the second (which requires compensation due to the court's failure to respect and protect rights).

Corrective justice seems to find more appeal with the second ground for alternative accommodation orders. Corrective justice concerns the correcting of injustice caused and considers only two parties – the one that caused the loss and the one that suffered the loss. Hence, it does not to consider others within the state's jurisdiction. Since the second ground for alternative accommodation concerns the correcting of an injustice, corrective justice seems most appropriate and it seems unnecessary for the court to consider the plight of others if its order is based on the second ground.[1776]

Even if corrective justice is to be used in matters based on the second ground, there might be several persons within the municipality's jurisdiction with a similar claim against the state. If they all suffered due to a failure on the part of the state, corrective justice would require that their claims also be successful. This could place an impossible burden on the resources of the

[1772] This relates to distributive justice, see Chapter 6:4.2.2. It also relates to the rule of law as procedural safeguard since it takes into account the fact that not all persons in a similar position have access to courts and legal representation. On the rule of law as procedural safeguard, see, Chapter 1:3.1.1.

[1773] On this principle, see Chapter 6:2.

[1774] See Chapter 6:4.2.2.

[1775] Relating to equity and the time spent waiting for emergency housing. See Chapter 6:4.2.2.

[1776] On corrective justice, see Chapter 6:3.

state and would affect its ability to fulfil the needs of others within its jurisdiction. For this, and other, reasons, it was concluded that distributive justice would be the most appropriate form of justice even in matters concerning the second ground for alternative accommodation orders.[1777] If distributive justice applies also to the second ground, this means that the interests of others in a similar position to the unlawful occupiers must be taken into account. Hence, the second ground does not justify prioritising evictees since several other persons living in emergency housing situations have also lost their existing access to adequate housing.[1778]

Another issue concerns what resources are to be distributed. The available resources to be considered in terms of the first ground are limited to a reasonable short-term housing budget. This is because the state has the duty to budget and the separation of powers doctrine dictates that the court should not interfere with this budget unless it is unconstitutional.[1779] Moreover, as a measure for implementing its housing duty, the reasonableness review standard requires the court to accept the measure unless it is unreasonable.[1780]

It can be argued that the state's short-term housing programme and budget also embody its plan for complying with its duty to respect and protect the rights of unlawful occupiers and landowners in eviction matters, as well as the social order.[1781] Hence, if the state has a reasonable short-term housing budget, the separation of powers doctrine dictates that the court should not interfere with this budget, even if the matter is brought in terms of the second ground.[1782]

As starting point, the enquiry should be aimed at the municipality's short-term housing programme. If this programme does not exist or the resources are insufficient, the provincial or even the national short-term housing budget can be considered. If no provincial or national short-term housing budgets exist, surplus revenue or any litigation budget might be used. Moreover, the court might expect the state to reprioritise funds from elsewhere in the budget.[1783] If this is the case, distributive justice requires the court to consider whether such a

[1777] On the appropriateness of distributive justice, see Chapter 6:4.
[1778] See Chapter 6:4.2.1.
[1779] See Chapter 5:3.1.3.
[1780] *Grootboom* para 41.
[1781] See Chapter 6:4.2.1.
[1782] See Chapter 5:3.1.3.
[1783] See Chapter 3:6.3.

decision would be just, considering the interests of those who would have benefited from these resources.[1784] In addition, a court would have to determine what percentage of state revenue should go to the respect, protection and fulfilment of these rights and not require the state to spend more than this amount.[1785] This is a highly polycentric issue and places an enormous burden on the court.[1786]

A further issue to be considered is whether the court must determine whether the state actually *has* the resources to comply with the order. In other words, even if the court finds that it is in line with distributive justice to prioritise the parties before it, must it consider whether the state can comply with an order in favour of these parties? It did not seem to consider this in *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd*[1787] (hereinafter "*Skurweplaas*") before granting the alternative accommodation order.[1788] If the order is based on the first ground, the Constitution prohibits alternative accommodation orders that cannot be complied with due to a lack of resources since it limits the state's housing duty to its available resources.[1789] The same conclusion is not as clear in respect of the second ground.

In *Jaftha v Schoeman; Van Rooyen v Stoltz*,[1790] the court found that the negative obligations in terms of section 26(1) of the Constitution are not limited by section 26(2) of the Constitution; that is, the available resources of the state. This is because "the availability of state resources is not an issue".[1791] Even in *Jaftha v Schoeman; Van Rooyen v Stoltz*, the statement is not entirely correct. In this case, the court required judicial oversight in all matters requesting the sale in execution of immovable property used as homes.[1792] This definitely has resource implications. Similarly, even if an alternative accommodation order based on the second ground is considered relief for the limitation of the landowner's rights, the availability of

[1784] Chapter 6:4.2.1.2.

[1785] Since this would also affect its ability to perform its other functions.

[1786] On polycentric issues, see Chapter 5:3.1.1.

[1787] 2012 (4) BCLR 382 (CC).

[1788] See Chapter 2:3.2.

[1789] S 26(3) of the Constitution. See also, Chapter 3:6.1.

[1790] 2005 2 SA 140 (CC).

[1791] *Jaftha v Schoeman; Van Rooyen v Stoltz* para 31.

[1792] *Jaftha v Schoeman; Van Rooyen v Stoltz* para 64. See also the discussion of this case and its implications in E Du Plessis "Judicial oversight for sales in execution of residential property and the National Credit Act" (2012) 45 *De Jure* 532 539-542.

state resources *is* an issue. This is because the realisation of any right has resource implications.[1793]

It is impossible to comply with an alternative accommodation order if the state does not have the resources to do so. Hence, courts have considered the state's available resources in granting remedies even in matters not concerning section 26(2) of the Constitution.[1794] A court should not grant orders with which the state could not comply.[1795] Accordingly, even if an order is based on the second ground, it should still be limited to the state's available resources.

In summary, regardless of the ground relied upon for alternative accommodation, a court should take cognisance of the limited resources of the state and the interests of others, who are not before it. A court should not grant an alternative accommodation order without considering whether the state has the available resources to comply with the order and whether those before the court should be prioritised above others in similar circumstances. Prioritisation should be based on the urgency of the matter. An eviction matter might be less urgent than an emergency housing situation in which persons were left homeless due to flood. An eviction matter can be postponed, thereby removing the threat of imminent homelessness.[1796]

2.2 Recommendations regarding the choice of grounds

Since reliance on these grounds is likely to have the same outcome regarding whether an alternative accommodation order should be granted, it is recommended that only one ground be used. This would create certainty and would prevent parallel systems of law.[1797] It is recommended that the state's duty to fulfil the unlawful occupiers' right of access to adequate housing be used as the only ground for alternative accommodation orders. This is because

[1793] Liebenberg *Socio-Economic Rights* 191.

[1794] See, *S v Jaipal* 2005 (4) SA 581 (CC) para 55-56; *Khosa* para 45, 58. These cases are referred to in Liebenberg *Socio-Economic Rights* 55-56, 159.

[1795] The fact that someone can only be held in contempt of court if they acted wilfully and *mala fide* confirms that an inability to comply with an order is treated differently. Liebenberg *Socio-Economic Rights* 451.

[1796] This may amount to an unconstitutional limitation of the rights of the landowner, in which case the state might have to compensate the landowner. See Chapter 7:3.1.4.1.

[1797] On certainty and parallel systems of law, see Chapter 1:3.2.1.

there are already very clear laws and policies regarding compliance with this duty,[1798] whereas the second ground is not technically sanctioned by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).[1799] Moreover, the first ground is the main ground relied upon in the cases, discussed in Chapter 2, in which alternative accommodation orders were granted.[1800] In addition, the provision of alternative accommodation as relief for the limitation of the landowner's rights has the effect of fulfilling the unlawful occupiers' positive right of access to adequate housing, which suggests that the law relating to the first ground should apply.[1801]

In terms of distributive justice, it is more appropriate that the first ground should be the only ground used for requesting alternative accommodation orders since courts are more likely to consider the interests of others in similar situations when applying this ground.[1802] Moreover, allowing two grounds for alternative accommodation orders might frustrate distributive justice because it would be difficult to define the group and parties might want to argue that they should be considered separately since their arguments are based on different grounds.[1803]

Furthermore, if unlawful occupiers qualify for emergency housing assistance, the state has a duty towards them. Depending on their need, they might not be prioritised and the state might not have a duty to assist them immediately. This calls for a delay of the eviction.[1804] The delay might unconstitutionally limit the rights of the landowner and call for the compensation of the landowner, through constitutional damages. In such matters, whether this route should be taken should be based on the first ground for alternative accommodation. That is because it amounts to the state providing emergency accommodation to the unlawful occupiers. While the first ground is used, compensation to the landowner for the loss of its property should still be paid. However, the payment forms part of the available resources and the state's fulfilment of its housing duty. Hence, the laws relating to the first ground must be applied since the order for compensation is actually founded on the first ground.

[1798] Chapter 3:2.
[1799] See Chapter 4:4.3.
[1800] Chapter 2:3.4.
[1801] Chapter 6:4.2.1.
[1802] Chapter 7:2.1.3.
[1803] On defining the group in distributive justice, see Chapter 6:4.2.1.
[1804] Or a postponement of the eviction date or suspension of the eviction order.

Of course, if a case founded on the first (or the second) ground leads to a conclusion that an alternative accommodation order against the state cannot be granted, a stalemate situation could still exist. In such a situation, a court is not required to grant an eviction order that would leave the unlawful occupiers homeless. This idea is bolstered by the Constitutional Court decision in *Occupiers of Erven 87 and 88 Berea*, where the court found that an eviction without alternative accommodation would not be just and equitable. Instead, a finding that the court cannot grant an alternative accommodation order simply means that the issue cannot be solved in this way. The following section makes recommendations to solve, or at least minimise such stalemate situations, especially where they are due to the limited resources of the state.

3 Recommendations regarding key issues

Throughout the analysis, certain issues concerning the granting of alternative accommodation orders became apparent. One issue is the fact that the state has limited resources that must be used to respect, protect, promote and fulfil the human rights of many people in need. Another issue is the fact that the court requires a considerable amount of information to grant an alternative accommodation and there is uncertainty regarding which entity must place this information before the court. These issues are discussed in the following sections and recommendations are made regarding how these issues must be approached.

3.1 Availability of resources

One of the main issues with alternative accommodation orders is that they have far-reaching budgetary implications. Municipalities have limited resources to be used to respect, protect, promote and fulfil the property and housing rights of the many people within their jurisdictions. This section considers how this burden on municipalities can be reduced. As is evident from the discussion below, reducing the burden on municipalities is consistent with the notion of distributive justice since it ensures that more resources are available and that resources can be distributed more justly.

First, this section considers how a different approach to determining whether the unlawful occupiers need alternative accommodation might reduce the burden. Second, the section considers how the involvement of other spheres of government might reduce the burden on

municipalities. Third, the section examines how changing the standards of emergency housing might reduce the burden. Fourth, the section explores how the burden might be reduced by granting remedies other than alternative accommodation orders.

The recommendations made in this section should be followed by courts in deciding whether and on what terms to grant an alternative accommodation order. Moreover, these recommendations can be used as guidelines for municipalities in drafting their short-term housing programmes. In measuring the reasonableness of a municipality's short-term housing programme, these recommendations can also be of use.

3.1.1 Lack of alternative accommodation

In *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*,[1805] homelessness after an eviction was defined as having no reasonable prospect to find alternative accommodation that is of comparable standard, similar rental rate and within the reasonable proximity of the property, evicted from, before the date of execution of the eviction order.[1806] One way of limiting the budgetary effects of alternative accommodation orders is to consider if the unlawful occupiers would genuinely become homeless if evicted and to require the state to assist only those who cannot secure accommodation elsewhere. This approach was followed in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[1807] (hereinafter "*Changing Tides*"), where the unlawful occupiers' legal representatives were required to investigate the individual personal circumstances of the unlawful occupiers and report on those who would not be able to access accommodation elsewhere.[1808]

Two elements affect the effectiveness of the court's inquiry into whether unlawful occupiers genuinely face homelessness. One is whether the court's inquiry is done on an individual basis. The other is whether factors other than the income of the unlawful occupiers are taken into account. Primarily, the evidence used by courts, to determine whether unlawful occupiers face homelessness, relates to the employment of the unlawful occupiers and to

[1805] 2013 (1) SA 583 (GSJ).

[1806] *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village* para 85, as referred to in Smith (2014) *De Rebus* 42.

[1807] 2012 (6) SA 294 (SCA).

[1808] See Chapter 2:3.1.2.1.

whether they have sufficient income to afford alternative accommodation.[1809] Not only have courts failed to consider other factors; they have also failed to consider the individual circumstances of the unlawful occupiers. In *Blue Moonlight*, for example, the court's finding that the unlawful occupiers faced homelessness was based on the average income of the group.[1810] Furthermore, in *Skurweplaas*, the court neither applied any factors nor considered the unlawful occupiers separately, but inferred from the circumstances that the eviction would leave them homeless.[1811]

While a general guesstimate regarding the potential homelessness of the unlawful occupiers can indicate whether the state must be joined to the matter, the guesstimate cannot be the end of the enquiry.[1812] Using such a general guesstimate to determine whether the state ultimately has a duty toward the unlawful occupiers might be prejudicial to poor persons living amongst people that are more affluent. This is because the average income of the group could indicate that the unlawful occupiers can afford alternative accommodation, while some individuals might, in fact, face homelessness. Similarly, it might give unjust priority to persons who are more affluent than others in a group of unlawful occupiers are.[1813] Including such persons within an alternative accommodation order would unduly burden the municipality.

