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CONSTITUTIONAL ANALYSIS OF THE RIGHTS AND  
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ISSN 1727-3781



**2014 VOLUME 17 No 4**

<http://dx.doi.org/10.4314/pelj.v17i4.01>

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**UNLAWFUL OCCUPATION OF INNER-CITY BUILDINGS: A  
CONSTITUTIONAL ANALYSIS OF THE RIGHTS AND OBLIGATIONS  
INVOLVED**

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## **1 Introduction**

The unlawful occupation of inner-city buildings in South Africa has led to a number of legal disputes between vulnerable occupiers and individual landowners – highlighting the direct conflict between individuals' constitutional right not to be evicted in an arbitrary manner and property owners' constitutional right not to be deprived of property arbitrarily.<sup>1</sup> The cause of this tension is a shortage of affordable housing options for low-income households in the inner cities, which shows that the state is evidently struggling to give effect to its housing obligation.<sup>2</sup> In a number of recent cases the courts had to decide whether or not to order eviction of the unlawful occupiers and thus protect the entitlements of the private owner. The essence of the courts' reasoning turned on the obligations of the state in giving content to section 26(1) of the *Constitution*, because it was assumed that any interference with private landowners' rights beyond a temporary nature would be unjustifiable.<sup>3</sup> In all the cases, this assumption was made from the outset without any constitutional analysis to determine if a further limitation of the individual

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<sup>1</sup> Ss 26(1) and 25(1) of the *Constitution of the Republic of South Africa*, 1996, respectively.

<sup>2</sup> S 26(2) of the *Constitution* provides that the state must take reasonable legislative and other measures to achieve the progressive realisation of the right to have access to adequate housing.

<sup>3</sup> In most instances the courts granted the eviction orders, provided that the state should provide alternative accommodation to the evictees.

landowner's property rights might be justifiable and non-arbitrary in the circumstances of each case. In addition, consideration of the purpose of the constitutional property clause in serving the public interest, mainly in relation to the creation and implementation of measures that would aid government in giving effect to the housing guarantee, was absent from the courts' reasoning.<sup>4</sup>

Arguably, a proper analysis of section 4(7) of the *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act* 19 of 1998 (PIE),<sup>5</sup> which gives content to section 26(3) of the *Constitution*,<sup>6</sup> might have led to a different outcome in at least some of these cases, especially if the circumstances of both the occupiers and the landowners had been taken into consideration. Both the personal and socio-economic circumstances of the occupiers and the circumstances of the landowner pertaining to the previous, current and future use of the property should preferably form part of the constitutional enquiry. In some instances the temporary limitation of the landowner's property rights to allow the state to make alternative housing available (the current rule of thumb) might be unjustifiable, while in a different scenario, the eviction and relocation of the occupiers might be found to be in contravention of the *Constitution*. In general, the courts can allow, suspend or refuse the eviction of unlawful occupiers, provided that the order does not amount to an arbitrary deprivation of property. Nevertheless, in some instances the arbitrary deprivation of property is inevitable, despite the court's best efforts to protect property entitlements. These cases clearly show both the limits of the courts' powers in providing adequate solutions to protect owner's property rights while also giving

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<sup>4</sup> In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 16, the Court held that part of the purpose of s 25 of the *Constitution* is to serve the public interest in the sphere of land reform, but also in other spheres.

<sup>5</sup> This section provides as follows: "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

<sup>6</sup> S 26(3) provides as follows: "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."

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effect to section 26(1) of the *Constitution*, and the duty of the state to take positive *Constitution*-driven steps.

The purpose of this article is to scrutinise the courts' decisions in three prominent eviction cases in the light of section 25 of the *Constitution*, to determine if these orders amount to arbitrary interferences with the owners' property rights. The analysis indicates that the courts' decisions are generally sound if one takes into consideration the fact that the courts are inherently limited to a number of orders that they may give. Arbitrary deprivations of property occur at the point where the courts are unable, due to their inherent limitations, to award an order to protect owners' property rights, while the state fails to act. These arbitrary deprivations therefore occur as a result of the state's negligence to protect property rights. Ironically, the article suggests that in some instances it may be preferable for the state to expropriate property as a means to give effect to section 26(1) and to protect landowners from arbitrary interferences with their property rights. The administrative arm of the state's power to expropriate property in other instances is also explored to suggest scenarios when it would be in the public's interest to expropriate abandoned inner-city buildings specifically for housing purposes. Arguably, this mechanism could have provided a great deal of legal certainty for the landowners, occupiers and state in some of the eviction cases. A brief comparative analysis with specifically enacted laws aimed at restricting both vacancy rates in the inner cities and housing shortages in the Netherlands and England shows to what extent other jurisdictions have responded to the problem of vacant buildings amidst a housing shortage, while shedding some light on the need for the South African legislature and state (in general) to introduce and utilise mechanisms that can start to address the housing crises in the inner cities.

## 2 The constitutional right of access to adequate housing

### 2.1 Introduction

The unlawful occupation of privately owned inner-city buildings in South Africa has become unexceptional during the past couple of years and has given rise to a number of interesting eviction cases.<sup>7</sup> The cases highlight a fundamental socio-economic problem in urban areas, namely that many private owners left their inner-city buildings to stand vacant and to deteriorate<sup>8</sup> during a period of political uncertainty at the same time that thousands of desperately poor households were struggling to find suitable affordable accommodation in the inner cities, in close proximity to their place of work.<sup>9</sup> Unsurprisingly, this has resulted in the invasion (and unlawful occupation) of vacant buildings or unlawful holding over by occupiers who previously occupied the premises lawfully.<sup>10</sup> The historical use of the buildings and the current aims of the landowners with regard to the future use of their buildings often differ,<sup>11</sup> although the personal circumstances of the unlawful

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<sup>7</sup> See specifically: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA) (*Shulana Court*); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) (*Blue Moonlight*); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) (*Maphango*); and *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) (*Changing Tides*).

<sup>8</sup> In *Shulana Court*, the owner allowed the property to deteriorate while it leased the premises to the occupiers. As a result of its dilapidated state, the owner decided to terminate the leases in order to renovate the premises: *Shulana Court* paras 1, 2. The premises in *Blue Moonlight* deteriorated to such an extent that the City issued warning notices to the owner to remedy the fire, health and sanitation conditions on the property: *Blue Moonlight* para 1. The condition of the building in *Changing Tides* was held to be unfit for human habitation, because it was a health and safety hazard. The building did not have toilet or ablution facilities, there was no water supply or sewage disposal, there were illegal electricity connections and there was inadequate ventilation: *Changing Tides* para 2.

<sup>9</sup> The majority of the occupiers in *Shulana Court* failed to find suitable alternative accommodation in close proximity to where they worked: *Shulana Court* para 5. The occupiers in *Blue Moonlight* also worked in the informal sector of the Johannesburg central business district and the location of their homes was crucial to their livelihoods, since they would not be able to afford transportation costs necessitated by living elsewhere and they were unable to find suitable alternative accommodation close to their current location: *Blue Moonlight* para 6.

<sup>10</sup> In most cases the occupiers previously occupied either the current or previous owner's premises lawfully. See specifically *Shulana Court* paras 1, 2; *Blue Moonlight* para 6; *Changing Tides* para 2; and *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 59.

<sup>11</sup> In the majority of cases the landowner indicated that it wanted to redevelop the premises and that it had an investment-backed expectation: *Shulana Court* paras 1, 2; *Blue Moonlight* para 8; and *Changing Tides* paras 3, 11. The weight attached to the owners' previous and future use of

occupiers and their current needs are generally comparable. In all the cases, the occupiers are described as vulnerable and poor with limited job opportunities.<sup>12</sup> The cases highlight an existing tension between the constitutional property rights<sup>13</sup> of the owners not to be arbitrarily deprived of property and the occupiers' constitutional right of access to adequate housing.<sup>14</sup>

The courts are required to strike an equitable balance between these opposing rights, which can lead to the limitation of landowners' normal ownership entitlements in order to give content to the occupiers' housing rights.<sup>15</sup> The question is to what extent limitations of this kind can stretch. The overriding consideration in most of the eviction disputes is the concern that the eviction order might render the occupiers homeless, which diverts the courts' attention towards the section 26(1) obligations of the state. The emphasis placed on the obligations of the government has introduced a new notion in evictions law, namely that private owners' entitlements may be restricted only temporarily to allow the government to provide emergency alternative accommodation.<sup>16</sup> The desirability of this development is questionable, since in some instances landowners should be compelled to carry a greater burden than a mere temporary restriction of their right of use. The courts are generally unable to provide unlawful occupiers with lawful and secure housing rights, although the question of whether or not the state can somehow step in and transform the nature of unlawful occupiers' tenure into lawful occupation has not been fully explored.

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the property when considering the correct method and extent of regulation by the state will be discussed in subsequent paragraphs.

<sup>12</sup> See specifically *Shulana Court* para 5 and *Blue Moonlight* para 6.

<sup>13</sup> S 25(1)-(3) of the *Constitution* legalises state power with regard to the regulation (deprivation) and expropriation of private property.

<sup>14</sup> S 26 of the *Constitution* provides that everyone has a right of access to adequate housing.