In addition to considering the individual circumstances of the unlawful occupiers to determine whether they can afford accommodation elsewhere, other ways of obtaining alternative accommodation should also be considered. Such ways include returning whence they came[1814] and moving in with friends or family.

In *Skurweplaas*, one of the families had been renting a backyard dwelling nearby.[1815] While this suggests that they can afford alternative accommodation, it also indicates that they have a place to which to return. These facts seem to lend itself to a conclusion that the unlawful

---

[1809] See, for example, *Blue Moonlight HC* para 19; *SOHCO* para 31; *Premier of the Province of the Eastern Cape v Mtshelakana* 2011 5 SA 640 (ECM) para 13. See also, Fick (2015) *Stell LR* 681.

[1810] *Blue Moonlight* para 6.

[1811] Se Chapter 2:3.2.

[1812] Muller and Liebenberg explore this requirement of the joinder of the state in eviction matters in Muller & Liebenberg (2013) *SAJHR*.

[1813] In terms of distributive justice, see Chapter 6:2. This is the case in the Marikana cases, where some unlawful occupiers earn over R 4000, see *Fischer v Unlawful Occupiers, Erf 150, Philippi (Answering Affidavit)* (9443/14) para 75.

[1814] That the court should consider whether the unlawful occupiers could return whence they came is argued in Smith (2014) *De Rebus* 42.

[1815] *Skurweplaas (1st Resp HoA)* para 11.

occupiers have alternative accommodation. Their unlawful occupation had not been very long and the accommodation they would be returning to would be nearby. In addition, their occupation would be with the consent of the landowner.[1816] In other cases, the facts might not be as conducive to a conclusion that the unlawful occupiers can return whence they came.

If the previous occupation had been unlawful, a court would be less likely to find that the unlawful occupiers should return. Nevertheless, if their previous unlawful occupation was peaceful and uncontested, a court might find this to be sufficient temporary alternative accommodation, given the state's limited resources, albeit not necessarily "adequate" long-term housing.[1817]

Moreover, if the previous accommodation was far away that could also hinder a finding that they can return whence they came. In *MEC for Department of Human Settlements, Gauteng Province v Molema*,[1818] the court pointed out that unlawful occupation near cities could be a result of the Apartheid regime. The racial segregation during Apartheid means that many black people still grow up in rural areas far away from cities and the employment opportunities that they offer. They move to urban areas in search of employment. Forcing them to return to the rural areas would perpetuate the discrimination of the Apartheid regime.[1819] However, this only applies to specific situations and cannot be a blanket defence against the argument that persons must return whence they came.

Nonetheless, the fact that returning would cause them to lose their jobs or any prospect of getting a job is a valid argument.[1820] This must be proved. Proving that returning whence they came would cause them to lose the prospect of getting a job includes showing that the unlawful occupier is able to work and is not prevented from doing so due to old age or disability. The fact that a child will be far away from his school might not be an unassailable hindrance,[1821] unless the area he is returning to does not have a school. Moreover, a longer commute to work should not be a valid argument since persons from all levels of

[1816] On the duration of occupation as relevant circumstance, see Chapter 4:3.5.

[1817] As required by s 26(1) of the Constitution. This is because emergency housing might not meet the standards of long-term housing.

[1818] (44773/13) [2013] ZAGPPHC 438.

[1819] *MEC For Department of Human Settlements, Gauteng Province v Molema* para 7-8.

[1820] See, for example, *Blue Moonlight* para 6.

[1821] The alternative accommodation offered by the state was rejected inter alia because it was far from the children's schools, *PE Municipality* para 54.

employment can be expected to commute to work.[1822] The distance from employment must be shown effectively to prevent continued employment.

Proof that it would not be possible to return whence they came, would be a valid argument against finding that the unlawful occupiers have alternative accommodation. This would likely be the case where the unlawful occupiers have occupied the property for a long time[1823] or where they were evicted from their previous occupation.[1824] In addition, the fact that their previous housing had already been occupied by others would prevent them from returning.[1825]

In respect of illegal immigrants, they might have to return to their countries of origin.[1826] The Immigration Act 13 of 2002 provides that "any illegal foreigner shall be deported".[1827] Continued occupation would only be allowed if authorised by the Department of Home Affairs, on the basis that the illegal immigrants have applied for a status.[1828] Applying for a status could refer to an application to receive refugee status, to acquire a visa or a permanent residence permit.[1829] The fact that the EHP only caters for illegal immigrants subject to conditions set by the Department of Home Affairs seems to relate to this provision.[1830] Hence, the condition that the Department of Home Affairs is likely to set for inclusion of illegal immigrants under the EHP is that they have applied for a status.

Nevertheless, it could be argued that health and safety concerns require an urgent eviction and that waiting for deportation would not be feasible.[1831] However, in terms of the Immigration Act, deportation should take no longer than 90 days,[1832] which is much shorter

---

[1822] That the alternative accommodation offered was far from their employment was argued in *PE Municipality* para 54.

[1823] As was the case in *PE Municipality* where the unlawful occupiers had occupied the land for between 2 and 8 years. See Chapter 2:2.2.

[1824] In *Skurweplaas*, some of the unlawful occupiers moved onto the property because they had been evicted from elsewhere. See Chapter 2:3.2.

[1825] In *Grootboom* the unlawful occupiers were evicted after moving onto the property from an informal settlement. They could not return since their spaces had already been occupied by others, see *Grootboom* para 9.

[1826] See, *Betta Eiendomme v Ekple-Epoh* para 7.4.1, 1085. Here the court found that the Nigerian nationals had to return to Nigeria. On considering whether an unlawful occupier is an illegal immigrant as a relevant circumstance, see Smith (2014) *De Rebus* 41-42.

[1827] S 32(2) of Immigration Act 13 of 2002.

[1828] S 32(1) of Immigration Act.

[1829] S 1 (definition of "status") of Immigration Act.

[1830] See, Department of Human Settlements *EHP* (2009) Part A 2.4.

[1831] In *Changing* the eviction was said to be urgent for health and safety reasons. See Chapter 2:3.1.2.1.

[1832] S 34(1)(d) of Immigration Act.

than the delay allowed by courts in urgent matters based on health and safety.[1833] Moreover, illegal immigrants can be kept in detention prior to deportation.[1834]

Other than finding that the unlawful occupiers have alternative accommodation since they can return whence they came, it can also be argued that they can find alternative accommodation through friends or family. In both *Omar NO v Omar*[1835] and *Ives v Rajah*,[1836] the court found that the unlawful occupiers must be evicted and that they would have to stay with family members. Ives was to stay with her sister and the evictees in *Omar NO v Omar* were to stay with their children.[1837]

Requiring family members to accommodate each other is morally[1838] and often even legally sound. A reciprocal common-law duty of support exists between certain family members. This includes parents and children; grandparents and children; siblings; and spouses.[1839] However, this duty is limited to the extent that the family member is able to provide such support, which, in the context of evictions, would be in the form of accommodation.[1840]

What needs to be determined is whether a court can find that the unlawful occupier has alternative accommodation through friends or family if no legal obligation to support is proved.[1841] In other words, would factual evidence that the unlawful occupier can live with someone else be enough? If the person is unwilling, factual evidence that such a person is able to provide accommodation would probably not be enough.[1842] In addition, distance would play a role once more. As with finding that the unlawful occupiers can return whence they

---

[1833] The eviction in *Changing Tides* was only required eight months after the decision was made. See Chapter 2:3.1.2.1.

[1834] S 34(1)(d) of Immigration Act.

[1835] (9643/2007) [2011] ZAWCHC 415.

[1836] 2012 (2) SA 167 (WCC).

[1837] *Ives v Rajah* para 8, 34; *Omar NO v Omar* para 30.

[1838] *Omar NO v Omar* (9643/07) [2010] ZAWCHC 91 para 55.

[1839] W Domingo & A Barratt "Parent and Child" in *Law of Persons and the Family* (2012) 177 190.

[1840] It is also limited to the extent to which support is needed. See, Domingo & Barratt "Parent and Child" in *Persons and Family* 190. However, where an unlawful occupier cannot afford alternative accommodation it is assumed that he needs support. See further Fick (2015) *Stell LR* 684, 686-687.

[1841] Either because the evidence was not placed before the court or because an attempt to prove such failed.

[1842] Whether there rested a legal duty on the family members were not in either *Ives v Rajah* or *Omar NO v Omar*. For more on finding alternative accommodation through relatives, see further Fick (2015) *Stell LR* 678-690.

came, the implication of the distance that the friend or relative lives from the current property must be considered.

With both the argument that the unlawful occupiers can return whence they came and that they can live with relatives or friends, the locus of the burden of proof is a critical consideration. If the duty falls on the unlawful occupiers, it would be much easier to justify an eviction without an alternative accommodation order where the availability of alternative accommodation has not been proved.[1843]

In addition to reducing the burden on the resources of the state, reimagining what it means when unlawful occupiers lack alternative accommodation reduces the circumstances in which an alternative accommodation order is granted to protect the social order.[1844] This is because considering the ability of each unlawful occupier to find alternative accommodation would reduce a number of unlawful occupiers and the social impact of the eviction. Obviously, an eviction as large as that of *Modderklip*, with tens of thousands of people, would create difficulties. It would be difficult to consider their individual circumstances. It is recommended that the state act timeously to prevent large-scale unlawful occupation, by engaging with those attempting to occupy land unlawfully and trying to meet their housing needs. An urgent large-scale eviction may require the provision of very basic temporary alternative accommodation and the subsequent "weeding out" of those who do not qualify for alternative accommodation.

Considering the individual circumstances of unlawful occupiers in a large group might require a considerable amount of resources. Nevertheless, the state already has a duty to engage meaningfully with the unlawful occupiers to determine their needs. While the court, in *Joe Slovo*, found that the state does not need to engage on an individual basis if the group is large, this case has been criticised for departing from the requirements set in *Olivia Road*.[1845] Furthermore, some burden of proof may fall on the unlawful occupiers to provide information regarding their personal circumstances.[1846]

[1843] This is discussed in Chapter 7:3.2.1.

[1844] On protecting the social order, see Chapter 4:5.1.

[1845] In *Olivia Road*, the court found that the state must engage on an individual and collective basis. See, para 13. Liebenberg criticises the court for "diluting the potential of meaningful engagement", in 21-23. In *Olivia Road*, the court found that the state must engage on an individual and collective basis. See, *Olivia Road* para 13.

3.1.2 Involvement of other spheres

Another way of reducing the burden on municipalities is to involve other spheres of government in decisions regarding alternative accommodation. Municipalities are often the first and final sphere of government held responsible for providing alternative accommodation in eviction matters.[1847]

The fact that municipalities are considered the first port of call is in line with the Constitution, as well as the Housing Act, the Municipal Systems Act and the EHP.[1848] Municipalities operate closest to the people living in their jurisdictions and are able to better gauge their needs.[1849] Nevertheless, municipalities should not be the final sphere of government held responsible for providing alternative accommodation.[1850]

There are three reasons for this. Firstly, revenue is primarily collected and distributed by the national government. Municipalities have limited capacity to collect revenue and they, therefore, rely on other spheres for funding. Accordingly, if a municipality does not have the resources to provide alternative accommodation, its ability to increase its available resources is very limited.[1851] Instead, it must apply to the provincial authority for additional funds.[1852] Reprioritisation of its existing resources might not be constitutionally sound since it is similarly responsible for the fulfilment of the housing and other needs of other people within its jurisdiction.[1853]

The second reason why municipalities should not be the final port of call in eviction matters is that housing falls within the concurrent functions of the national and provincial spheres of government.[1854] While these spheres might delegate these functions to municipalities, they are

---

Liebenberg criticises the court for "diluting the potential of meaningful engagement", in Liebenberg (2012) *AHRLJ* 21-23.

[1846] See discussion in Section 3.2.1 below.

[1847] See Chapter 3:2.4 and Chapter 5:4.

[1848] See Chapter 5:4.5.

[1849] Seedorf & Sibanda "Separation of Powers" in *CLOSA* 12-14.

[1850] See Chapter 5:4.5.

[1851] See Chapter 5:2.2 and 3.

[1852] This can be done in terms of the EHP, see Chapter 5:4.4.

[1853] It might also not be just in terms of distributive justice, see Chapter 6:4.2.2.

[1854] See Chapter 5:4.4.

ultimately responsible for the fulfilment thereof.[1855] This relates to the third reason for involving other spheres of government in eviction matters, namely the principle of co-operative government. This principle requires the national and provincial spheres of government to assist and support municipalities. If a municipality cannot or do not fulfil its duties, the provincial government must step in and ensure that the duties are fulfilled.[1856]

The EHP confirms the fact that other spheres of government must be involved in the provision of emergency housing. It stipulates that municipalities should apply to the provincial authority if they lack sufficient funds. Should the provincial authority lack sufficient resources, it must apply to the national authority. Likewise, if a municipality reports that it does not have sufficient resources, a court should order it to apply to the provincial authority for funding. A court could even require the provincial authority itself to report on its available resources.[1857]

It could be argued that there are certain situations in which the court should not involve other spheres of government. For one, if the alternative accommodation order based on the second ground is seen as relief for the unconstitutional limitation of human rights.[1858] At first glance, the Housing Act and the EHP do not seem to apply to alternative accommodation orders based on the second ground. However, it could be argued that compliance with the order would still amount to the provision of housing, which must comply with these instruments.[1859] Moreover, co-operative government is required by the Constitution in all matters.[1860]

Another possible argument against involving other spheres concerns situations where the municipality had been at fault.[1861] However, since the provincial government is required to monitor the municipalities' fulfilment of their duties and ensure that they fulfil them, they are likely to be equally at fault for not intervening.[1862] The liability of other spheres is even more probable if the municipality's default included a failure to adopt a short-term housing budget.

[1855] See Chapter 5:4.5.
[1856] *Grootboom* para 40.
[1857] See Chapter 3:6.3 and Chapter 5:4.5.
[1858] See Chapter 4:5.2.
[1859] See Chapter 6:4.2.1.
[1860] See s 41(1) of the Constitution.
[1861] On fault, see Chapter 4:5.2.
[1862] See Chapter 5:4.5.

This is because the Constitution requires the provincial authority to intervene and adopt an interim budget when the municipality fails to adopt one, for whatever reason.[1863]

While the decisions, where alternative accommodation orders were granted against the municipality, did not prevent an application for funding from other spheres, it did not require other spheres to co-operate. It should not be necessary to order the co-operation of other spheres since such co-operation is constitutionally mandated. Nevertheless, the provincial authority's clear reluctance to participate indicates the necessity of such an order.[1864] By involving other spheres, the burden on municipalities is reduced and more people can be assisted.

3.1.3 Standards of emergency housing

A further way of reducing the burden on municipalities is to subscribe lower standards for the emergency housing to be provided. The higher the standards of housing are, the more resources are required to meet the standards, the fewer housing opportunities can be provided.[1865] This is evident from the decline in permanent housing delivery since the increase of the housing standards.[1866] It is also clear from the alternative accommodation orders granted by the court, which required the provision of emergency housing of standards lower than stipulated in the EHP. These orders were made in response to reports from municipalities that their resources are insufficient.[1867]

In addition to lowering the standards in alternative accommodation orders, lower standards in the short-term housing programmes of municipalities than those suggested in the EHP would reduce the burden even more. This would allow the accommodation of more people within the programme.[1868] It must be kept in mind that the EHP is not the measure to be used for the provision of long-term or permanent housing. Housing provided in terms of the EHP can be of a lower standard than what is required for adequate housing, as defined in international law[1869] since it is meant to be temporary and to be upgraded at a later stage. The specific

[1863] S 139(4) of the Constitution.
[1864] For example, the provincial authority in *Skurweplaas (4th Resp HoA)* para 39.
[1865] This is inconsistent with the notion of distributive justice, see Chapter 6:2.
[1866] See Chapter 2:2.
[1867] See Chapter 3:5.1.
[1868] Van Wyk (2007) *JS Afr L*54-55. See also, Liebenberg *Socio-Economic Rights* 404.
[1869] See Chapter 4:5.1.2.

standard of housing for alternative accommodation would depend on the state's available resources considering the other urgent emergency housing situations within its jurisdiction.

Very basic emergency housing for more people would reduce the burden on municipalities. However, it would also mean that those within emergency housing would be less patient in waiting for their standard of housing to be upgraded. Incremental upgrades could assist in this regard. As was concluded, the fact that emergency housing is described as "temporary" often only implies that the lower standard is temporary and that the expectation is for the housing to be upgraded. Nevertheless, this should only be the case if unlawful occupiers truly face homelessness and they qualify in terms of the requirements of the short-term housing programme, as well as the requirements of the permanent housing programme.[1870]

3.1.4 Other remedies

This section recommends remedies other than, or in addition to, alternative accommodation orders for eviction matters. Alternative accommodation orders might not be the most appropriate orders to grant in eviction matters since it is a once-off solution to a potentially extensive failure by the state. Moreover, it is an expensive solution and places a great burden on the state.

3.1.4.1 Relief for the landowner

The provision of alternative accommodation, especially of the standards prescribed by the EHP, requires considerable resources. Land might have to be bought and prepared; houses built; and services installed.[1871] The requisite resources increase along with the size of the group of unlawful occupiers. Where the state does not have the available resources to accommodate the unlawful occupiers immediately, a delay of the eviction would be in the best interests of the unlawful occupiers.[1872] Such a delay might be just and equitable if the landowner does not need to use the land productively in the near future. If, however, a stalemate situation exists, the remedy can either be to provide relief for the landowner or the unlawful occupiers.[1873]

[1870] Chapter 3:5.2.

[1871] See Chapter 3:6.3.

[1872] Or a postponement of the eviction date or a suspension of the eviction order.

[1873] See Chapter 4:4.2 and 4.3.

It is unlikely that the unlawful occupiers would be entitled to relief from the state for the unconstitutional limitation of their negative right of access to adequate housing. Not only could it be argued that the eviction would not amount to a limitation of their rights, but such a limitation might also be justified in terms of section 36(1) of the Constitution.[1874] If, however, it can be argued that an eviction would amount to an unconstitutional limitation of the unlawful occupiers' rights, there is bound to be stalemate situation. In other words, an eviction would cause an unlawful limitation of the unlawful occupiers' rights and a delay of the eviction would amount to an unconstitutional limitation of the landowner's right. In such a situation, the size of the group should determine which party's loss should be addressed. With a large group, it might be less expensive to address the loss of the landowner than that of the unlawful occupiers. This approach was taken by the court in *Modderklip*.[1875]

The Constitutional Court interprets section 172(1)(b) to require remedies that balance interests, rather than maximise rights.[1876] "Interest balancing" allows a court to grant a remedy that does not fully correct the violation of a specific right. This deficient correction is justified by the involvement of other factors such as the interests of others or the availability of resources.[1877] Accordingly, compensation granted to the landowner, in the form of constitutional damages, might be less than the market value of the property.[1878] In *Modderklip*, the court required that the amount of constitutional damages be calculated in terms of the Expropriation Act.[1879] Using this finding as a guideline, it is recommended that the constitutional factors to be considered in determining just and equitable compensation in expropriation matters must be used to determine the amount of constitutional damages. The Constitution requires that several factors in addition to market value be considered, such as the current use of the property and the purpose of the expropriation.[1880]

Considering these factors might result in a finding that the amount of damages should be less than market value. It is recommended that the court place a deadline on the state to ensure that the unlawful occupation is ceased. The unlawful occupation should not be allowed to

---

[1874] See Chapter 4:5.1.2.

[1875] See Chapter 2:2.3. It is also in line with the principle of distributive justice, see Chapter 6:2.

[1876] Bishop "Remedies" in *CLOSA* 9-59.

[1877] Gewirtz (1983) *Yale LJ* 591, referred to in Bishop "Remedies" in *CLOSA* 9-59.

[1878] See Chapter 6:4.2.2.

[1879] S 12(1) of the Expropriation Act. See *Modderklip* para 68.

[1880] S 3(a) – (e) of the Constitution.

continue indefinitely simply because constitutional damages were paid to the landowner. This is because the landowner would continue to carry responsibility for the property as owner thereof. Usually, placing a deadline on the state would entail postponing the eviction order until the state has the available resources to fulfil any short-term housing duty it has toward the unlawful occupiers. The state can fulfil its short-term housing duty either by providing those unlawful occupiers who qualify under the EHP with alternative accommodation or by expropriating the property. Should the state decide to expropriate the land, any amount of constitutional damages must be set off against the compensation for expropriation.[1881] Any deadline for the provision of alternative accommodation would have to be taken into account as a factor in determining the amount of constitutional damages. As with temporary expropriation,[1882] the compensation would be less than if the landowner lost the use of its property permanently.

In three eviction matters regarding the unlawful settlement known as "Marikana"[1883] (hereinafter "the Marikana cases"),[1884] which are currently heard together in the Western Cape High Court, two alternative remedies have been sought.[1885] These are that the municipality should be ordered to purchase the land from the landowners and that the municipality should be ordered to expropriate the land.[1886]

The matters involve the unlawful[1887] occupation of privately owned land by approximately 60 000 persons.[1888] Many of them moved onto the property due to an eviction from elsewhere

---

[1881] As was required in *Modderklip* para 64.

[1882] S 2(1) of the current Expropriation Act and s 3(2) and 8(3) of the Expropriation Bill 4 of 2015 allow for temporary, as well as partial, expropriation of the right to use property.

[1883] *Fischer v Unlawful Occupiers (Appl HoA)* para 55.2.

[1884] *Fischer v Unlawful Occupiers, Erf 150, Philippi* unreported case no: 9443/2014; *Stock v The Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Philippi & Portion 0 Farm 597* unreported case no: 11705/15; *Coppermoon Trading 203 (Pty) Ltd v The Persons Who Identities are to the Applicant Unknown and Who Unlawfully Occupy Remainder Erf 149, Philippi, Cape Town* 14422/14.

[1885] Alternative to an alternative accommodation order and an order for constitutional damages. The demand for these remedies is based on the allegation that the landowners' right to property is infringed. *Fischer v Unlawful Occupiers (Appl HoA)* para 24.3.

[1886] *Fischer v Unlawful Occupiers, Erf 150, Philippi (National and Provincial Government's Head of Argument)* (9443/14) para 2; *Fischer v Unlawful Occupiers (Appl HoA)* para 93-117, 130.

[1887] *Fischer v Unlawful Occupiers (Appl HoA)* para 3.

[1888] Ntongana T at GroundUp *Marikana Lawyer Calls for State to Expropriate Land* (2017) http://www.groundup.org.za/article/marikana-lawyer-calls-state-expropriate-land/ 27-02-2017; Socio-Economic Rights Institute of South Africa *Fischer v Unlawful Occupiers, Erf 150, Philippi* (2017) http://www.seri-sa.org/index.php/19-litigation/case-entries/491-fischer-v-unlawful-occupiers-erf-149-philippi 27-02-2017.

or an inability to continue to pay rent.[1889] It is accepted that an eviction would leave the unlawful occupiers homeless.[1890] Nevertheless, their individual circumstances have not been considered.[1891]

The landowners prefer that their property be purchased by the municipality at market value.[1892] They do not support an order for expropriation unless compensation for expropriation is at market value.[1893] This demand is not in line with distributive justice, in terms of which full restoration is not required, nor is it in line with the constitutional provision regarding the calculation of compensation for expropriation, which requires several other factors to be considered.[1894] Moreover, the Supreme Court of Appeal, in *Ekurhuleni Metropolitan Municipality v Dada NO and Others* (hereinafter "*Dada*"),[1895] rejected an order that the municipality purchase the land as remedy in an eviction matter. It found that an order to purchase disregarded the fact that the state's housing duty need only be fulfilled progressively;[1896] it violated the separation of powers doctrine;[1897] and was not appropriate relief.[1898]

In respect of the demand to expropriate, the unlawful occupiers support this remedy on the basis that the municipality has the discretion to expropriate land for housing purposes in terms of s 9(3) of the Housing Act.[1899] While the municipality argues that this discretion does not place a duty on them to expropriate,[1900] the unlawful occupiers argue that discretionary power could be forced.[1901] However, this is inconsistent with the High Court decision of

---

[1889] *Fischer v Unlawful Occupiers, Erf 150, Philippi (Unlawful Occupiers' Head of Argument)* (9443/14) para 50.

[1890] *Fischer v Unlawful Occupiers (UO HoA)* para 53.

[1891] *Fischer v Unlawful Occupiers (Nat & Prov HoA)* para 17.

[1892] *Fischer v Unlawful Occupiers (Appl HoA)* para 103.

[1893] Ntongana T at GroundUp *Marikana Lawyer Calls for State to Expropriate Land* (2017). *Fischer v Unlawful Occupiers (Appl HoA)* para 102-117.

[1894] Chapter 6:4.2.2.

[1895] 2009 (4) SA 463 (SCA).

[1896] *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) (hereinafter "*Dada*") para 13.

[1897] *Dada* para 10.

[1898] *Dada* para 14. See also, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, where the court found that it cannot order parties to contract. Referred to in *Fischer v Unlawful Occupiers (Muni HoA)* para 25.

[1899] Ntongana T at GroundUp *Marikana Lawyer Calls for State to Expropriate Land* (2017).

[1900] *Fischer v Unlawful Occupiers (Muni HoA)* para 49.

[1901] *Fischer v Unlawful Occupiers (UO HoA)* para 121-126.