<sup>15</sup> Property rights "have to be understood in the context of the need for the ordinarily opening-up or restoration of secure property rights for those denied access to or deprived of them in the past": *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) 16.

<sup>16</sup> In *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 30 the Supreme Court of Appeal held that emergency accommodation is often made available for only "three nights per person", while other programmes provide alternative accommodation "for a maximum of two weeks".

## 2.2 Case analyses

A number of laws have been enacted to give content to section 26,<sup>17</sup> although these laws are focussed on the second part of the provision, which deals with the obligations of the state in creating appropriate housing programmes and markets that would eventually deliver housing options. To determine the current meaning of the right to have access to adequate housing one should examine recent case law, bearing in mind that the content of section 26(1) as it currently stands was developed as a result of the courts' interpretation of section 26(2).

In *Government of the Republic of South Africa v Grootboom*<sup>18</sup> the Constitutional Court held that sections 26(1) and 26(2) must be read together and that section 26(1) places at least a negative obligation on the state (and all other entities and individuals) to desist from action that would impair the right of access to adequate housing.<sup>19</sup> This negative obligation was confirmed in *Jaftha v Schoeman; Van Rooyen v Stoltz*<sup>20</sup> where the Constitutional Court held that the right of access to adequate housing does contain a negative element, which means that "any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)".<sup>21</sup> Shortly after the *Jaftha* decision, in *President*

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<sup>17</sup> For example, the *Housing Act* 107 of 1997 reflects the government's aim in promoting "housing development", which is a key phrase in the Act. S 1(a) generally defines "housing development" as the establishment of residential environments in which citizens will have access to residential structures with secure tenure. One can infer from the phraseology of the Act that housing development is vital in giving effect to ss 26(1) and 26(2). The *Rental Housing Act* 50 of 1999 aims to introduce stability and encourage investment in the rental housing market: Legwaila 2001 *Stell LR* 277; Mukheibir 2000 *Obiter* 326. However, the Act does not promote access to rental housing, nor does it to encourage an increase in rental housing stock. In terms of the *Social Housing Act* 16 of 2008, the municipality must take measures to facilitate the delivery of social housing within that area and encourage the development of social housing through the conversion of existing non-residential stock and the upgrading of existing stock (ss 5(a) and 5(b)). In terms of s 5(c), the municipality is obliged to provide access to land and buildings for social development and to provide access for social housing institutions to municipal rental stock.

<sup>18</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34 per Yacoob J.

<sup>19</sup> In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33 the Court rejected the contention that s 26(1) imposed a minimum core obligation on the state. See also Liebenberg *Socio-Economic Rights* 163-173 and Russell "Minimum State Obligations" 11-21.

<sup>20</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC).

<sup>21</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34 per Mokgoro J. At paras 25-26 the Court emphasised that the aim of s 26 in relation to security of tenure had to be interpreted against the historical background of apartheid-type evictions and forced removals.

*of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,<sup>22</sup> the Constitutional Court postponed the eviction of unlawful occupiers from private land until alternative accommodation could be provided by the state.<sup>23</sup> At this stage the courts were still focussing on the government's general obligation in terms of section 26(2) to structure the law in such a way that it can accommodate those in need, while eviction disputes between private parties remained a private-law matter in which the state does not have a direct interest.<sup>24</sup>

This position changed when the courts allowed the joinder of the state in private eviction proceedings where the eviction order would render the unlawful occupiers homeless. In *Sailing Queen Investments v The Occupants La Colleen Court*,<sup>25</sup> the court held for the first time that the interests of the occupiers, the private landowner and the state (municipality) would be protected if the state was joined, because the state has a duty to provide the evicted occupiers with adequate housing.<sup>26</sup> This decision significantly impacts on the position of the state, because it now has a direct interest in private eviction proceedings if the occupiers might be rendered homeless.<sup>27</sup> In addition, the decision introduced a more substantive meaning into section 26(1) by placing a positive duty on the state to provide alternative housing to evictees who might be rendered homeless, which was refined in subsequent case law.

In *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*,<sup>28</sup> the SCA decided that it would generally not be just and equitable, and would therefore be in contravention of sections 4(6) and 4(7) of PIE, to grant an

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The state should be allowed to interfere with an individual's access to housing only when it is justifiable to do so: *Jafftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 26, 28. See also Liebenberg 2008 *TSAR* 467.

<sup>22</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). See Liebenberg *Socio-Economic Rights* 281-286 for a discussion of the case.

<sup>23</sup> The same logic was followed in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) and *Shulana Court*.

<sup>24</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 40 per Yacoob J.

<sup>25</sup> *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W).

<sup>26</sup> *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W) para 18.

<sup>27</sup> This duty of the state will be elaborated on in subsequent paragraphs. See also *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W) para 9.

<sup>28</sup> 2010 9 BCLR 911 (SCA) (*Shulana Court*).



eviction order where the effect would be to render the occupiers homeless.<sup>29</sup> In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,<sup>30</sup> the Constitutional Court took into consideration a number of factors to determine whether the eviction order would be just and equitable or not,<sup>31</sup> although it eventually decided that regardless of who the evictor is, once the possibility of homelessness exists as a result of an eviction order the scenario can be categorised as an emergency and the state should provide emergency accommodation.<sup>32</sup>

The Court in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*<sup>33</sup> considered the requirements for an eviction order listed under section 4(7) of PIE and held that if those requirements were met, section 4(8) of PIE mandates the court to award the eviction order, provided that no valid defence was raised by the occupier.<sup>34</sup> In the light of previous case law the Court emphasised that all spheres of government have constitutional obligations to give effect to section 26(1), especially when the need for housing can be defined as an emergency. This would typically be the case where the occupiers would be rendered homeless as a consequence of the eviction order.<sup>35</sup> The section 26 obligations of the government were, however, not linked with the initial question of whether the eviction order would be just and equitable.<sup>36</sup> The needs of the occupiers, and specifically the availability of alternative accommodation, could have an influence on the date of the eviction order, but would weigh very little when considering whether the eviction order should be granted or not.<sup>37</sup> The Court

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<sup>29</sup> *Shulana Court* paras 14, 16, 18.

<sup>30</sup> 2012 2 SA 104 (CC) (*Blue Moonlight*).

<sup>31</sup> The factors considered by the Court were: a) that the occupiers initially occupied the buildings lawfully; b) that Blue Moonlight was aware of the occupiers when it bought the property; c) that the eviction order would render the occupiers homeless; and d) that the possibility of homelessness did not exist for Blue Moonlight: *Blue Moonlight* para 39. These considerations highlight some differentiation between private owners regarding their use of the property and their relationship with the current occupiers. Nevertheless, the Court refrained from incorporating these factors in its final analysis and decision.

<sup>32</sup> *Blue Moonlight* para 92. See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 46 for a contradictory statement by the Supreme Court of Appeal.

<sup>33</sup> 2012 6 SA 294 (SCA) (*Changing Tides*).

<sup>34</sup> *Changing Tides* para 12.

<sup>35</sup> However, this does not mean that the right of access to adequate housing is an unqualified right, nor does it mean that the local authority's duty to provide alternative accommodation in the event of evictions is an unqualified duty: *Changing Tides* para 15.

<sup>36</sup> *Changing Tides* para 14.

<sup>37</sup> *Changing Tides* para 18.

decided that the eviction should be carried out without delay and that the City should provide temporary alternative accommodation to the evictees on the sheriff's schedule.<sup>38</sup>

The effect of these decisions was a general development in eviction law that places a restriction on the immediate eviction of vulnerable occupiers if a) the result of the eviction order would be to render them homeless and b) the state has not already made alternative housing available. An immediate eviction order in such circumstances would generally not be just and equitable. To solve this predicament and also to refrain from limiting the landowners' property rights unjustifiably, the courts oblige the state to provide temporary (emergency) accommodation to the evictees. The way in which the courts have reached this outcome is twofold.

Firstly, they decided that the only method through which the essential right to housing can be realised is when the state fulfills its section 26(2) obligation. In the eviction cases where the occupiers would likely be rendered homeless as a result of the eviction orders, the obligation of the state is interpreted narrowly to mean that the local authority should make alternative emergency housing available on an interim basis.<sup>39</sup> In addition, the landowner's identity, the previous use of the property, future plans with regard to the property and the relationship with the occupiers are irrelevant, because the courts will disregard these factors when there is an emergency situation and place the obligation to prevent an increase in homelessness squarely on the local authority.

Secondly, in *Changing Tides* it was decided that this obligation of the government, specifically the question of whether alternative accommodation should be made available, must be distinguished from the initial question, namely whether or not it would be just and equitable to grant the eviction order. The question concerning the justification of the eviction order must be separated from the obligation to provide

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<sup>38</sup> *Changing Tides* paras 56-58.

<sup>39</sup> However, the courts also indicated that the other spheres of government should play a role in the provision of housing, although the extent to which these spheres' plans, projects and budgets can be scrutinised by the courts is limited due to the separation of powers principle. The obligations of the three spheres of government and the cooperation between these spheres will be discussed in subsequent paragraphs.

housing, because these matters have implications for different role-players. To determine whether this narrow approach adopted by the courts is both logically sound and in line with the transformative vision of the *Constitution*, one should first consider the obligations of the government in more depth and secondly scrutinise the rights (and obligations) of landowners in its section 25 context, which generally allows restrictions on landowners' rights for public purposes.