Dolpire v South African National Roads Agency Ltd,[1902] in which the court found that the discretion to expropriate cannot be forced by the court.[1903]

The unlawful occupiers rely on *Modderklip* in support of their demand for expropriation.[1904] In *Modderklip*, the court found that it did not need to consider whether an order for expropriation would ever be an appropriate remedy.[1905] Hence, it did not rule such a remedy out for future cases. However, its doubt regarding the appropriateness of such a remedy is evident from its reference to the arguments that such an order would violate the separation of powers doctrine.[1906] In addition, the court found that the most appropriate order in that matter would be an order for constitutional damages based on the amount of compensation that would have been payable, were it an expropriation. Should the state decide to expropriate the property at a later stage, the court found that the compensation for the expropriation should be reduced by the compensation paid in terms of its order.[1907]

This order for damages leaves the discretion regarding expropriation in the hands of the executive authority.[1908] However, from a distributive justice point of view, whether the land is expropriated or compensation paid makes no difference. In fact, in situations such as the Marikana cases, where the municipality argued that the land is not suitable for long-term housing,[1909] compensation equal to that payable for expropriation of the property is inconsistent with distributive justice. The state is required to pay for the permanent use of the property that cannot be upgraded to formal housing.

Instead, temporary expropriation would be more appropriate. Both the current Expropriation Act[1910] and the Expropriation Bill[1911] allow for temporary, as well as partial, expropriation of

---

[1902] *Dolpire v South African National Roads Agency Ltd* (A464/2011) [2012] ZAWCHC 280.

[1903] *Dolpire v South African National Roads Agency Ltd* para 17 in terms of s 41 of South African National Roads Agency Limited and National Roads Act 7 of 1998; referred to in *Fischer v Unlawful Occupiers, Erf 150, Philippi (Municipality's Supplementary Head of Argument)* (9443/14) para 36-39.

[1904] *Fischer v Unlawful Occupiers (UO HoA)* para 35. Referring to *Modderklip* para 64.

[1905] *Modderklip* para 63.

[1906] *Modderklip* para 62.

[1907] *Modderklip* para 64.

[1908] *Modderklip* para 64.

[1909] *Fischer v Unlawful Occupiers (Muni HoA)* para 37.6. The reasons given are that part of the land is to be used by Eskom for powerlines; part of the land is to be used by the municipality for transport infrastructure; the land is industrial/agricultural land; the land is not suitable for bulk services; and the land lies within the airport noise corridor.

[1910] S 2(1) of the Expropriation Act.

the right to use property. Ideally, the state should temporarily expropriate a landowner who is suffering an unreasonable delay in enjoying the use of its property due to unlawful occupation. This would make the emergency housing situation less urgent and give the state time to assist those who are needier first and prepare alternative accommodation in a more suitable area. Since an order for temporary expropriation arguably violates the separation of powers doctrine, an order for constitutional damages equal to the cost of temporary expropriation might be more appropriate. As explained above, the eviction would then be delayed based on the municipality's estimation of its ability to provide alternative accommodation. If during this time, the municipality decides that it wants to use the property for housing, it could expropriate the property. The amount already paid should be deducted from the compensation payable for complete expropriation.

While compensation to the landowner, in the form of constitutional damages, for the continued occupation of its land fulfils the state's short-term housing duty toward the unlawful occupiers, it should not substitute this fulfilment entirely. Such an approach would not consider the unlawful occupiers individually and might amount to an inclusion of persons who would not have been included had their personal circumstances been considered.[1912] For this reason, compensation should be used as a temporary measure to prevent urgency, pending the provision of emergency housing. If the landowner's property is to be used as emergency housing, the unlawful occupiers who do not qualify for emergency housing assistance, for example, if they can afford alternative accommodation, should still be evicted.

3.1.4.2 Employment programmes

Another possible remedy is to order the state to include the unlawful occupiers, capable of working, in a programme aimed at skills development and the securing of employment. Such a programme could be similar to the Street People programme of the City of Cape Town.[1913] Alternative accommodation can be provided until employment is secured and the unlawful occupier can afford his own accommodation.

[1911] S 3(2) and 8(3) Expropriation Bill.

[1912] In the Marikana cases, for example, the highest income is R 4810. *Fischer v Unlawful Occupiers (UO HoA)* para 51.5.

[1913] See Chapter 3:4.

This strategy could be implemented together with an increase in the state's rental stock.[1914] This could allow the unlawful occupier to rent housing from the state's rental stock at a low rental rate.

3.1.4.3 Measures to keep state accountable

One of the requirements for an alternative accommodation order is blameworthiness on the part of the state. In terms of either ground, persons living in emergency housing situations or facing the loss of their homes should be able to approach the court for an alternative accommodation order. If the state was blameworthy, a court would be able to make an alternative accommodation order.

The problem is that it would have to consider all other persons who might have such a claim. This would place a heavy burden on the court. Moreover, not all persons would have the resources to approach the court. It is more desirable that the state should be deterred from neglecting its duties in the first place than to try to remedy the consequences of such neglect. Hence, a court could grant a remedy that would prevent the state from neglecting its duties in the future. Such a remedy can be in the form of a structural interdict. A structural interdict requires the state to report to the court on its progress periodically.[1915] This might place a great burden on the court.[1916] Instead, measures to ensure the state's fulfilment of its duties and to keep the state accountable for fulfilling its duties in eviction and short-term housing matters must be taken.

A short-term housing programme that complies with the notion of distributive justice, as set out in Chapter 6, would be complex and would require expertise to develop and implement. A database should record all current and potential future emergency housing situations. Criteria should be created to determine the urgency of each emergency housing situation. Record must also be kept of all resources available for the provision of temporary housing. This includes not only the amount budgeted for the programme but also all land and buildings owned by the municipality. The municipality would have to calculate what percentage of its available resources it could use to address current emergency housing situations and what

[1914] Used to provide subsidised rental housing.

[1915] See, Swart (2005) *SAJHR* 226; Liebenberg (2002) *Law Democracy & Dev* 9-10.

[1916] For criticism against structural interdicts, see Pienaar *Land Reform* 776-780; Kotze *Effective Relief* 42-47. Kotze also provides counterarguments against the criticism.

percentage it must save to be able to address future emergency housing situations. Moreover, it must be determined how much of the housing budget should be spent on emergency housing and how much should be spent on longer-term housing. Account must be taken of the fact that emergency housing should be temporary, especially if it is of a lower standard.

These calculations are similar to valuations for long-term insurance funds and pension funds.[1917] In terms of section 16(1) of the Pension Funds Act 24 of 1956, funds must be valuated every three years by valuator (usually an actuary).[1918] A valuation report must be drafted.[1919] This report must indicate whether the fund has sufficient assets to be able to meet its financial obligations and pay out all claims during the following three years.[1920] This requires an estimation of future liabilities as informed by actuarial assumptions.[1921] Actuarial assumptions are based on statistical analyses and experienced judgment.[1922] To ensure accountability, the reports are submitted to the Registrar of Pension Funds,[1923] being the executive officer of the Financial Services Board (the FSB).[1924] The FSB is an independent body created by statute to oversee the non-banking financial services industry of South Africa, such as insurance and pension funds.[1925] If a report indicates that the fund is not in a sound financial condition, the FSB can require the fund to submit a plan setting out how it intends to ensure the financial soundness of the plan within a reasonable time.[1926] A valuator is independent to the extent that it is accountable to a professional body, such as the Actuarial Society of South Africa.[1927]

[1917] See s 29-32, 36 of the Long-term Insurance Act 52 of 1998; s 16 of the Pension Funds Act 24 of 1956.

[1918] S 1(1) – definition of "valuator" of the Pension Funds Act. In respect of long-term insurance funds, see s1(1)(xxxvi) – definition of "statutory actuary" of the Long-term Insurance Act.

[1919] S 16(1) of the Pension Funds Act.

[1920] . Government Finance Officers Association *The Role of the Actuarial Valuation Report in Plan Funding* (2013) http://www.gfoa.org/role-actuarial-valuation-report-plan-funding 19-07-2017.

[1921] . Investopedia *Actuarial Valuation* http://www.investopedia.com/terms/a/actuarial-valuation.asp 19-07-2017.

[1922] . Investopedia *Actuarial Valuation* .

[1923] S 16(1) of the Pension Funds Act. In respect of long-term insurance funds, see s 36 of Long-term Insurance Act.

[1924] S 3 of the Pension Funds Act. In respect of long-term insurance funds, see s 2(2) of the Long-term Insurance Act.

[1925] . Financial Services Board *About Us* https://www.fsb.co.za/aboutUs/Pages/About-FSB.aspx 19-07-2017.

[1926] S 18(1) of the Pension Funds Act.

[1927] . Actuarial Society of South Africa *Standards of Actuarial Practice and Advisory Practice Notes* http://www.actuarialsociety.org.za/Professionalresources/ActuarialStandardsandAdvice.aspx 19-07-2017.

Based on this formula, the Housing Act can require a valuator to draft a valuation report in respect of the EHP and the state's ability to meet its obligations. Reports can be required on municipal or provincial level. To ensure a satisfactory report, the municipality or executive council would need to employ their own actuaries and draft their short-term housing plan according to the calculations of the actuaries. Third-party actuarial firms might also be used on a consultancy basis. The Housing Act can require reports to be submitted to the FSB. If a report indicates that the housing plan is not in a sound financial condition, the FSB can require the state to submit a plan setting out how it intends to ensure the financial soundness of the plan within a reasonable time. Moreover, such a report can be used as evidence in court of the state's non-compliance with its duties.

An obvious issue with this recommendation is that the employment of actuaries would be costly. However, it is evident that expertise to devise an effective short-term housing programme, as well as a means of ensuring transparency and accountability for the drafting and implementing of this programme, is necessary. An accurate and up to date short-term housing database would also assist the court in determining whether the state has the available resources to provide the unlawful occupiers with alternative accommodation. Based on this information, the court could decide whether it would be just to grant an alternative accommodation order.

3.2 Burden of proof

An issue that runs through this analysis is who must place the information before the court. The court needs information regarding the individual circumstances of the unlawful occupiers, the reasonableness of the state's measures and the state's available resources. Generally, the party alleging an infringement of a right must prove its limitation and the party responsible for the limitation must prove that the limitation was justified.[1928] This section considers the effect of this general rule on two contentious issues: proof of lack of alternative accommodation and proof regarding the state's resources and its fulfilment of its duties.

[1928] See Chapter 4:5.

3.2.1 Proof of lack of alternative accommodation

To prove that their rights have been infringed, unlawful occupiers would have to prove that they require alternative accommodation. Hence, they would carry the burden of proving that they would be homeless if they were to be evicted without an alternative accommodation order.[1929] This burden of proof is confirmed in *Changing Tides*, where the court required the legal representatives of the unlawful occupiers to report on the personal circumstances of the unlawful occupiers and whether they would require alternative accommodation.[1930]

In addition, the court in both *Ives v Rajah* and *Omar NO v Omar* seemed to place the burden to prove that they lacked alternative accommodation on the unlawful occupiers. The court granted an eviction without an alternative accommodation order on the basis that the unlawful occupiers would not be left homeless once evicted since their family could accommodate them. Nonetheless, there was no proof that the relatives of the unlawful occupiers had a duty, or were willing, to accommodate them.[1931] The court seemed to accept that the unlawful occupiers could live with their relatives without such proof.

A problem arises when the unlawful occupiers fail to provide evidence regarding whether they face homelessness. Should they bear the burden of proof, the court would have to accept that they would not be left homeless. This would probably result in an eviction without an alternative accommodation order. However, if such an eviction does, in fact, leave the unlawful occupiers homeless, it might not be just and equitable. To prevent such an outcome, a court should ensure that it has knowledge of all the relevant circumstances before granting an eviction order.[1932] This means requiring the unlawful occupiers to place their personal circumstances before the court. Such an outcome could further be prevented by requiring the state to engage with the unlawful occupiers and to provide at least *prima facie* proof that the unlawful occupiers would not be left homeless. It would then be up to the unlawful occupiers to prove otherwise.[1933]

[1929] Smith argues in favour of this burden of proof in Smith (2014) *De Rebus* 42.

[1930] See the discussion in Chapter 2:3.1.2.1.

[1931] See the discussion Chapter 7:3.1.1.

[1932] This is required by the court in *PE Municipality*, see Chapter 2:2.2.

[1933] Such engagement is already a requirement where the unlawful occupiers might face homelessness, see *Olivia Road* para 10-12; *Grootboom* paras 82-83, 87; *PE Municipality* para 39. The CESCR also requires "genuine consultation", see United Nations Committee on Economic, Social and Cultural Rights *General*

Some unlawful occupiers might not understand the legal process and the fact that they have to prove their lack of alternative accommodation to prevent an eviction that would leave them homeless. For this reason, a court should make sure that the unlawful occupiers understand their legal position. This may include requiring that they acquire legal representation, which may be in the form of legal aid.[1934] A court may also choose to accept evidence or statements that sufficiently place the state's reports in doubt, despite it not constituting actual *proof* of the contrary.

3.2.2 Proof of available resources and fulfilment of the state's duties

That the burden of proof regarding their personal circumstances is placed on the unlawful occupiers is justified because they are the ones who possess this information.[1935] Information regarding the programmes and actions of the state and whether they are reasonable, as well as the available resources of the state, is usually at the disposal of the state. To prove that the state has the available resources, one must prove either that the state has sufficient resources to accommodate all persons living in emergency housing situations in the municipality's jurisdiction, including the unlawful occupiers, or that the unlawful occupiers must be prioritised based on the measure identified above.[1936] Accordingly, information regarding all other persons living in emergency housing situation within the municipality's jurisdiction, as well as information regarding the resources of the state, must be placed before the court.[1937] Placing the burden of proof on parties other than the state in these matters can create an almost impossible burden since the information is not easily accessible to them.[1938]

In respect of the second ground for alternative accommodation orders (that the state did not respect and protect certain rights), the enquiry into the available resources of the state forms part of the second stage. It relates to the state's justification for not fulfilling its duty. Hence, based on the general rule, the duty is on the state to prove that it lacks the available

---

Comment No 7 . Many regard engagement as a requirement in eviction matters, see Mostert "Landlessness, Housing and the Rule of Law" in *Essays* 94; Muller (2011) *Stell LR* 742; Socio-Economic Rights Institute of South Africa *Evictions and Alternative Accommodation* (2013) 30-34; Van Wyk (2011) *PER/PELJ* 62-65; Wilson (2011) *Urban Forum* 272-274; Liebenberg *Socio-Economic Rights* 298-299, 301-302.

[1934] See *Occupiers of Erven 87 and 88 Berea* para 25, 47.

[1935] Smith (2014) *De Rebus* 42.

[1936] This relates to distributive justice, see Chapter 6:4.2.2.

[1937] Liebenberg *Socio-Economic Rights* 205.

[1938] Gevers et al *South African Constitutional Law* 21; Chenwi (2008) *Harv L Rev* 122. For this reason, Liebenberg argues that the burden of proof regarding its available resources should be placed on the state, see Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-54.

resources.[1939] In respect of the first ground for alternative accommodation orders (that the state did not fulfil the right of access to adequate housing), the enquiry into the reasonableness of the state's measures and the availability of resources forms part of the first stage. This is because they form part of the internal limitations within the right; the state need only fulfil the right by taking reasonable measures within its available resources.[1940] Based on the general rule, if the first ground for alternative accommodation orders is relied upon the duty is on the unlawful occupiers to prove that the state's measures were unreasonable or that the state has the available resources.[1941] Had a minimum core for the right of access to adequate housing been established, this duty would not fall on the unlawful occupiers in respect of minimum core fulfilment of the right.[1942]

The general rule regarding the burden of proof (especially in respect of the first ground) has not been followed strictly by the courts.[1943] In *Port Elizabeth Municipality v Various Occupiers*,[1944] the court found that, in eviction matters, a court must ensure that all relevant information is before it.[1945] This means that the court can disregard the technical rules of onus and require all parties to place the information at their disposal before it.[1946] In *Changing Tides*, the court interpreted this to mean that the municipality carries a burden of proof regarding its ability to provide alternative accommodation[1947] since information regarding the availability of resources is at the disposal of the state.[1948] Further cases, in which the state was required to report on its programmes and its available resources, confirm this interpretation

[1939] Chapter 4:5.1.

[1940] Woolman & Botha "Limitations" in *CLOSA* 34-33.

[1941] Liebenberg *Socio-Economic Rights* 202; Kruuse (2011) *SALJ* 628. This is also true for an enquiry into whether the landowner's right in terms of s 25(1) of the Constitution was unconstitutionally limited under the second ground for alternative accommodation orders.

[1942] Chenwi (2008) *Harv L Rev* 122; Liebenberg "Interpretation of socio-economic rights" in *CLOSA* 33-31.

[1943] Liebenberg *Socio-Economic Rights* 203; Woolman & Botha "Limitations" in *CLOSA* 34-33.

[1944] 2005 (1) SA 217 (CC).

[1945] *PE Municipality* para 32-33.

[1946] *PE Municipality* para 32-33. See also, Woolman & Botha "Limitations" in *CLOSA* 34-44; Liebenberg *Socio-Economic Rights* 197; *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 595G.

[1947] Liebenberg supports this notion. See Liebenberg *Socio-Economic Rights* 144, 184, 193, 197. See also, Van Der Berg (2015) *SAJHR* 353.

[1948] *Changing Tides* para 35, 40. A generalised or vague report is insufficient, see Pope "A Tricky Balancing Act" in *DCM Festschrift* 16.

by the court.[1949] That the state has the burden of proof regarding the availability of resources is also in line with international law.[1950]

An argument against disregarding the general rule on the burden of proof is that the duty to consider all relevant circumstances, used to justify this disregard, is part of the court's duty in terms of section 26(3). Whether or not the state has a duty to provide alternative accommodation in terms of section 26(2) is a separate inquiry and is not subject to this requirement. However, where the inquiry into the state's short-term housing duty is made as part of an eviction matter, the outcome thereof will necessarily be a relevant circumstance, to be considered in terms of section 26(3).

The notion that the court should ensure it has all the relevant information before deciding a matter suggests that, where the municipality has not acquitted itself of its task, the court cannot make a decision. Instead, it should postpone the matter and order the municipality to place the requisite information before it. On the contrary, a court cannot postpone the matter indefinitely if the municipality makes no reasonable effort to fulfil its duty. In practice, as seen from the cases discussed in Chapter 2, courts allow the municipality some time to prove that they do not have the available resources, but they are not willing to postpone the matter indefinitely. Instead, they decide the matters based on the information before them.[1951]

In the bad-building cases, the unlawful occupiers placed some evidence regarding the state's available resources before the court.[1952] It has been argued that the burden of proof should shift to the state if the complainant has placed *prima facie* proof before the court that the state's measures were unreasonable or that the state has the available resources.[1953] This is

---

[1949] See, for example, Socio-Economic Rights Institute of South Africa *Hlophe and Others v City of Johannesburg* (2016); *Ives v Rajah*; *Brookway*; *Grobler*. See also, Muller & Liebenberg (2013) *SAJHR* 565-568.

[1950] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 3* (1990) para 10.

[1951] This confirms the burden of proof on the municipality since its failure to prove its lack of resources meant that the allegations of the unlawful occupiers were accepted.

[1952] The budget that projected a surplus.

[1953] M Chaskalson, G Marcus & M Bishop "Constitutional litigation" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 3 3-28; S Liebenberg "The interpretation of socio-economic rights" in Woolman S and Bishop M (eds) 33 33-31. This argument relates to the idea that the court has collapsed the s 26(1), s 26(2) and the s 36 enquiry into one analysis. This muddles the burden of proof issue. The reason why there is no separate limitation analysis in terms of s 36 of the Constitution is that it is considered to have the same outcome as the s-26(2) analysis. However, if the analysis were to be separated, an unlawful occupier would likely only have to prove that the municipality has the resources to house him specifically. The onus would then shift to the municipality to prove that there are other, needier persons within its jurisdiction, on whom the resources should rather be spent. This explains the kind of shared onus described

consistent with the recommendations regarding the burden of proofing respect of the personal circumstances of the unlawful occupiers, as well as the court's duty to consider all relevant circumstances.

Placing the burden of proof on the state is also consistent with the support for the reasonableness review, in matters concerning section 26(2) of the Constitution, that it "places a burden of justification or explanation on government".[1954] If this burden of proof is accepted, it means that a court must give the state the opportunity to meet its onus. If the onus is met, a court should not disregard the information before it. Accordingly, if a municipality proves that it does not have the available resources, a court should not grant an alternative accommodation order contrary to this information.

4 Conclusion

There is no doubt that courts *can* grant alternative accommodation orders in eviction matters. Whether they *should* do so in every instance, is a matter of contention. When deciding an eviction a court must balance the relevant circumstances to determine a just and equitable outcome. A finding that the state has a duty to accommodate the unlawful occupiers immediately, in terms of its duty to fulfil human rights, is likely to lead to an eviction with an order against the state to provide alternative accommodation. Such an order should only be made if blameworthiness on the part of the unlawful occupiers does not justify an eviction without alternative accommodation; the state was blameworthy; and the state has sufficient resources to assist all persons living in emergency housing circumstances within its jurisdiction or sufficient justification is provided for prioritising the unlawful occupiers before the court.[1955]

Priority should be based on the urgency of the emergency housing situation. A court could make an eviction less urgent delaying the eviction. If such a postponement unconstitutionally limits the rights of the landowner, the court could order the state to compensate the landowner, in the form of constitutional damages. In granting a compensation order, the court

---

above. S Woolman & H Botha "Limitations" in Woolman S and Bishop M (eds) 34 34-33, 34-35. Referring specifically to *Grootboom*. See also, Liebenberg *Socio-Economic Rights* 199.

[1954] Liebenberg *Socio-Economic Rights* 173.

[1955] Because they are neediest or more deserving.

must consider the distributive effect of the order. This is because the compensation forms part of the state's short-term housing duty and reduces the state's available resources. If the municipality is unable to assist in even the most urgent matters, priority should be based on the income and vulnerability of those within the emergency housing situations, as well as the time spent waiting for assistance.

Should the state not have a duty to assist the unlawful occupiers in terms of its duty to fulfil human rights, it is unlikely to have such a duty within its duty to respect and protect human rights. Hence, the outcome of these grounds should be similar. In the interest of certainty and justice, it is recommended that only the first ground be relied on for granting alternative accommodation orders.

A finding that the court should not grant an alternative accommodation order with immediate effect in a specific situation does not require it to grant an eviction order that would leave the unlawful occupiers homeless. Such an order might not be just and equitable. Instead, a finding that the court cannot grant an alternative accommodation order simply means that the issue cannot be solved in this way. To minimise such stalemate situations the state's available resources should be maximised.

To maximise the state's available resources and ensure that the rights of as many people as possible are respected, protected, promoted and fulfilled, some recommendations are made. For one, only those unlawful occupiers who truly face homelessness if evicted without an alternative accommodation order must be assisted. This entails considering the personal circumstances of the unlawful occupiers individually. In addition, instead of only focusing on the unlawful occupier's ability to afford alternative accommodation elsewhere, other factors such as their ability to return whence they came or to live with family must also be considered. With large-scale eviction matters, considering the individual circumstances of the unlawful occupiers might prove difficult. For this reason, the state should try to prevent large-scale unlawful occupations by engaging with persons attempting to occupy land unlawfully. An urgent large-scale eviction may require the provision of very basic temporary alternative accommodation and the subsequent "weeding out" of those who do not qualify for alternative accommodation.

A second recommendation to maximise the state resources is to involve other spheres of government. Courts seem to focus on the available resources of municipalities. However,

requiring other spheres to co-operate and assist municipalities might increase the available resources.

The third recommendation is that the standard of emergency housing might be reduced in certain circumstances to ensure that the state's resources reach more needy people. In relation to this recommendation, the final recommendation regarding state resources is that other remedies, such as compensation for the landowner, might require fewer resources. Where the state's resources are limited, the granting of these other remedies might be preferable to an alternative accommodation order. In addition, to prevent further emergency housing issues, it is recommended that the state employ the services of experts, such as actuaries, to formulate a just short-term housing programme. This programme could be overseen by the FSB.

To determine whether the state has a duty to fulfil or protect the rights of the parties before the court, a considerable amount of information must be placed before the court. This thesis recommends that the unlawful occupiers be expected to place information before the court regarding their personal circumstances and show that an eviction without an alternative accommodation order would leave them homeless. In addition, the state should bear the burden of proving that its measures and actions are reasonable or that it lacks sufficient resources. This means that the municipality must be joined as a party in eviction matters where unlawful occupiers could face homelessness. If the municipality is unable to provide alternative accommodation, the provincial and even the national authority could be joined.

Nonetheless, the court has a duty to consider all relevant circumstances before granting an order. Hence, if a party fails to meet its burden of proof, the court needs at least *prima facie* evidence regarding these issues. This evidence can be brought by any of the parties. To protect ignorant unlawful occupiers, a court could require that they acquire legal representation, which may be in the form of legal aid.[1956] A court may also choose to accept evidence or statements that sufficiently place the state's reports in doubt, despite it not constituting actual *proof* of the contrary.

It is hoped that the conclusions and recommendations made in this thesis will be followed by courts in deciding whether and on what terms to grant an alternative accommodation order. They could also be used in measuring the reasonableness of a municipality's short-term

[1956] See *Occupiers of Erven 87 and 88 Berea* para 25, 47.

housing programme. The extent to which these conclusions and recommendations can be used to measure the reasonableness of such a programme requires future research.