### **2.3 Governmental obligations in the inner cities**

In relation to section 26(1), section 26(2) provides that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". The *Housing Act* 107 of 1997<sup>40</sup> indicates how this duty is distributed between the three spheres of government,<sup>41</sup> and that these governmental spheres must co-operate with one another in good faith and mutual trust in a number of ways, including mutual assistance and support.<sup>42</sup> National and provincial government must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions.<sup>43</sup>

In terms of the *Housing Act*, national government must establish and facilitate the national housing development process. The Minister must determine national policy in respect of housing, set delivery goals, monitor the performance of provincial and local governments in respect of such goals, and support (and strengthen) the capacity of municipalities to perform their duties in respect of housing development,<sup>44</sup> while the provincial government must take all reasonable and necessary steps to strengthen the capacity of municipalities to exercise their powers and perform their duties in respect of housing development.<sup>45</sup> The obligations of

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<sup>40</sup> This Act is the principal act that deals with the provision of housing in South Africa.

<sup>41</sup> Nevertheless, one should keep in mind that the three spheres of government are distinct, inter-dependent and interrelated: s 40(1) of the *Constitution*.

<sup>42</sup> S 41(1) of the *Constitution*.

<sup>43</sup> S 154(1) of the *Constitution*. This forms part of the co-operative government principle.

<sup>44</sup> S 3(1) and 3(2) of the *Housing Act* 107 of 1997.

<sup>45</sup> S 7(2) of the *Housing Act* 107 of 1997. The provincial government must also intervene on the basis of s 139 of the *Constitution* to ensure performance if a municipality cannot perform its duties as outlined in the Act.

local government in relation to the provision of housing are staggering.<sup>46</sup> Local government must take all necessary steps a) to ensure that individuals in its area have access to adequate housing on a progressive basis; b) to set appropriate housing delivery goals in its area; c) to identify land for housing development; and d) to initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.<sup>47</sup> In relation to emergency housing, section 12.4.1 read with section 12.6.1(b) of the National Housing Code provides that municipalities must initiate and plan projects that relate to emergency housing and, if necessary, request assistance from other authorities.<sup>48</sup>

The obligation that rests with the government in giving content to section 26(1) is undoubtedly a positive obligation in that all the spheres of government must take positive steps on a continuous basis to create feasible housing options that are accessible to all South Africans. The immensity of this task is overwhelming, but it rests on all spheres of government and the local authority should be assisted by the other spheres to fulfill its obligations. In the eviction cases, the shortage of housing options for the socio-economically weak becomes evident and it shows that the government (in all its spheres) is currently failing to fulfill its constitutional and statutory obligations in relation to housing. As a result, the courts are faced with the impossible task of a) balancing landowners' constitutional right not to be arbitrarily deprived of property with the constitutional housing rights of the unlawful occupiers; b) determining what the actual situation is with regard to the premises in question;<sup>49</sup>

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<sup>46</sup> One of the objects of local government is to ensure the provision of services ("basic municipal services" are defined in s 1 of the *Local Government: Municipal Systems Act* 32 of 2000 as municipal services that are necessary to ensure a reasonable quality of life for individuals) to communities in a sustainable manner, while municipalities should also structure their planning, budgeting and administration processes to give priority to the basic needs of the community: ss 152 and 153(a) of the *Constitution*, respectively.

<sup>47</sup> S 9(1) of the *Housing Act* 107 of 1997. The section also includes a number of other duties.

<sup>48</sup> *Blue Moonlight* para 66. However, the point of departure is that the City must finance its own emergency housing scheme, which means that it must plan and budget to accommodate evictees in desperate need: *Blue Moonlight* para 67.

<sup>49</sup> In *Blue Moonlight*, the court directed the City to compile a report with information "regarding the numerous unoccupied inner city buildings and, if State or City owned, whether they were deliberately being moth-balled under other urban renewal initiatives:" *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* [2011] ZAGPJHC 3 para 13. The Court decided in *Changing Tides* that the local authority must file a report with the court detailing the following

and c) scrutinising the reasonableness of the government's policies and projects in relation to its housing obligation, while complying with the separation of powers principle.<sup>50</sup> Despite the municipalities' response that they are neither obliged nor able to provide accommodation,<sup>51</sup> the approach that the courts have followed suggests that it will force municipalities to fulfill their constitutional and statutory obligations in relation to housing, albeit limited to the occupiers who might be rendered homeless in question.

## **2.4 Conclusion**

One of the considerations that favoured eviction orders and the concomitant relocations to temporary public housing was the decision that any deprivation of the landowners' property rights beyond a temporary nature would be unjustifiable.<sup>52</sup> The courts merely assumed that they had to award the eviction orders for two reasons, namely that the obligation to provide housing to the socio-economically weak rests on the state and that private owners' property entitlements should generally not be limited to a greater extent than is necessary for the state to fulfill its obligations. At no point did the courts engage with section 4(7) of PIE to verify that an eviction and

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information: a) its current housing policy; b) any information with regard to the relevant building or property in respect of which the order is being sought; c) the municipality's opinion regarding the condition of the building, specifically whether it is fit for human habitation; d) information relating to the personal circumstances of the occupiers; e) whether an eviction order will render the occupiers homeless; f) what steps the municipality will take to alleviate such homelessness; and g) what the implications would be for the owner if the eviction order is delayed: para 40.

<sup>50</sup> In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41 the Constitutional Court suggested that the role of the courts is not to question the measures adopted by the state, but rather to determine if the chosen measures are reasonable.

<sup>51</sup> See for instance *Blue Moonlight* para 3. At para 32 the City argued that it cannot be held accountable for the provision of housing to all persons evicted from privately owned land.

<sup>52</sup> In *Blue Moonlight*, the Court emphasised that in some instances, especially where the owner was aware of the presence of unlawful occupiers when it bought the building, private landowners might have to tolerate the temporary presence of such occupiers, but this does not mean that owners should provide free housing for an indefinite period: *Blue Moonlight* paras 34, 35, 39-40. This was decided without any real engagement with the social obligations of the landowner as enacted in s 25. In *Changing Tides*, the court decided that private owners might in some instances have to be patient when their usual ownership entitlements, including the right to use and dispose, are restricted temporarily to accommodate the pressing needs of the occupiers. The needs of the occupiers can have an influence on the date of the eviction order, but not the question of whether the eviction order should be granted or not: *Changing Tides* para 18.

relocation order would be appropriate.<sup>53</sup> Arguably, in some instances private owners should carry a greater burden than the courts suggest, depending on the relevant circumstances of the landowner and the occupiers (as prescribed by section 4(7) of PIE). Nevertheless, the power of the courts to provide some relief for unlawful occupiers is still limited in the sense that they can suspend or refuse eviction orders, but they are generally unable to change the nature of unlawful occupiers' tenure. This indicates both the limits of the courts' powers in providing adequate relief for the desperately homeless and the point where the positive duty of the state becomes so essential.

The state has the statutory power to intervene, on its own initiative, and accommodate unlawful occupiers on a permanent basis. The state can, for example, expropriate property for housing purposes. Section 9(3) of the *Housing Act* provides that a municipality may by notice in the *Provincial Gazette* expropriate any land required by it for the purpose of housing development if a) it is unable to purchase the land from the owner after reasonable negotiations; b) it obtained permission from the MEC before placing the notice in the *Provincial Gazette*; and c) the notice is published within six months after the MEC granted permission. Consequently, the state would acquire the property as the landowner and be able to provide the accommodation to the unlawful occupiers on a legal basis – the nature of their tenure would effectively be transformed. The state would thus give effect to section 26(1) and (2), while side-stepping eviction and relocation procedures. Of course, expropriations of this kind can be extended to vacant inner-city buildings as well and

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<sup>53</sup> This judicial development is not in line with the dictum of Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), namely that "the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation a new and equally relevant right not arbitrarily to be deprived of a home ... The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case": para 23. The general decision that the occupiers should be evicted and relocated is also in conflict with the decision in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) that any measure which deprives an occupier of existing access to housing limits the s 26(1) right. It follows that such an approach should generally not be followed by the courts.

should not be limited to buildings that are already unlawfully occupied. However, all interferences with landowners' property rights must pass constitutional muster and the constitutionally permissible extent to which the state may interfere will depend on the case at hand.

### **3 The constitutional rights and obligations of private owners**

#### ***3.1 Section 25: a general overview of the relevant provisions***

Section 25 of the *Constitution* casts the common law entitlements and obligations of ownership (often imposed in terms of legislation) in a constitutional light. Sections 25(1)-(3) read with section 25(4) are of particular importance when considering the interaction between the housing obligations of the state mandated in sections 26(1) and (2) and its responsibility to refrain from interfering with private property rights excessively. The watershed case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>54</sup> (*FNB*) has shaped our understanding of section 25 disputes insofar as it gives content and structure to challenges of this kind.<sup>55</sup> The paragraphs below outline the relevant constitutional provisions and refer to the key aspects of the *FNB* decision.