BIBLIOGRAPHY

Primary sources

Legislation

Borrowing Powers of Provincial Government Act 48 of 1996

City of Johannesburg Emergency Services Bylaws of 2003

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Disaster Management Act of 57 of 2002

Domestic Violence Act 116 of 1998

Expropriation Act 63 of 1975

Expropriation Bill 4 of 2015

Extension of Security of Tenure Act 62 of 1997

Fire Brigade Services Act 99 of 1897

Group Areas Act 41 of 1950

Immigration Act 13 of 2002

Intergovernmental Fiscal Relations Act 97 of 1997

Intergovernmental Relations Framework Act 13 of 2005

Interim Protection of Informal Land Right Act 31 of 1996

Land Reform (Labour Tenants) Act 3 of 1996

Local Government: Municipal Systems Act 32 of 2000

Long-term Insurance Act 52 of 1998

Magistrates' Courts Act 32 of 1944

Municipal Planning By-Law City of Johannesburg Metropolitan Municipality 1240 of 2016

National Building Regulations and Building Standards Act 103 of 1977

National Housing Act 107 of 1997

Pension Funds Act 24 of 1956

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Prevention of Illegal Squatting Act 52 of 1951

Prevention of Illegal Squatting Amendment Act 104 of 1988

Provincial Tax Regulation Process Act 53 of 2001

Public Finance Management Act 1 of 1999

Re-Emergence of Slums Act 6 of 2007

Rental Housing Act 55 of 1999

Restitution of Land Rights Act 22 of 1994

Slums Act 53 of 1934

Social Assistance Act 59 of 1992

South African National Roads Agency Limited and National Roads Act 7 of 1998

Spatial Planning and Land Use Management Act 16 of 2013

Trespass Act 6 of 1959

Welfare Laws Amendment Act 106 of 1997

Policies and government documents

City of Cape Town *Street People Policy (Policy Number 12398B)* (2013)

City of Johannesburg *Chapter 11 Inner City Regeneration* (2003)

Department of Human Settlements *"Breaking New Ground" A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004)

Department of Human Settlements *Emergency Housing Programme* (2009)

Department of Human Settlements *The Lwandle Eviction Ministerial Enquiry* (2014)

Department of Human Settlements *Simplified Guide to the National Housing Code* (2009)

Department of Human Settlements *Technical guidelines: National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed Through National Housing Programmes* (2009)

Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (2008)

Government Communications *South Africa Yearbook 2014/2015* (2015)

Western Cape Government *Western Cape PSDF: Inclusionary Housing Discussion Document* (2009)

International law and documents

African Charter on Human and Peoples' Rights of 1981

African Charter on the Rights and Welfare of the Child of 1990

Convention on the Elimination of all Forms of Discrimination against Women of 1979

Convention on the Rights of the Child of 1989

International Convention on the Elimination of all Forms of Racial Discrimination of 1965

International Covenant on Economic, Social and Cultural Rights, 1996

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2000

United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing (Art 11.1 of the Covenant, UN Doc E/1992/23) General Comment No 4* (1991)

United Nations *Basic Principles and Guidelines on Development-Based Evictions and Displacement A/HRC/4/18* (2013)

United Nations Committee on Economic, Social and Cultural Rights *Forced Evictions (Art 11.1 of the Covenant, UN Doc E/1998/22) General Comment No 7* (1997)

United Nations Committee on Economic, Social and Cultural Rights *The Nature of State Parties' Obligations (Art 2.1 of the Covenant, UN Doc E/1991/23) General Comment No 3* (1990)

Case law

Abrahamse v Cape Town City Council 1953 (3) SA 855 (C)

Absa Bank bpk v Murray (8946/02) [2003] ZAWCHC 48

Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd (252/99) [2001] ZASCA 59

All Builders And Cleaning Services CC v Matlaila (42349/13) [2015] ZAGPJHC 2

Amod v Multilateral Motor Vehicle Accidents Fund 1998 4 SA 753 (CC)

Ark City of Refugee v Bailing (A107/2011) [2012] ZAWCHC 285

Barnett v Minister of Land Affairs 2007 (6) SA 313 (SCA)

Bernstein v Bester NO and others 1996 (2) SA 751 (CC)

Betta Eiendomme v Ekple-Epoh 2000 (4) SA 468 (W)

Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue 2009 (1) SA 470 (W)

Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk 1997 (4) SA 635 (O)

Brookway Property 30 (Pty) Ltd v People Who Intend Invading Portion 150 of the Farm Zandfontein 317 J.R., Portion 124 (33786/2010) [2010] ZAGPPHC 129

Cashbuild (South Africa) (Pty) Ltd v Scott 2007 (1) SA 332 (T)

Changing Tides 47 (Pty) Ltd v The Unlawful Occupiers of Chung Huo Mansions unreported case no: 2011/20127

Chetty v Naidoo 1974 3 SA 13 (A)

Chieftain Real Estate Incorporated in Ireland v City of Tshwane Metropolitan Municipality 2008 (5) SA 387 (T)

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)

City Council of Pretoria v Walker 1998 (2) SA 363 (CC)

City of Cape Town v Daniels (5090/2011) [2011] ZAWCHC 340

City of Cape Town v Hoosain NO and Others (10334/2011) [2012] ZAWCHC 180

City of Cape Town v Persons Who Are Presently Unlawfully Occupying Erf 1800, Capricorn: Vrygrond Development 2 All SA 438 (C)

City of Cape Town v Rudolph 2004 (5) SA 39 (CPD)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2011 (4) SA 337 (SCA)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC)

City of Johannesburg Metropolitan Municipality v Hlophe [2015] 2 All SA 251 (SCA)

City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 (SCA)

City of Johannesburg v Dladla (403/2015) [2016] ZASCA 66

City of Johannesburg v Rand Properties (Pty) Ltd 2007 (6) SA 417 (SCA)

City of Johannesburg v Rand Properties (Pty) Ltd 2007 (1) SA 78 (W)

Coppermoon Trading 203 (Pty) Ltd v The Persons Who Identities are to the Applicant Unknown and Who Unlawfully Occupy Remainder Erf 149, Philippi, Cape Town 14422/14

Darson Construction (Pty) Ltd v City of Cape Town 2007 (4) SA 488 (C)

De Lange v Smuts NO and others 1998 (3) SA 785 (CC)

De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) 2004 (1) SA 406 (CC)

Dihlabeng Local Municipality v Makhotsa (569/2005) [2005] ZAFSHC 63

Dladla v City of Johannesburg Metropolitan Municipality 2014 (6) SA 516 (GJ)

Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC)

Dolpire v South African National Roads Agency Ltd (A464/2011) [2012] ZAWCHC 280

Dominican Sisters of the Congregation of St Catherine of Siena of King Williamstown v Nyamfu (3936/09) [2010] ZAECGHC 35

Du Plessis v De Klerk 1996 (3) SA 850 (CC)

Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952, Johannesburg Situated at 124 Kerk Street, Johannesburg In re: Unidentified Occupants of Erf 952, Johannesburg Situated at 124 Kerk Street, Johannesburg v City of Johannesburg (0/04599) [2011] ZAGPJHC 3

Ekurhuleni Metropolitan Municipality v Dada NO and Others 2009 (4) SA 463 (SCA)

Emfuleni Local Municipality v Builders Advancement Services CC A5047/110 [2012] ZAGPJHC 39

Emfuleni Local Municipality v Builders Advancement Services CC (2009/51258) [2010] ZAGPJHC 27

Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) (SA) 744 (CC)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)

Ferreira v Levin NO and others; Vryenhoek v Powell NO and others 1996 (1) SA 984 (CC)

First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

Fischer v Ramahlele 2014 (4) SA 614 (SCA)

Fischer v Unlawful Occupiers, Erf 150, Philippi unreported case no: 9443/2014

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC)

Golden Thread Limited v People Who Intend Invading Portion R25 of the farm Mooiplaats 355JR Tshwane, Gauteng (3492/2010) [2010] ZAGPPHC 262

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Grobler v Msimanga [2008] 3 All SA 549 (W)

Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants 2002 (1) SA 125 (T)

Hlophe v City of Johannesburg Metropolitan Municipality 2013 (4) SA 212 (GSJ)

In re: National Education Policy Bill No 83 of 1995 1996 (3) SA 289 (CC)

Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC)

Ives v Rajah 2012 (2) SA 167 (WCC)

Jaftha v Schoeman; Van Rooyen v Stoltz 2005 2 SA 140 (CC)

Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village 2013 (1) SA 583 (GSJ)

Joseph v City of Johannesburg 2010 (4) SA 55 (CC)

K v Minister of Safety and Security 2005 (6) SA 419 (CC)

Kaunda v President of the Republic of South Africa 2005 (4) SA 235 (CC)

Khosa v Minister of Social Development; Mahlaule v Minster of Social Development 2004 (6) SA 505 (CC)

Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands 2008 (3) BCLR 325 (W)

Mahambehlala v MEC for Welfare, Eastern Cape 2002 (1) SA 342 (SE)

Mainik CC v Ntuli (81/05/01) [2005] ZAKZHC 10

Mazibuko v City of Johannesburg 2010 4 SA 1 (CC)

Mbanga v MEC for Welfare, Eastern Cape 2002 (1) SA 359 (SE)

MEC For Department of Human Settlements, Gauteng Province v Molema (44773/13) [2013] ZAGPPHC 438

MEC for the Department of Welfare v Kate 2006 (4) SA 478 (SCA)

Minister of Education v Harris 2001 (4) SA 1297 (CC)

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)

Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC)

Minister of Local Government and Housing for the Western Cape v Various Unlawful Occupiers of Houses Situated in Precincts 4 and 6, Delft Symphony (102/08) [2008] ZAWCHC 15

Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA530 (CC)

Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA)

Modderklip Boerdery (Pty) Ltd v Modderklip East Squatters 2001 (4) SA 385 (W)

Modderklip Boerdery (Pty) Ltd v President van die Republiek van Suid-Afrika 2003 (1) All SA 465 (T)

Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC)

Mtshali v Tayengwa (02312/2013) [2013] ZAGPJHC 219

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)

Nokotyana v Ekurhuleni Metropolitan Municipality 2010 (4) BCLR 312 (CC)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC)

Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd 2010 (4) BCLR 354 (SCA)

Occupiers of Erven 87 and 88 Berea v De Wet NO and Another (CCT108/16) [2017] ZACC 18

Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd 2012 (2) SA 337 (CC)

Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd 2012 (4) BCLR 382 (CC)

Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele [2010] 4 All SA 54 (SCA)

Odvest 182 Pty (Ltd) v Occupiers of Portion 26 (Portion of Portion 3) of Farm Klein Bottelary No 17, Botfontein Road (19695/2012) [2016] ZAWCHC 133

Omar NO v Omar (9643/07) [2010] ZAWCHC 91

Omar NO v Omar (9643/2007) [2011] ZAWCHC 415

Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

Pheko v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC)

Phoebus Apollo Aviation CC v Minister of Safety and Security 2003 (2) SA 34 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

PPC Aggregate Quarries (Pty) Ltd v People Who Intend Invading The Remaining Extent Of The Farm Skurweplaas 353, J.R. Tshwane, Gauteng (12289/2010) [2010] ZAGPPHC 606

Premier of the Province of the Eastern Cape v Mtshelakana 2011 5 SA 640 (ECM)

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC)

President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)

Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)

Residents of Joe Slovo Community, Western Cape v Thebelisha Homes 2011 (7) BCLR 723 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC)

Resnick v Government of the Republic of South Africa 2014 (2) SA 337 (WCC)

Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg (30782/05) [2006] ZAGPHC 6

Ross v South Peninsula Municipality 2000 (1) SA 589 (C)

S v Bequinot 1997 (2) SA 887 (CC)

S v Dodo 2001 (3) SA 382 (CC)

S v Jaipal 2005 (4) SA 581 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

S v Mamabolo 2001 (3) SA 409 (CC)

S v Manamela 2000 (3) SA 1 (CC)

S v Mhlungu 1995 3 SA 867 (CC)

S v Zuma 1995 (2) SA 642 (CC)

Sailing Queen Investments v Occupants La Colleen Court 2008 (6) BCLR 666 (W)

Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality 2013 (1) SA 323 (CC)

SOHCO Property Investments (Company Incorporated under Section 21) v Ramdass (14264/10) [2013] ZAKZDHC 4

Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC)

South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)

South African National Defence Union v Minister of Defence 2007 5 SA 400 (CC)

South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)

Stock v The Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Philippi & Portion 0 Farm 597 unreported case no: 11705/15

Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality 2007 (6) SA 511 (SCA)

Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 All SA 108 (SCA)

Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC)

Van Rooyen v S 2002 (5) SA 246 (CC)

Volks NO v Robinson 2005 (5) BCLR 446 (CC)

Wintertide Trading 89 CC v Thompson (2534/2009) [2010] ZANWHC 14

Zantsi v Council of State, Ciskei 1995 4 SA 615 (CC)

Court documents

All Builders And Cleaning Services CC v Matlaila (First Respondent's Heads of Argument) (42349/13) [2015] ZAGPJHC 2

Changing Tides 47 (Pty) Ltd v The Unlawful Occupiers of Chung Huo Mansions (Unlawful Occupiers' Heads of Argument) unreported case no: 2011/20127

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (Appellant's Heads of Argument) 2012 (2) SA 104 (CC)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (Second Respondent's Heads of Argument) 2012 (2) SA 104 (CC)

Fischer v Unlawful Occupiers, Erf 150, Philippi (Answering Affidavit) (9443/14)

Fischer v Unlawful Occupiers, Erf 150, Philippi (Applicant's Head of Argument) (9443/14)

Fischer v Unlawful Occupiers, Erf 150, Philippi (Municipality's Head of Argument) (9443/14)

Fischer v Unlawful Occupiers, Erf 150, Philippi (Municipality's Supplementary Head of Argument) (9443/14)

Fischer v Unlawful Occupiers, Erf 150, Philippi (National and Provincial Government's Head of Argument) (9443/14)

Fischer v Unlawful Occupiers, Erf 150, Philippi (Unlawful Occupiers' Head of Argument) (9443/14)

Hlophe v City of Johannesburg Metropolitan Municipality (Affidavit by Philani Hlophe) 2013 (4) SA 212 (GSJ)

Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (Appellant's Heads of Argument) 2012 (4) BCLR 382 (CC)

Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (First Respondent's Heads of Argument) 2012 (4) BCLR 382 (CC)

Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (Fourth Respondent's Heads of Argument) 2012 (4) BCLR 382 (CC)

Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd (Second Respondent's Heads of Argument) 2012 (4) BCLR 382 (CC)

Socio-Economic Rights Institute of South Africa *Fischer v Unlawful Occupiers, Erf 150, Philippi* (2017) http://www.seri-sa.org/index.php/19-litigation/case-entries/491-fischer-v-unlawful-occupiers-erf-149-philippi 27-02-2017

Secondary sources

Actuarial Society of South Africa *Standards of Actuarial Practice and Advisory Practice Notes* http://www.actuarialsociety.org.za/Professionalresources/ActuarialStandardsandAdvice.aspx 19-07-2017

Allan K & Heese K at Municipal IQ *Understanding Why Service Delivery Protests Take Place and Who is to Blame* http://www.municipaliq.co.za/publications/articles/sunday_indep.pdf 30-07-2016

Aristotle *Nicomachean Ethics* (1962)

Barry B *Theories of Justice* (1989)

Bentham J *A Fragment on Government* (2001)

Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* LLD University of Stellenbosch (2015)

Bhardwaj V at Africa Check *Are There 30 Service Delivery Protests a Day in South Africa?* (2016) https://africacheck.org/reports/are-there-30-service-delivery-protests-a-day-in-south-africa-2/ 30-07-2016

Bilchitz D "Giving socio-economic rights teeth: the minimum core and its importance" (2002) 119 *South African Law Journal* (*SALJ*) 484

Bilchitz D "Is the constitutional court wasting away the rights of the poor - Nokotyana v Ekurhuleni Metropolitan Municipality" (2010) 127 *South African Law Journal* (*SALJ*) 591

Bilchitz D "Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* (*SAJHR*) 1

Bingham T *The Rule of Law* (2011)

Bingham T *The Rule of Law* (2010)

Bingham T "The rule of law" (2006) 66 *Cambridge Law Journal* (*Cambridge LJ*) 67

Bishop M "Remedies" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 9

Bishop M & Raboshakga N "National legislative authority" in Woolman S and Bishop M (eds) *Constitutional Law in South Africa* 2 ed (2013) 17

Boggenpoel Z-Z & Pienaar J "The continued relevance of the mandament van spolie: recent developments relating to dispossession and eviction" (2013) 46 *De Jure* (*De Jure*) 998

Bowen GA "Document analysis as a qualitative research method" (2009) 9 *Qualitative research journal* (*QRJ*)

Brand D "Judicial deference and democracy in socio-economic rights cases in South Africa" (2011) 22 *Stellenbosch Law Review* (*Stell LR*) 614

Bronstein V "Legislative competence" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 5

Burchell J *Principles of Delict* (1993)

Burns JH "Happiness and utility: Jeremy Bentham's equation" (2005) 17 *Utilitas* (*Utilitas*) 46

Calland R & Taylor M "Parliament and the socio-economic imperative - what is the role of the national legislature" (1997) 1 *Law Democracy & Development* (*Law Democracy & Dev*) 193

Cane P *Administrative Law* (2011)

Centre on Housing Rights and Evictions *Any room for the poor? Forced evictions in Johannesburg, South Africa* (2004)

Chaskalson M, Marcus G & Bishop M "Constitutional litigation" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 3

Chayes A "The role of the judge in public law litigation" (1976) *Harvard Law Review* (*Harv L Rev*) 1281

Cheadle H "Limitations" in Cheadle H, et al. (eds) *South African Constitutional Law: The Bill of Rights* (2002)

Chenwi L "Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions" (2008) 8 *Harvard Law Review* (*Harv L Rev*) 105

Chilemba E "State of evictions report" (2014) *Community Law Centre* (*CLC*) 1

Coleman J "Corrective justice and wrongful gain" (1982) 11 *The Journal of Legal Studies* (*J of Legal Stud*) 421

Community Law Centre & Socio-Economic Rights Institute of South Africa *'Jumping the queue', waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa* (2013)

Consolidated General Report on the Audit Outcomes of Local Government 2010-2011 (2012)

Consolidated General Report on the Audit Outcomes of Local Government 2014-2015 (2016)

Cook KS & Hegtvedt KA "Distributive justice, equity, and equality" (1983) *Annual review of sociology* (*Annu Rev Sociol*) 217

Creamer Media's Engineering News *Housing backlog at 2.1m, says Minister Sisulu* (2016) http://www.engineeringnews.co.za/article/housing-backlog-at-21m-says-minister-sisulu-2016-04-22 05-08-2016

Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013)

Davis D "The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: what about separation of powers?" (2012) 15 *Potchefstroom Electronic Law Journal* (*PER/PELJ*) 1

Davis DM "Adjudicating the socio-economic rights in the South African Constitution: towards deference lite" (2006) 22 *South African Journal on Human Rights* (*SAJHR*) 301

De Villiers B "Intergovernmental relations in South Africa" (1997) 12 *South African Public Law* (*SAPR/PL*) 197

De Vos P "Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" (1997) 13 *South African Journal on Human Rights* (*SAJHR*) 67

De Wet P at Mail & Guardian *New Stats Show That Nine Out of 11 Protests a Day Are Peaceful* (2016) http://mg.co.za/tag/service-delivery-protests 30-07-2016

Deutsch M "Equity, equality, and need: what determines which value will be used as the basis of distributive justice?" (1975) 31 *Journal Social Issues* (*JSI*) 137

Dicey A *Introduction to the Study of the Law of the Constitution* 8 ed (1915)

Domingo W & Barratt A "Parent and Child" in *Law of Persons and the Family* (2012) 177

Du Plessis E "Judicial oversight for sales in execution of residential property and the National Credit Act" (2012) 45 *De Jure* (*De Jure*) 532

Du Plessis L "Interpretation" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 32

Du Plessis L ""Subsidiarity": what's in the name for constitutional interpretation and adjudication?" (2006) 17 *Stellenbosch Law Review* (*Stell LR*) 207

Dugard J "Beyond Blue Moonlight: the implications of judicial Avoidance in relation to the provision of alternative housing" (2014) 5 *Constitutional Court Review* (*CCR*) 265

Dyzenhaus D "The pasts and future of the rule of law in South Africa" (2007) 124 *South African Law Journal* (*SALJ*) 734

Ebrahim S "The right to housing: challenges associated with the 'waiting list system' Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5 2014 3 SA 23 (SCA)" (2015) 30 *Southern African Public Law* (*SAPR/SAPL*) 112

ENCA *Emergency Units Target Informal Settlements to Reduce Winter Fire Deaths* (2016) https://www.enca.com/south-africa/emergency-unit-readies-for-winter-fire 26-07-2016

English Oxford Living Dictionaries *Justice* https://en.oxforddictionaries.com/definition/justice 12-01-2017

Ensor L at Business Day Live *Eviction Delays Sought While Laws Are Tightened* (2014) http://www.bdlive.co.za/national/2014/06/17/eviction-delays-sought-while-laws-are-tightened 24-07-2014

ESCR-Net *The Government of South Africa Ratifies the ICESCR* (2015) https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr 14-03-2016

Feinberg J *Doing & Deserving; Essays in the Theory of Responsibility* (1970)

Fick S *Consenting to Objectifying Treatment? Human Dignity and Individual Freedom* LLM University of Stellenbosch (2012)

Fick S "Obtaining alternative accommodation through family: [discussion of Omar NO v Omar [2011] ZQWCHC]" (2015) 26 *Stellenbosch Law Review* (*Stell LR*) 678

Financial and Fiscal Commission *Exploring Alternative Finance and Policy Options For Effective and Sustainable Delivery of Housing in South Africa* (2013)

Financial Services Board *About Us* https://www.fsb.co.za/aboutUs/Pages/About-FSB.aspx 19-07-2017

Fischer DA "Causation in fact in omission cases" (1992) *Utah Law Review* (*Utah LR*) 1335

Friedrich CJ *The Philosophy of Law in Historical Perspective 135* (1963)

Fuller LL & Winston KI "The forms and limits of adjudication" (1978) 92 *Harvard Law Review* (*Harv L Rev*) 353

Fuo ON "Constitutional basis for the enforcement of 'executive' policies that give effect to socio-economic rights in South Africa" (2013) 16 *Potchefstroom Electronic Law Journal* (*PER/PELJ*) 1

Gardner J "Corrective justice, corrected" (2012) 12 *Diritto & questioni pubbliche* (*Diritto & questioni pubbliche*) 9

Gevers C, Brand D, Govender K, Lenaghan P, De Vos P, Mailula D, Freedman W, Ntlama N, Sibanda S & Stone L *South African Constitutional Law in Context* (2015)

Gewirtz P "Remedies and resistance" (1983) 92 *Yale Law Journal* (*Yale LJ*) 585

Government Finance Officers Association *The Role of the Actuarial Valuation Report in Plan Funding* (2013) http://www.gfoa.org/role-actuarial-valuation-report-plan-funding 19-07-2017

Herron Brett *City of Cape Town's New Reintegration and Rehabilitation Programme for Street People to be Piloted in Ward 57* (2011) http://www.brettherron.co.za/213/news/ward57-news/city-of-cape-towns-new-reintegration-and-rehabilitation-programme-for-street-people-to-be-piloted-in-ward-57/ 28-07-2016

Hoexter C "The rule of law and the principle of legality in South African administrative law today" in Carnelley M and Hoctor S (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 55

Investopedia *Actuarial Valuation* http://www.investopedia.com/terms/a/actuarial-valuation.asp 19-07-2017

Jenkins J *The American Courts: a Procedural Approach* (2011)

Kende M "The South African Constitutional Court's embrace of socio-economic rights: a comparative perspective" (2003) 6 *Chapman Law Review* (*Chap L Rev*) 137

Kende MS "The South African Constitutional Court's construction of socio-economic rights: a response to critics" (2003) 19 *Connecticut Journal of International Law* (*Conn J Intl L*) 617

Klare K "Legal subsidiarity and constitutional rights: a reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* (*CCR*) 129

Klimchuk D "On the autonomy of corrective justice" (2003) 23 *Oxford Journal of Legal Studies* (*OJLS*) 49

Koelble T & Reynolds A "Power-sharing democracy in the new South Africa" (1996) 24 *Politics & Society* (*Politics & Society*) 221

Konow J "Which is the fairest one of all? A positive analysis of justice theories" (2003) 41 *Journal of economic literature* (*JEL*) 1188

Kothari C *Research Methodology: Methods and Techniques* (2004)

Kotze T *Effective Relief Regarding Residential Property Following the Failure to Execute an Eviction Order* LLM University of Stellenbosch (2016)

Kruger M "Arbitrary deprivation of property: an argument for the payment of compensation by the state in certain cases of unlawful occupation" (2014) *South African Law Journal* (*SALJ*) 328

Kruuse H "The art of the possible in realising socio-economic rights: the SCA decision in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd" (2011) 128 *South African Law Journal* (*SALJ*) 620

Langa P "Symposium 'a delicate balance': the place of the judiciary in a constitutional democracy" (2006) 22 *South African Journal on Human Rights* (*SAJHR*) 2

Lauchli UM "What distributive justice? The legal theories of Rawls and Nozick" (1994) 4 *Tilburg Law Review* (*TLR*) 169

Liebenberg S "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* (*AHRLJ*) 1

Liebenberg S "The interpretation of socio-economic rights" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 33

Liebenberg S *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010)

Liebenberg S "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002) 6 *Law Democracy & Development* (*Law Democracy & Dev*) 159

Liebenberg S & Goldblatt B "The Interrelationship between equality and socio-economic rights under South Africa's transformative Constitution" (2007) 23 *South African Journal on Human Rights* (*SAJHR*) 335

Mapumulo Z at City Press *Service Delivery Protests Intensifying in Run-Up to Elections* (2016) http://city-press.news24.com/News/service-delivery-protests-intensifying-in-run-up-to-elections-20160603 30-07-2016

Mbazira C *Litigating Socio-economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009)

MES *Our Programmes and Services* http://www.mes.org.za/index.php/2015-11-17-13-25-02/mes-johannesburg 29-07-2016

Modak-Truran M "Corrective justice and the revival of judicial virtue" (2000) 12 *Yale Journal of Law and the Humanities* (*Yale JL & Human*) 249

Montesquieu C *The Spirit of the Laws* (1989)

Mostert H "Landlessness, housing and the rule of law" in Mostert HDW, MJ (ed) *Essays in Honour of CG van der Merwe* (2011)

Muller G "Conceptualizing meaningful engagement as a deliberative democratic partnership" (2011) 22 *Stellenbosch Law Review* (*Stell LR*) 742

Muller G *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD Stellenbosch University (2011)

Muller G "On considering alternative accommodation and the rights and needs of vulnerable people" (2014) 30 *South African Journal on Human Rights* (*SAJHR*) 41

Muller G "Proposing a way to develop the substantive content of the right of access to adequate housing: an alternative to the reasonableness review model" (2015) 30 *Southern African Public Law* (*SAPR/SAPL*) 71

Muller G & Liebenberg S "Developing the law of joinder in the context of evictions of people from their homes" (2013) 29 *South African Journal on Human Rights* (*SAJHR*) 554