Section 25(1) of the *Constitution* has a dual function. It recognises the state's power to regulate the exercise of property entitlements for a public purpose, while it also sets two requirements, namely law of general application and non-arbitrariness, against which regulatory interference must be measured.<sup>56</sup> As a result, deprivations – including instances where regulatory interference results in the complete or partial destruction of ownership or ownership entitlements – will pass constitutional muster

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<sup>54</sup> 2002 4 SA 768 (CC) (*FNB*).

<sup>55</sup> For a general discussion of *FNB* refer to Roux "Property" chap 46; Van der Walt 2004 *SALJ* 854-878.

<sup>56</sup> Van der Walt *Constitutional Property* 17, 225-228. Van der Walt argues that a third requirement, that of public purpose, can be read into either the requirement of law of general application or into the requirement of non-arbitrariness.

if they meet the section 25(1) requirements.<sup>57</sup> Expropriations are regulated by sections 25(2)-(3) of the *Constitution*<sup>58</sup> and are constitutionally permissible if they are a) authorised by a law of general application; b) for a public purpose or in the public interest;<sup>59</sup> and c) subject to the payment of just and equitable compensation.<sup>60</sup> The term "public interest" includes the nation's commitment to land reform and to measures designed to enable equitable access to natural resources.<sup>61</sup>

In *FNB*, the Constitutional Court developed a methodology<sup>62</sup> to assess constitutional property challenges, which should be understood in the light of the distinction between deprivations and expropriations. Deprivations embrace the wider category of interference since they include any regulatory control that limits the use, enjoyment or exploitation of private property.<sup>63</sup> Expropriations, by contrast, fall in the narrower category of interference and are considered a subspecies of deprivation.<sup>64</sup> Accordingly, "[t]he starting point for constitutional analysis ... for the infringement of property rights, must be s 25(1)".<sup>65</sup> An essential step in the methodology is to determine whether the deprivation is arbitrary because the "law of general application" does not provide "sufficient reason" for the particular deprivation in question or is procedurally unfair.<sup>66</sup> "Sufficient reason" is established with reference to eight contextual considerations, centred on the complexity of the

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<sup>57</sup> The state is authorised to regulate the use and exercise of property rights, provided that such interference is for a legitimate public purpose and that it is fairly imposed: Van der Walt *Constitutional Property* 214-215.

<sup>58</sup> Refer to Van der Walt *Constitutional Property* 196-213 for an explanation of the nuanced relationship between deprivation and expropriation in South African law.

<sup>59</sup> S 25(2)(a) of the *Constitution*.

<sup>60</sup> S 25(3) regulates the payment of compensation for expropriation. This section lists specific factors that should be taken into account when determining the amount of compensation payable. See generally Van der Walt *Constitutional Property* 334-520.

<sup>61</sup> S 25(4)(a) of the *Constitution*.

<sup>62</sup> *FNB* para 46.

<sup>63</sup> *FNB* para 57. A number of cases, including *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*, 2005 1 SA 530 (CC) para 32 deviated from this interpretation of "deprivation". See specifically Van der Walt 2005 *SALJ* 79-80.

<sup>64</sup> *FNB* para 57. See further Van der Walt 2004 *SALJ* 867.

<sup>65</sup> *FNB* para 60.

<sup>66</sup> *FNB* para 100. The court did not elaborate on the meaning of procedural fairness for the purposes of an s 25(1) enquiry. Refer to Van der Walt *Constitutional Property* 264-270 for a general discussion of procedural fairness.



relationships involved in the dispute.<sup>67</sup> These considerations are referred to in the analysis of the case law below.

### ***3.2 Inner-city landowners' obligations and entitlements in the context of urban decay and the increasing demand for housing***

#### *3.2.1 Introduction*

Ownership consists of rights and obligations that are shaped according to the prevailing demands of society.<sup>68</sup> Section 25(1) of the *Constitution* acknowledges these obligations, but it also provides two threshold requirements that have to be met to prevent disproportionate inroads into ownership entitlements. In the context of inner-city evictions, the case law referred to above shows that landowners often neglect essential obligations such as paying rates and taxes or maintaining structures in accordance with statutory health and safety standards. There are also instances where – by attempting to abandon their inner-city properties – landowners have shunned all obligations arising from land ownership. These cases highlight the unequal distribution of housing resources in South Africa and raise questions concerning the obligations of landowners, who form part of a society in the midst of a housing crisis. As explained above, in *Blue Moonlight*<sup>69</sup> the Constitutional Court unequivocally stated that private landowners cannot be expected to provide free

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<sup>67</sup> *FNB* para 100.

<sup>68</sup> Even before the coming into operation of the *Constitution* it was widely recognised that landowners have certain responsibilities when exercising ownership entitlements. See for instance Visser 1985 *Acta Juridica* 43-48, who argues that ownership in the South African context has never been an absolute right and that it has always had to yield to the demands placed on it by society. Lewis 1985 *Acta Juridica* 243-244; 248-249 and 260-262 argues that the right to use property has never been unfettered in Roman and Roman-Dutch law, as is evidenced by the restrictions placed on ownership entitlements by neighbour law. Likewise, Van der Walt 1987 *SALJ* 476-479 argues with reference to environmental laws that it seems as if the concept of landownership in South Africa has changed and "that change implies the limitation of ownership by social duties and restrictions deriving from various interests in society" such as the public interest in the conservation of the environment. According to Van der Walt it is necessary to determine whether ownership in South Africa should be viewed as an "unbound" right which can be narrowed down by legislation, or alternatively, whether it should be viewed as an inherently limited right. Van der Walt suggests a framework that accommodates the view that the limitations imposed on ownership do not amount to "limitations of the owner's theoretically unlimited right, but as natural duties and limits inherent in ownership of land as such".

<sup>69</sup> *Blue Moonlight* para 40.

housing to the homeless indefinitely.<sup>70</sup> However, they can be forced to tolerate within reason the temporary unlawful occupation of their property until such time as it is just and equitable to grant an eviction order. As has already been said, the courts have generally opted for suspended eviction orders while holding on to the traditional understanding that landowners' rights should be limited in the least burdensome way. This result may be ascribed to the fact that South African courts have the ability to protect constitutional and existing property rights but (with a few exceptions that are not relevant here) they do not have the authority to create rights that did not exist previously. In the eviction framework, this restricts the courts' power in so far as remedies are concerned.

This section re-examines three prominent cases to identify ownership obligations and entitlements stemming from the public's interest in providing housing to the poor, while protecting private property rights against unlawful infringements.<sup>71</sup> Against this background, the paragraphs below describe the role of the court not only as an arbiter when constitutional rights are in conflict, but also as a functionary directly involved in ameliorating the current housing crisis. The section below also highlights the existing shortcomings in the government's eviction and informal housing policies to show where it is necessary to develop the law in relation to the provision of housing. Arguably there are also instances where – instead of developing the law – the local government should resort to existing mechanisms, such as expropriation, to meet its section 26(1) mandate. In the spirit of *FNB*, the point of departure of this enquiry will be section 25(1) of the Constitution.

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<sup>70</sup> *Blue Moonlight* para 40.

<sup>71</sup> *Blue Moonlight* para 40.

### 3.2.2 *The Olivia Road cases*

In *Olivia Road*,<sup>72</sup> the city requested the Court to evict unlawful occupiers from three inner-city private properties.<sup>73</sup> The buildings, consisting of a 16-storey residential building, a retail building and a high-rise structure, had been abandoned<sup>74</sup> and were in a particularly derelict state.<sup>75</sup> Most of the occupiers were destitute and earned very little income, if any.<sup>76</sup> Many of the occupiers had been living on the properties for years<sup>77</sup> and had developed livelihood strategies focused on income-earning opportunities and activities in the city and surrounds.<sup>78</sup> Counsel for the city argued that eviction would promote public health and safety and prevent further urban decay. The occupiers opposed the application on various grounds, including that eviction would violate their section 26 rights.<sup>79</sup>

The Court reiterated that eviction was fundamentally a constitutional matter<sup>80</sup> and that the city's statutory duties had to be reconciled with – as opposed to insulated

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<sup>72</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 3 SA 208 (CC). For a discussion of these cases refer to Strydom *Demolition Orders* 64-77.

<sup>73</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 4. The city relied on s 12(4)(b) of the *National Building Regulations and Building Standards Act* 103 of 1977 (*Building Standards Act*) in support of its eviction application.

<sup>74</sup> Refer to Sonnekus 2004 *TSAR* 747-757 for an overview of the legal implications of abandoning land in South Africa.

<sup>75</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) paras 13- 20. At paras 5 and 23 the court explained that these buildings were classified as bad buildings and evacuation was one of the first steps of the Johannesburg Inner City Regeneration Strategy. See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 21 for information on this strategy.

<sup>76</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 20.

<sup>77</sup> In *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 29 the court emphasised that occupiers who resided on properties for years had to be treated with more sympathy than occupiers who deliberately invaded buildings to disrupt the municipality's housing scheme.