Muller J at Financial Mail *Human Settlements: Housing Backlog Widens* (2016) http://www.financialmail.co.za/specialreports/budget2016/2016/02/25/human-settlements-housing-backlog-widens 06-08-2016

Municipal IQ *The Camera's Eye Can Be a Force for Good* (2016) http://www.municipaliq.co.za/index.php?site_page=article.php&id=90 30-07-2016

Murray C & Ampofo-Anti O "Provincial executive authority" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 20

Musungu K, Motala S & Smit J "Using multi-criteria evaluation and GIS for flood risk analysis in informal settlements of Cape Town: the case of Graveyard Pond" (2012) 1 *South African Journal of Geomatics* (*SAJG*) 92

Neethling J & Potgieter J *Visser Law of Delict* 7 ed (2015)

Ngcobo S "South Africa's transformative Constitution: towards an appropriate doctrine of separation of powers" (2011) 22 *Stellenbosch Law Review* (*Stell LR*) 37

Ngwabi SSF *Urban Regeneration and Private Sector Investment: Exploring Private Sector Perception of Urban Regeneration Initiatives in the Johannesburg Inner City* PhD (Town and Regional Planning) University of Pretoria (2009)

Nozick R *Anarchy, State and Utopia* (1974)

Ntongana T at GroundUp *Marikana Lawyer Calls for State to Expropriate Land* (2017) http://www.groundup.org.za/article/marikana-lawyer-calls-state-expropriate-land/ 27-02-2017

Nussbaum B "African culture and Ubuntu - reflections of a South African in America" (2003) 17 *Perspectives* (*Perspectives*) 1

Nussbaum M "Capabilities as fundamental entitlements: Sen and social justice" (2003) 9 *Feminist economics* (*Feminist economics*) 33

Nussbaum M *Creating Capabilities* (2011)

Parliament of the Republic of South Africa *How a Law is Made* http://www.parliament.gov.za/live/content.php?Item_ID=1843 10-01-2017

Perry S *On the relationship between corrective and distributive justice* (2000)

Phakathi B at Business Day Live *Housing Nightmare in Stark Relief* (2014) http://www.bdlive.co.za/national/2014/06/10/housing-nightmare-in-stark-relief 17-08-2016

Pienaar J *Land Reform* (2014)

Pienaar J ""Unlawful occupier" in perspective: history, legislation and case law" in Mostert H and De Waal M (eds) *Essays in Honour of CG van der Merwe* (2011) 309

Pienaar J & Muller A "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" (1999) 10 *Stellenbosch Law Review* (*Stell LR*) 370

Pieterse M "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* (*SAJHR*) 383

Pieterse M "Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience" (2004) 26 *Human Rights Quarterly* (*Human Rights Quarterly*) 882

Pieterse M "Towards a useful role for section 36 of the Constitution in social rights cases - Residents of Bon Vista Mansions v Southern Metropolitan Local Council" (2003) 120 *South African Law Journal* (*SALJ*) 41

Pillay A "South Africa: access to land and housing" (2007) 5 *International Journal of Constitutional Law* (*Int'l J Const L*) 544

Pillay K "Implementation of Grootboom: Implications for the enforcement of socio-economic rights" (2002) 6 *Law Democracy and Development* (*Law Democracy & Dev*) 255

Polanyi M *The Logic of Liberty Reflections and Rejoinders* (1951)

Pope A "The alternative accommodation conundrum: trends and patterns in eviction jurisprudence" (2011) 25 *Speculum Juris* (*Speculum Juris*) 134

Pope A "A tricky balancing act: reflections on recent South African eviction jurisprudence" in *DCM Festschrift (forthcoming)* (2017)

Posner RA "The concept of corrective justice in recent theories of tort law" (1981) 10 *Journal of Legal Studies* (*J of Legal Stud*) 187

Posner RA "Utilitarianism, economics, and legal theory" (1979) 8 *Journal of Legal Studies* (*J of Legal Stud*) 103

Radin MJ "Reconsidering the rule of law" (1989) 4 *Boston University Law Review* (*BUL Rev*) 781

Rautenbach I & Malherbe E *Constitutional Law* 5 ed (2009)

Rawls J *A Theory of Justice* (2009)

Raz J "Rule of law and its virtue" (1977) 93 *Law Quarterly Review* (*Law Quarterly Review*) 195

Roach K "The limits of corrective justice and the potential of equity in constitutional remedies" (1991) 33 *Arizona Law Review* (*Ariz L Rev*) 859

Roederer CJ "Wrongly conceiving wrongful conception: distributive vs corrective justice" (2001) 118 *South African Law Journal* (*SALJ*) 347

Roux T "Legitimating transformation: political resource allocation in the South African Constitutional Court" (2003) 10 *Democratization* (*Democratization*)

Roux T "Property" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 46

Roux T "Understanding Grootboom - a response to Cass R Sunstein" (2001) 12 *Constitutional Forum* (*Const F*) 41

SABC *Almost a Quarter of Gauteng Built on Dolomitic Land* (2011) http://www.sabc.co.za/news/a/4948a580485a10fda0a1aa0e3505e7d1/Almost-a-quarter-of-Gauteng-built-on-dolomitic-land-20111609 19-07-2016

Schwartz JC "How governments pay: Lawsuits, budgets and police reform" (2016) 63 *University of California Los Angeles Law Review* (*UCLA LR*) 1144

Seedorf S & Sibanda S "Separation of powers" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 12

Sen A "Equality of what?" (1980) 1 *The Tanner Lecture* (*The Tanner Lecture*) 197

Sen A *The Idea of Justice* (2011)

Sen A "Justice: means versus freedoms" (1990) *Philosophy & Public Affairs* (*Philosophy & Public Affairs*) 111

Smith C "Eviction - need for a way out" (2014) *De Rebus* (*De Rebus*) 40

Socio-Economic Rights Institute of South Africa *City of Johannesburg v Changing Tides Properties and the Unlawful Occupiers of Tikwelo House* (2013) http://www.seri-sa.org/index.php/19-litigation/case-entries/117-city-of-johannesburg-v-changing-tides-properties-and-the-unlaawful-occupiers-of-tikwelo-house-tikwelo-house 21-06-2016

Socio-Economic Rights Institute of South Africa *Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government* (2013)

Socio-Economic Rights Institute of South Africa *Hlophe and Others v City of Johannesburg* (2016) http://www.seri-sa.org/index.php/what-2/housing-and-evictions?id=196:hlophe-and-others-v-city-of-johannesburg-and-others-hlophe 22-06-2016

Socio-Economic Rights Institute of South Africa *A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice* (2011)

Sosibo K at Mail & Guardian *City of Jo'burg Blamed For Not Providing Homes for Evictees* (2014) http://mg.co.za/article/2014-06-12-city-of-joburg-blamed-for-not-providing-accommodation-for-evictees 13-01-2017

South African Inflation *Inflation Adjustment Calculator* http://www.inflationcalc.co.za/?date1=1994-01-01&date2=2014-08-01&amount=12500 06-08-2016

Southern African Legal Information Institute *Court Roll: Western Cape High Court (Cape Town)* (2016) http://www.saflii.org/za/other/ZAWCHCRolls/2016/ 05-01-2017

Stein R "Rule of law: what does it mean" (2009) 18 *Minnesota Journal of International Law* (*Minn J Int'l L*) 293

Steinberg C "Can reasonableness protect the poor - a review of South Africa's socio-economic rights jurisprudence" (2006) 123 *South African Law Journal* (*SALJ*) 264

Steytler N "Local government in South Africa: Entrenching decentralised government" in Steytler N (ed) *The Place and Role of Local Government in Federal Systems* (2005) 183

Steytler N & De Visser J "Local government" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 22

Strydom J & Viljoen S "Unlawful occupation of inner-city buildings: a constitutional analysis of the rights and obligations involved" (2014) 17 *Potchefstroom Electronic Law Journal* (*PER/PELJ*) 1207

Sunstein CR *Designing Democracy: What Constitutions Do* (2002)

Swart M "Left out in the cold - crafting constitutional remedies for the poorest of the poor" (2005) 21 *South African Journal on Human Rights* (*SAJHR*) 215

Tamanaha BZ "A concise guide to the rule of law" (2007) *St John's University School of Law Legal Studies Research Paper Series* (*St John's University Research Paper Series*) 1

Times Live *Violent Service Delivery Protest Erupts in Emfuleni: DA* (2016) http://www.timeslive.co.za/local/2016/04/14/Violent-service-delivery-protest-erupts-in-Emfuleni-DA 30-07-2016

Tomlinson MR at Politicsweb *Why Can't We Clear the Housing Backlog?* (2015) http://www.politicsweb.co.za/news-and-analysis/why-cant-we-clear-the-housing-backlog--irr 05-08-2016

Trengove W "Judicial remedies for violation of socio-economic rights" (2004) 1 *Economic and Social Rights Review* (*ESR Review*) 6

Troyer J "Introduction" in Troyer J (ed) *The Classical Utilitarians Bentham and Mill* (2003) vii

Tushnet M "The issue of state action/horizontal effect in comparative constitutional law" (2003) 1 *International Journal of Constitutional Law* (*Int'l J Const L*) 79

Van Der Berg S "The need for a capabilities-based standard of review for the adjudication of state resource allocation decisions" (2015) *South African Journal on Human Rights* (*SAJHR*) 330

Van der Walt A *Constitutional Property Law* (2005)

Van der Walt A *Constitutional Property Law* (2011)

Van der Walt A "The limits of constitutional property" (1997) 12 *Southern African Public Law* (*SAPR/SAPL*) 275

Van der Walt A "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* (*CCR*) 77

Van der Walt A *Property and Constitution* (2012)

Van der Walt A "The state's duty to protect owners v the state's duty to provide housing: thoughts on the Modderklip case" (2005) 21 *South African Journal on Human Rights* (*SAJHR*) 144

Van der Walt A "The States Duty to Protect Owners v the State's Duty to Provide Housing: Thoughts on the Modderklip Case" (2005) 21 *South African Journal on Human Rights* (*SAJHR*)

Van der Walt A & Pienaar G *Introduction to the Law of Property* 7 ed (2016)

Van der Walt J & Midgley J *Principles of Delict* 4 ed (2016)

Van Niekerk H *Towards a New Understanding of Mineral Tenure Security: the Demise of the Property-Law Paradigm* PhD University of Cape Town (2016)

Van Wyk J "The complexities of providing emergency housing assistance in South Africa" (2007) *Journal of South African Law* (*JS Afr L*) 35

Van Wyk J "The role of local government in evictions" (2011) 14 *Potchefstroom Electronic Law Journal* (*PER/PELJ*) 50

Vecchiatto P & Phakathi B at MSN *Ministers to Probe Sanral's Cape Evictions* (2014) http://news.howzit.msn.com/ministers-to-probe-sanrals-cape-evictions 24-07-2014

Viljoen S "The systemic violation of section 26 (1): An appeal for structural relief by the judiciary" (2015) 30 *Southern African Public Law* (*SAPR/SAPL*) 42

Visser P & Potgieter J *Visser and Potgieter's Law of Damages* (2003)

Wagstaff GF "Equity, equality, and need: Three principles of justice or one? An analysis of "equity as desert"" (1994) 13 *Current psychology* (*Current psychology*) 138

Waldron J "The concept of the rule of law" (2008) *New York University School of Law Public Law and LEgal Theory Research Paper Series* (*NYU Research Paper Series*) 1

Waldron J "The Hamlyn lectures: the rule of law and the measure of property" (2012) *New York University School of Law Public Law and LEgal Theory Research Paper Series* (*NYU Research Paper Series*) 1

Walker MU "Restorative justice and reparations" (2006) 37 *Journal of Social Philosophy* (*Journal of Social Philosophy*) 377

Weinrib EJ "Corrective justice" (1991) 77 *Iowa Law Review* (*Iowa L Rev*) 403

Weinrib EJ "Corrective justice in a nutshell" (2002) 52 *University of Toronto Law Journal* (*UTLJ*) 349

Wilkinson K at Africa Check *Factsheet: The Housing Situation in South Africa* (2014) https://africacheck.org/factsheets/factsheet-the-housing-situation-in-south-africa/ 06-08-2016

Wilson S "Breaking the tie: evictions from private land, homelessness and a new normality" (2009) 126 *South African Law Journal* (*SALJ*) 270

Wilson S "Curing the poor: state housing policy in Johannesburg after Blue Moonlight" (2014) 5 *Constitutional Court Review* (*CCR*) 280

Wilson S "Litigating housing rights in Johannesburg's inner city: 2004-2008" (2011) 27 *South African Journal on Human Rights* (*SAJHR*) 127

Wilson S "Planning for inclusion in South Africa: the state's duty to prevent homelessness and the potential of "meaningful engagement"" (2011) 22 *Urban Forum* (*Urban Forum*)

Woolman S *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013)

Woolman S & Botha H "Limitations" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 34

Woolman S & Roux T "Co-operative government & intergovernmental relations" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 14

Woolman S & Swanepoel J "Constitutional history" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2013) 2

YouTube *Plenary: National Assembly, 2pm 17 May 2016* (2016) https://www.youtube.com/watch?v=1fGzvZbR0Vk&feature=youtu.be&t=8164 30-07-2016