<sup>78</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) paras 20, 57. From the outset the court made it apparent that relocation to an informal settlement (situated on the outskirts of Johannesburg) was not a viable solution as this would deprive the occupiers of their means of earning an income. Unfortunately, this meant that once evicted, the occupiers would become homeless, or simply move on to another vacant building, as there was no suitable, long-term alternative accommodation in the city.

<sup>79</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) paras 11, 12. Refer to Strydom *Demolition Orders* 64-76 for a discussion of the other grounds on which the occupiers opposed the eviction order.

<sup>80</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 26.

from – its section 26 duties.<sup>81</sup> The Court found that the city had failed to prioritise the housing needs of indigent persons who reside in dangerous and unsuitable inner-city structures.<sup>82</sup> Consequently, the Court found that the occupiers could not be evicted until the city either implemented a comprehensive housing plan or provided alternative housing.<sup>83</sup>

The Supreme Court of Appeal<sup>84</sup> ordered the eviction on condition that the city provided alternative, temporary housing for the occupiers, and<sup>85</sup> held that the city had a "special duty" towards the homeless. At the very least, this duty meant that the city had to provide temporary accommodation for occupiers rendered homeless as a result of the eviction.<sup>86</sup>

The Constitutional Court ordered the parties to meaningfully engage with each other to reach an agreement regarding the eviction, and to determine if the buildings could be made more safe and healthy on a temporary basis.<sup>87</sup> It was agreed that the occupiers would vacate the premises if the municipality provided alternative accommodation in other buildings, pending more permanent housing solutions developed by the city in consultation with the occupiers.<sup>88</sup>

### 3.2.3 *Blue Moonlight*

In *Blue Moonlight* the landowner sought to evict 86 unlawful occupiers<sup>89</sup> from a commercial property that it had purchased in 2004 for redevelopment purposes.<sup>90</sup>

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<sup>81</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 26.

<sup>82</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) paras 50, 65-67.

<sup>83</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 67.

<sup>84</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA).

<sup>85</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 78.

<sup>86</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 47.

<sup>87</sup> *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 5, 25.

<sup>88</sup> *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 26.

<sup>89</sup> The occupiers consisted of 81 adults (two adults were pensioners) and 5 children, one of whom was disabled. There were also many households headed by women. See *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) paras 63-78 for the facts of the case.

<sup>90</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) paras 18-20. The property had been used as a carpet factory until 1999. Many of the occupiers were employed by the business and were allowed to live on the premises provided they paid

These occupiers were extremely poor and would become homeless if evicted.<sup>91</sup> From the outset it was apparent that there was a direct relationship between the location of the building and the occupiers' ability to earn an income.

As in all private eviction disputes, the enquiry centred on the landowner's section 25(1) rights;<sup>92</sup> the occupiers' section 26(3) rights – as given effect to by section 4 of PIE; and their section 26(1)-(2)<sup>93</sup> rights of access to adequate housing. The Court held that property rights were not completely unfettered and that it could, depending on the circumstances, delay the enforcement of an eviction order temporarily.<sup>94</sup> However, local authorities had to meet their section 26(1) housing duties without transferring their social housing responsibilities onto private landowners, as this would nullify the institution of ownership.<sup>95</sup> Expropriation was raised as an option during argument, but the Court held that it did not have the power to grant such an order.<sup>96</sup> As such, it granted the eviction order<sup>97</sup> but postponed its operation for two months and ordered the city to pay constitutional damages to the landowner.<sup>98</sup>

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rent. The factory closed down and from 1999 to 2005 the occupiers paid rent to persons ostensibly collecting on behalf of first the landowner and later Blue Moonlight, who denied ever receiving rent from the occupiers. See *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) para 12 and *City of Johannesburg Metropolitan Municipality v Blue Moonlight* 2011 4 SA 337 (SCA) paras 9-11.

<sup>91</sup> *Blue Moonlight* para 6. The city had filed a report with the court in which it insisted that it would not provide alternative accommodation to persons evicted from private property: *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) para 32.

<sup>92</sup> In this regard, the court explained that the right to property was an "essential foundational stone of a democratic state" and that the arbitrary seizure of property without compensation, as under the apartheid regime, undermined core democratic values. See *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) paras 93-94, 107.

<sup>93</sup> The court reiterated that s 26(2) of the *Constitution* does not envision laws that "effectively expropriate" landowners of their common law property rights indefinitely for social housing purposes. See *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) para 98.

<sup>94</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) paras 101-103.

<sup>95</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) para 135.

<sup>96</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) paras 155-160.

<sup>97</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) paras 194-195.

<sup>98</sup> This order was set aside in the Supreme Court of Appeal on the grounds that *Blue Moonlight* differed from *Modderklip* in several respects. See *City of Johannesburg Metropolitan Municipality*

The Constitutional Court confirmed that its decision to suspend the eviction order amounted to a deprivation of property<sup>99</sup> and that a landowner could not be deprived of its property rights permanently. However, the owner's right to use his property might be limited "in the process of the justice and equity enquiry mandated by PIE".<sup>100</sup> A range of factors could have a bearing on the just-and-equitable enquiry. The Court placed emphasis on the fact that the occupiers had lawfully resided on the land for some years. Moreover, Blue Moonlight had purchased the property knowing that it was occupied and that it may have some difficulty in evicting the occupiers. The eviction order would undoubtedly have rendered the occupiers homeless, while there was no competing risk that Blue Moonlight would be rendered homeless because of the eviction order.<sup>101</sup> The Court also considered if alternative land or accommodation could be made available to the occupiers once they were evicted.<sup>102</sup>

The Court held that the city's housing policy was unconstitutional insofar as it excluded persons evicted from private property from accessing its temporary housing programme.<sup>103</sup> It ordered the city to provide temporary accommodation to the occupiers fourteen days before they would be evicted.<sup>104</sup> In the meantime Blue Moonlight had to be patient, as the city had to be given reasonable time to comply with the court order.<sup>105</sup>

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*v Blue Moonlight* 2011 4 SA 337 (SCA) para 70 and the discussion in Strydom *Demolition Orders* 84-85.

<sup>99</sup> *Blue Moonlight* para 37. The Court also made it clear that the deprivation would pass constitutional muster, which meant that the deprivation was non-arbitrary.

<sup>100</sup> *Blue Moonlight* para 40.

<sup>101</sup> *Blue Moonlight* para 39. Blue Moonlight had an economic interest in the property. In some cases an eviction order might be sought to enable a family to reoccupy their home. This was clearly not the case for *Blue Moonlight*.

<sup>102</sup> *Blue Moonlight* para 41.

<sup>103</sup> *Blue Moonlight* para 97.

<sup>104</sup> *Blue Moonlight* para 101.

<sup>105</sup> *Blue Moonlight* para 100. The court confirmed the findings of the Supreme Court of Appeal in all material respects. Refer to the discussion in Strydom *Demolition Orders* 84-85.

### 3.2.4 Modderklip

Modderklip owned a large tract of agricultural land adjacent to an informal settlement. In October 2000 approximately 18000 persons took up residence on the land.<sup>106</sup> The owner launched an application for an eviction and the order was granted in 2001.<sup>107</sup> Modderklip enlisted the sheriff to execute the eviction order, but later abandoned this strategy as it could not afford the deposit to secure the cost of the eviction.<sup>108</sup>

The Supreme Court of Appeal upheld the court *a quo's* finding that Modderklip's section 25(1) rights and the occupiers' section 26(1) and (2) rights had been breached.<sup>109</sup> Furthermore, the Court held that Modderklip's right to equal protection by the law (section 9(2) of the *Constitution*) had been undermined by the state's failure to assist in safeguarding Modderklip's property rights.<sup>110</sup> However, removing the occupiers had become an impractical solution.<sup>111</sup> In the alternative, expropriation would have been an appropriate solution, but it was not within the Court's power to make such an order.<sup>112</sup> Consequently, the Court found that constitutional damages would be an appropriate remedy since it had the added advantage that the occupiers could remain on the land for the time being.<sup>113</sup> The Court explained that

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<sup>106</sup> *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) (*Modderklip*) paras 2-3. By the time the case was heard in the court *a quo* it was estimated that nearly 40 000 persons had occupied the land unlawfully.

<sup>107</sup> *Modderklip* paras 2-3. By the time the eviction order was granted the occupiers had established a more formal township with streets, numbered homes and fenced-off erven.

<sup>108</sup> *Modderklip* para 4-7. The sheriff estimated that to remove the occupiers with the help of a security company would cost R 1.8 Million. This amount exceeded the value of the property. Modderklip also unsuccessfully approached the police, the Minister of Safety and Security, the President, the Department of Agriculture and Land Affairs and the Department of Housing for assistance to enforce the order.

<sup>109</sup> *Modderklip* para 21.

<sup>110</sup> *Modderklip* para 31. The court expressed the view that Modderklip had not been treated equally as it had the burden to accommodate 40 000 people on its private property.

<sup>111</sup> *Modderklip* para 41. Modderklip did propose to the municipality that the property should be expropriated, but the municipality elected not to proceed.

<sup>112</sup> *Modderklip* para 41.

<sup>113</sup> *Modderklip* para 42.

this extraordinary remedy was under the circumstances the only way in which the interests of justice would be served.<sup>114</sup>

### 3.2.5 *Three categories of owners*

#### 3.2.5.1 Introduction

In the context of private inner-city evictions, one can roughly identify three types of landowners. Firstly, there are landowners who, as in *Olivia Road*, have allowed their structures to deteriorate, have failed to pay rates and taxes for some time, and who have subsequently attempted to abandon their properties.<sup>115</sup> In these instances eviction orders are usually sought by the local authority on the basis of health and safety concerns. Secondly, there are landowners, as in *Blue Moonlight*, who hold land for investment or development purposes and who have negligently allowed the premises to become unlawfully occupied in the interim, or who have purchased an already unlawfully occupied property. Finally, there are landowners, as in *Modderklip*, who for reasons beyond their control are burdened with the continuous unlawful occupation of their land, a state of affairs that may affect their section 25(1) rights. Subsequent paragraphs analyse whether the courts' decisions in these cases amounted to arbitrary interferences with the owners' property rights and, if not, whether other factors might have caused an unconstitutional deprivation. The constitutionality of the deprivation therefore comes into play only once a court has decided that a) it will grant the eviction order but postpone its implementation, or b) that it is not just and equitable to grant an eviction order at all. Once a court has reached a decision the resulting consequences for the landowners should be considered in the light of section 25(1).<sup>116</sup>

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<sup>114</sup> *Modderklip* paras 44-45. The Court ordered a damages enquiry to determine the nature and value of such an award within the framework of s 12 of the *Expropriation Act* 63 of 1975. This order was confirmed by the Constitutional Court, who held that the state had transferred its housing duties on a private landowner. The Court held that constitutional damages constituted a suitable remedy considering that the occupiers were a settled community and that *Modderklip* had repeatedly requested state assistance to no avail. See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

<sup>115</sup> See for instance *Changing Tides*.

<sup>116</sup> On a theoretical level, this approach finds support in Radin's property for personhood theory, which proposes a hierarchy of entitlements based on her distinction between personal and



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### 3.2.5.2 *Blue Moonlight* and *Modderklip*

By way of a comparison between *Modderklip* and *Blue Moonlight* and with reference to the *FNB* substantive arbitrariness test, the paragraphs below show that in some instances the continued unlawful occupation of landowners' properties as a result of the failure of the state to act or the suspension of an eviction order may amount to an arbitrary deprivation of property, but in other cases it may be constitutionally acceptable to permit the temporary unlawful occupation of private land. In this regard, it is argued that from a constitutional perspective there is a shortcoming in South African law in so far as it does not adequately protect landowners from being arbitrarily deprived of their property, and in particular their use entitlement where an eviction order cannot be granted or enforced.<sup>117</sup> There are also occasions where, as in *Olivia Road*, an expropriation order for social housing purposes would better serve the public interest since such an order would create more legal certainty and broaden the social housing base. The *FNB* analysis shows that in *Olivia Road*-type cases the law is lacking insofar as it does not reflect the public's interest in utilising abandoned buildings for social housing purposes. In *Blue Moonlight* and *Modderklip*, eviction orders were awarded, but the implementation of the respective orders was delayed or postponed. In both instances the courts also ordered constitutional damages to alleviate potentially disproportionate interferences with property rights, but this order was later set aside in the case of *Blue Moonlight*. In essence, it seems that the Supreme Court of Appeal in *Blue Moonlight*<sup>118</sup> came to the conclusion that the *Modderklip* landowner would have been arbitrarily deprived of his property but for the constitutional damages award. By contrast, the *Blue Moonlight* landowner

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fungible property. According to Radin, personal property – property closely connected to our personhood – should be more stringently protected than fungible property that is mostly owned for financial or economic reasons. The implication of this approach is that if two parties hold interests in the same property, one a personal interest (such as the unlawful occupiers' interest in the shelter provided by an inner-city structure) and the other a fungible interest (such as the landowner's investment interest in the occupied structure), the personal interest should probably override the fungible interest. Radin acknowledges that – as in the eviction context – personal property is not always owned by the persons who have come to rely on it for their survival. See Radin 1981 *Stan L Rev* 1015. For a critique of Radin's work refer to Schnably 1993 *Stan L Rev* 347-407.

<sup>117</sup> In the discussion below we argue that the deprivation in *Modderklip* was arbitrary because there was not sufficient reason for the deprivation. To soften the blow of the arbitrary deprivation, the Court granted compensation.

<sup>118</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight* 2011 4 SA 337 (SCA).

had a social responsibility to bear the unlawful occupation of its land – without compensation – until such time as the eviction order could be enforced.<sup>119</sup> This deprivation<sup>120</sup> was arguably in line with section 25(1).

FNB *requires of the courts to consider the complexity of the relationships involved in the dispute*. The following considerations would be relevant in the *Blue Moonlight* analysis: the occupiers lawfully occupied the property initially and continued to pay rent for some time; Blue Moonlight purchased the property knowing that it had to evict the occupiers before redeveloping the land and there was a delay on the part of Blue Moonlight in instituting eviction proceedings.<sup>121</sup> Under these circumstances, Blue Moonlight should have anticipated that it would not necessarily obtain an immediate eviction order.<sup>122</sup> In contrast, Modderklip was the victim of a massive land invasion and it actively pursued an eviction order to protect its property rights from the outset, but was unsuccessful because the state failed to support its efforts. Modderklip also approached different levels of state authority for assistance, to no avail. By the time Modderklip approached the Supreme Court of Appeal it had exhausted all its remedies.

FNB *directs the courts to consider the relationship between means (deprivation) and ends (the purpose of the deprivation)*. In addition, one must refer to the effect that the deprivation will have on the landowner and the relationship between the nature of the property and the extent and purpose of the deprivation. The purpose of the deprivation in *Blue Moonlight* was to protect the occupiers' section 26 rights, which were arguably upheld since the delay in eviction afforded the local authority time to show to the Court how it would accommodate the occupiers evicted from private

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<sup>119</sup> The landowner initiated eviction proceedings in May 2006 and obtained an eviction order in April 2012. See *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) para 1 and *Blue Moonlight* para 104. Therefore, the owner had to bear the occupation of its property for nearly 6 years.

<sup>120</sup> This deprivation was caused by the court's decision to enforce the eviction order only once it had found that it was just and equitable under the circumstances. Therefore, the source of the deprivation was the exercise of the court's discretion as authorised by s 4 of PIE.

<sup>121</sup> *Blue Moonlight* paras 8-10.

<sup>122</sup> In terms of Radin's property for personhood theory the *Blue Moonlight* occupiers had a personal interest in the property, which would at least temporarily have taken precedence over the landowner's fungible interest. The function of the court in this regard was to preserve the personal interest in the property until the occupiers could be accommodated elsewhere. See Radin 1981 *Stan L Rev* 957-1015.

land.<sup>123</sup> It was the Court's intention to compel the city to reconsider and restructure its existing resources and housing policies more actively. This measure was necessary to facilitate the dynamic involvement of the city in resolving the inner-city housing shortage. The delay in eviction may have had undesirable consequences – including financial repercussions – for Blue Moonlight, but these fungible interests warranted less protection than the occupiers' personal interests in the property.<sup>124</sup> This deprivation was extensive, but it restricted Blue Moonlight's rights only temporarily. The *Modderklip* deprivation may initially have been to uphold the occupiers' section 26(3) right, but it soon resulted in the indefinite outright transfer of government's duties under section 26(1) and (2) to a private landowner. This deprivation eradicated most if not all of Modderklip's ownership entitlements permanently as a result of the local authority's failure to give effect to the suspended eviction order.

*In terms of FNB the court must consider the extent of the deprivation with regard to the property.* Due to the sheer number of occupiers, the lack of suitable alternative accommodation to house the occupiers, the cost of enforcing the eviction order and the indifference of the state representatives, there was no practical way in which the *Modderklip* eviction order could ever have been enforced. In *Blue Moonlight* the landowner could easily evict the occupiers once the Court declared the eviction order enforceable. Given the significant purpose of the deprivation (protecting the interests of vulnerable and poor occupiers) and the circumstances under which Blue Moonlight purchased the property, this deprivation does not appear to be an excessive interference with property rights. *Modderklip*, by comparison, asserted its rights without delay and despite its best efforts could not enforce the eviction order. Moreover, the local authority rejected the possibility of expropriating the land, while

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<sup>123</sup> Alexander 2009 *Cornell L Rev* 745-820 argues that there are social obligations inherent in ownership. Alexander's argument is rooted in the Aristotelian notion that human beings will flourish if they belong to a group or community. According to Alexander, a landowner must give to his community that which its members need in order to flourish. In this regard, he explains that "[t]he major claim here, in short, is that our (and others') dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible". One social obligation relating to human flourishing is that the landowner may not use his property in a manner that is detrimental to the broader community.

<sup>124</sup> See the explanation in footnote 122.

the likelihood of selling the land to a third party – even at a below-market value – was probably rather slim.

*According to FNB there have to be more compelling reasons to justify an interference with property rights if the interference embraces all (and not just some) of the incidents of ownership or where the property is land.* Taking into account the centrality of the availability of land in the inner-city and the concomitant issue of homelessness in the post-apartheid context, the purpose fulfilled by the deprivation in *Blue Moonlight* was, under the circumstances, more important than the protection of the landowner's use entitlement.<sup>125</sup> By contrast, the *Modderklip* deprivation amounted to the appropriation of land in a manner that directly conflicted with the values enunciated by the Constitutional Court.<sup>126</sup>

*In line with FNB, and with reference to the considerations raised above, and in particular the nature and extent of the relevant deprivations, it is arguably safe to conclude that sufficient reason had to be established in Blue Moonlight and Modderklip with reference to a proportionality enquiry.* The interplay of factors in *Blue Moonlight* suggests that there was a proportional relationship between the deprivation (the temporary delay in eviction proceedings) and the purpose of the interference with property rights, namely to ensure that the occupiers would be treated with compassion and afforded time to find alternative accommodation.

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<sup>125</sup> In the South African context the landowner's social obligations should also be understood in the context of the constitutional matrix described in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 14-24. In a nutshell, this matrix requires of landowners and courts to be cognizant of the fact that the housing shortage and land hunger can at least partially be ascribed to apartheid-era injustices. In the constitutional era property rights will be protected from arbitrary interferences, but they will not always trump rights such as those embodied in s 26(1)-(3), that were previously disregarded under apartheid.

<sup>126</sup> In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 20-22 the court held that there are three features of the way that the Constitution addresses the relationship between land hunger, homelessness and property rights. Firstly, the *Constitution* advocates the progressive realisation of the right to housing and an orderly process of land reform. The *Constitution* does not allow the arbitrary confiscation of land by either the state or the landless. Secondly, s 26(3) does not prohibit the eviction of people if the eviction would result in the loss of a home. Thirdly, the courts are expected to formulate concrete and case-specific solutions, and the way in which the courts must "manage the process has, accordingly, been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission".

Therefore, one can conclude that there was sufficient reason for the deprivation, as required by section 25(1).

However, in the context of *Modderklip* there was a disproportionate relationship between the deprivation – the permanent seizure of land for informal housing purposes – and the purpose of the interference, namely upholding section 26(1) and (2) rights, a duty that should ultimately be borne by the state. Considering the extent of the deprivation, namely the indefinite mass invasion of private property and the fact that this deprivation was a result of the general failure of the state to fulfil its section 26 duties – one can conclude that there was insufficient reason for the limitation of Modderklip's property rights. The state's failure to give effect to the eviction order resulted in an arbitrary deprivation of Modderklip's property and would not have survived scrutiny under section 25(1). The only way in which the courts could restore the balance was by granting constitutional damages to soften the blow of an otherwise unconstitutional interference with property rights, until such time when the occupiers could either be removed or the property expropriated. This order served to bring an otherwise arbitrary deprivation of property in line with the *Constitution*.<sup>127</sup> Of course, the arbitrary deprivation in *Modderklip* was brought about by the state's inadequacy to protect Modderklip's property rights and not the decision of the court – the court ordered the eviction. The limits of the courts' power in rectifying arbitrary deprivations and consequently protecting owners' property rights are evident in this case. In *Blue Moonlight* the origin of the deprivation was the court's decision to grant a suspended eviction order, which was non-arbitrary.

*Blue Moonlight* and *Modderklip* show the pull between landowners' social obligations and property entitlements in the framework provided by section 25(1) of the

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<sup>127</sup> Van der Walt explains that the constitutional damages order in this case is comparable to the German equalisation payment. Equalisation payments are not compensation for the expropriation of property or delictual damages, but a payment of money to lessen the unequal burden imposed on ownership rights by the otherwise legitimate and lawful regulation of property. In essence, the equalisation payment alleviates the burden imposed by the statutory regulation of property and in so doing it prevents such regulation from being rendered excessive, unconstitutional and invalid. Importantly, equalisation payments differ from constitutional damages in that an equalisation amount is awarded in terms of specific authorising legislation. See specifically Van der Walt *Constitutional Property* 277-280; Van der Walt 1999 *SAPL* 288-290; Alexander *Global Debate* 120-12; and Hofman "Eigentumsgarantie" Rdn 40.

*Constitution. Blue Moonlight* illustrates that in the constitutional era new obligations may be imposed on landowners, that did not exist previously. Depending on the circumstances, the public interest may require that the landowner tolerate the temporary unlawful occupation of his property to enable the state to give effect to the occupiers' section 26 rights. It is the function of the court to determine when it may not be just and equitable to grant the eviction order at all or when it may be necessary to delay the order's implementation. The court has the authority to protect unlawful occupiers' interim housing interests, but it also has the power to intervene when an individual landowner is forced to bear a social burden that should arguably be borne by the public at large. This is usually done by means of an eviction order. However, *Modderklip* demonstrates that an eviction order will not always suffice to protect a landowner's property rights and that in these instances it may be necessary to find other mechanisms, such as constitutional damages or statutorily created equalisation payments to ensure that regulatory interferences with property rights do not fall foul of section 25(1).<sup>128</sup> Apart from *Modderklip*, there has been little indication of when a court would be willing to grant constitutional damages to protect property rights. There is a shortcoming in South African law insofar as it does not incorporate statutory measures designed to mitigate excessive losses caused by otherwise lawful regulatory action in terms of legitimate regulatory laws.<sup>129</sup> Development in this area of law is necessary to cater for the circumstances where it is not just and equitable to grant an eviction order, but where the continued occupation of private property will be substantively arbitrary and thus unconstitutional.

### 3.2.5.3 *Olivia Road*

*Olivia Road* differs from *Blue Moonlight* and *Modderklip* in that the landowner did not play a role in the eviction proceedings at all. The *Olivia Road* buildings were abandoned and in such a derelict state that the local authority deemed it necessary

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<sup>128</sup> Essentially, the court may elect to protect the landowner's property rights by way of a liability rule (the payment of constitutional damages) instead of a property rule (the eviction of the unlawful occupiers). See in this regard Calabresi and Melamed 1972 *Harv L Rev* 1089-1128.

to evict the unlawful occupiers on health and safety grounds. The court's decision to evict the occupiers was therefore warranted, since anything to the contrary would have overlooked the immediate threat of the unsafe buildings. In fact, it is difficult to imagine a more appropriate route that the court could have taken in this case. Nevertheless, this does not mean that the local authority could not have done more.

The facts in *Olivia Road* provide the ideal example of when the state should take positive measures to address the deterioration of inner-city buildings, while providing housing solutions for the homeless. Arguably, the local authority could have expropriated the buildings in terms of section 9(3) of the *Housing Act*, which empowers the local authority to expropriate land for housing purposes. What remains to be considered is the question of whether such an expropriation would be in the public interest and the amount of compensation that should be paid.

The seemingly harsh consequences of the expropriation should be viewed in the light of the ever-growing housing shortage prevalent in urban areas, the public's interest in the upgrading of decaying urban structures, and the general renewal of the inner city. The public has an interest in secure and healthy urban environments. On a theoretical level, the expropriation would highlight the principle that inner-city housing is a scarce resource and that the public interest is averse to protecting absentee landowners' property rights if their decaying buildings can be restored to form part of low-income housing stock.<sup>130</sup> This is exactly what the local authority should aim to accomplish, namely to protect scarce resources that are vital to individuals' livelihoods. In addition, the local authority's decision would also accommodate the occupiers in their current location, therefore side-stepping their permanent eviction and relocation. The provision of adequate long-term housing solutions to the desperately poor in areas that are vital to their livelihoods is undoubtedly in the public interest, because it gives effect to section 26(1) of the

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<sup>130</sup> Arguably, the ownership of an inner-city building is accompanied by a range of social obligations, including the duty to prevent the building from falling into a state of disrepair. These social obligations should be understood with reference to Alexander's social obligation norm. When exercising ownership entitlements a landowner has the duty to refrain from causing harm to his community, for instance by permitting a building to become a health and safety risk, or by allowing a structure to stand vacant if he has no intention to use the building in future and where it can be used for social housing purposes. See the explanation in footnote 127 above.

*Constitution*. The expropriation of the buildings has the potential to greatly improve the lives of the residents of the *Olivia Road* buildings or the recipients of accommodation in upgraded housing schemes, since there is a dire need of housing in the inner city.<sup>131</sup>

The housing shortage should be understood in the context of the existence in South Africa of vast socio-economic inequalities, acute poverty and landownership patterns that are inherently skewed by previous racial segregationist policies. It is therefore in the public interest to rectify past injustices and the previously dispossessed (such as the unlawful occupiers) should be on the receiving end of our constitutional transformation process in terms of which access to adequate housing is guaranteed. In the light of the nature of the properties (as said in the previous paragraph) and the profile of the occupiers, there are undeniably sufficient grounds to justify expropriations of this kind.

Finally, the landowner in *Olivia Road* attempted to abandon its properties to escape statutory responsibilities, such as paying rates and taxes, and the question remains whether compensation at below market value would be just and equitable. If the parties cannot agree on the amount of compensation, the court must calculate an amount that reflects an equitable balance between the public interest and the interests of those affected, while both the relevant circumstances and the factors in section 25(3) must be used to establish this balance. The factors are a) the current use of the property; b) the history of the acquisition and use of the property; c) the market value of the property; d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e) the purpose of the expropriation. In terms of section 12 of the *Expropriation Act*, the market value of the expropriated property is the primary standard used to calculate compensation, but the *Constitution* merely lists this factor as one of many that should be used to determine compensation. Even though market value should not be the core principle to establish compensation, some courts continue to focus on

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<sup>131</sup> The recipients of accommodation in social housing schemes have a personal interest in the properties that will be expropriated. With reference to Radin's property for personhood theory one may argue that these personal interests should trump the landowners' fungible interest in the property.



market value since it is the only easily quantifiable value.<sup>132</sup> The current use of the property can influence the amount of compensation, although not as a punitive measure to punish the owner for not using his property in a certain way.<sup>133</sup> If the purpose of the expropriation is land reform, some authors have argued that the compensation should be lower.<sup>134</sup>

Arguably, the compensation should in accordance with section 25(2)(b) and (3) of the *Constitution* reflect the fact that the properties have been abandoned and that the owner has shunned its social obligations arising from landownership. In particular, it would be necessary to take into account that there are unpaid rates and taxes in relation to the properties, that the buildings have become a public nuisance and that it will require extensive government investment before the structure may be used for housing purposes. In theory, the amount of the compensation paid should arguably mirror the fact that the public is disinclined to protect property rights on behalf of absentee landowners if these properties can be used to give effect to section 26 of the *Constitution*.

### ***3.3 A summary of the functions and powers of the state and courts in the inner-city housing context***

The paragraphs above drew a distinction between the interests of three types of landowners to show the instances where, in the eviction and housing context, it would be necessary to regulate property rights more extensively and the instances where the court would have to protect private property rights either by granting an eviction order (the property rule) or by making a constitutional damages award (the liability rule). The analysis above also demarcated the functions of the courts and the local authorities and the measures that they may take to counter the inner-city housing shortage. *Blue Moonlight* shows that it is within the court's power to delay the eviction of unlawful occupiers until it is just and equitable to enforce such an order. The purpose of this delay is to ensure that when the eviction takes place, it is done in accordance with the values of the *Constitution*. This delay also affords the

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<sup>132</sup> *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) par 19.

<sup>133</sup> Budlender "Constitutional Protection" 48, 59; Van der Walt *Constitutional Property* 512.

<sup>134</sup> See specifically Badenhorst 1998 *De Jure* 263.

local authorities time to find suitable alternative accommodation for the evicted occupiers. Unlike the courts, the local authorities have the statutory authority to create legal rights by expropriating decaying inner-city structures for low-income housing purposes. Section 9(3)(a) of the *Housing Act* makes provision for a municipality to expropriate land by notice in the *Provincial Gazette* if it is required for the purposes of a housing development. This provision enables the local authority to identify and take action against bad buildings. It is therefore not necessary for the legislature to enact specific legislation for this purpose.<sup>135</sup> Through this mechanism the state would be able to acquire housing stock and house the vulnerable without having to evict and rehouse the occupiers.<sup>136</sup> In the housing context, the local authority is primarily responsible for citizens' housing needs and the courts have recently reiterated this obligation. In terms of the *Housing Act*, local government should identify land for housing development and manage the actual land use and development.<sup>137</sup> The initiation of these types of expropriations therefore rests with the local authority. By exercising this power the local authority will also facilitate the gradual rebirth of the inner city and it will convey the message that there are certain social obligations inherent in ownership. These social obligations include the responsibility to ensure by meeting the standards set in legislation that buildings do not become unlawfully occupied or pose health and safety risks. In instances such as *Olivia Road*, the absentee landowner has the social obligation to submit to the public's interest when the local authority expropriates the building for housing purposes.

These measures can go a long way towards alleviating the inner-city housing shortage. The power of expropriation in particular has been under-utilised by the local authorities, perhaps because of financial restraints. The amount of compensation paid for the expropriation of *Olivia Road*-type properties should be offset by the outstanding rates and taxes and should reflect the fact that the landowner attempted to abandon the property. The expropriated properties can also be

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<sup>135</sup> The courts are generally not involved in the administrative action of the state when it decides to expropriate property. The courts would become involved only if the owner challenged the state's decision on the basis that it is unconstitutional.

<sup>136</sup> See s 2.3 above for the role of the local authority regarding its housing obligations.

<sup>137</sup> S 9(1)(a), 9(1)(c) and 9(1)(h).

transferred to third-party developers or social housing institutions, which may renovate the structures and make it available for social housing. Expropriation is a robust solution, and it may be necessary to refine the role that this power may play in the inner-city housing context in future. In this regard, it is imperative to consider how other jurisdictions have responded to both housing shortages and vacant inner-city buildings.

## 4 Comparative law

### 4.1 Dutch Leegstandwet

In terms of the Dutch criminal code<sup>138</sup> it is a crime (known as *huisvredebreuk*) to unlawfully enter and remain in a house, venue or stand used by someone else.<sup>139</sup> Despite this prohibition against squatting, for years homeless persons in the Netherlands have taken possession of vacant business and residential buildings for housing purposes.<sup>140</sup> During the 1960s<sup>141</sup> the tension that developed between homeless persons' housing needs and the fact that numerous buildings stood vacant gave rise to a number of politically-inspired squatting actions.<sup>142</sup> During this period the Netherlands experienced severe housing shortages<sup>143</sup> and squatting was therefore not only a political activity but a socio-economic activity as well, since most of the squatters were in fact in desperate need of housing.<sup>144</sup> On the other hand, the owners left their buildings vacant for speculation purposes but did not altogether

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<sup>138</sup> S 138 of the *Wetboek van Strafrecht*.

<sup>139</sup> Van der Walt 1992 *TSAR* 49. Dutch private law allows the owners to institute eviction proceedings against unlawful occupiers, but some owners have found it impossible to make use of civil proceedings as a result of the requirement of citation. Occupiers remain anonymous and consequently force the owners to make use of criminal proceedings. See also Van der Walt 1991 *Recht en Kritiek* 334.

<sup>140</sup> Priemus 2011 *Enhr Conference Paper* 1. This should not come as a surprise, since a housing shortage, combined with ample empty property is the ideal condition for squatting; Pruijt 2003 *Int J Urban Reg Res* 133.

<sup>141</sup> Currently squatting is illegal in the Netherlands; Pruijt 2013 *Urban Studies* 1114.

<sup>142</sup> The first squatting action took place in Amsterdam in 1964 when a student newspaper criticised the Amsterdam Municipal Policy regarding the vacancy of buildings that had to be demolished. The aim of the paper was to encourage students to occupy these buildings, which succeeded and led to further squatter movements organized by the squatters' cooperative housing agency; Priemus 2011 *Enhr Conference Paper* 1-2. See also Pruijt 2003 *Int J Urban Reg Res* 135.

<sup>143</sup> Pruijt 2003 *Int J Urban Reg Res* 138. During the early 1980s Amsterdam had a waiting list for low-income housing of nearly 50000 people

<sup>144</sup> Pruijt 2003 *Int J Urban Reg Res* 135.

abandon their properties. Abandonment was prevented by state regulation, while the condition of the occupied buildings remained decent.<sup>145</sup> In due course the courts became sympathetic towards the squatters and as a result of a number of decisions where the courts interpreted the requirement that the property must be used by another restrictively,<sup>146</sup> some *krakers*<sup>147</sup> of vacant buildings escaped criminal prosecution. A result of the conflict between landowners and *krakers* of vacant buildings was the enactment of the *Leegstandwet*.<sup>148</sup> It has been argued that the Act was founded on the idea that the socio-economically weak should be enabled to acquire a scarce primary resource, namely housing, specifically in the situation where the premises stood unjustly vacant.<sup>149</sup> It therefore aimed to protect a certain vulnerable group in society, indicating that the Act's point of departure was ethical.<sup>150</sup>

The way in which the Act operated and its direct consequences could be divided into three sections, namely a) all property owners were obliged to keep the state informed regarding the vacancy of buildings, while this information had to be logged into a vacancy register;<sup>151</sup> b) the state was compelled to claim vacant buildings and ensure that the buildings were put to use;<sup>152</sup> and c) there was a positive duty on the

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<sup>145</sup> Pruijt 2003 *Int J Urban Reg Res* 147. The state managed to prevent a general decay of buildings (and neighborhoods) by implementing controlled urban renewal programmes.

<sup>146</sup> In HR 2 februari 1971, 1971 *NJ* 1971, 385, the Hoge Raad held that the property must be in effective use in order to render the squatter's invasion and consequential occupation unlawful.

<sup>147</sup> Kraker is the Dutch phrase for squatter.

<sup>148</sup> Act 21 of May 1981. Van der Walt 1992 *TSAR* 50.

<sup>149</sup> In the Middelburg (Arr Rb Middelburg 1 October 1980 and 24 December 1980, *NJ* 1981, 374) decision the court held that even though the unauthorised invasion of private property amounts to an interference with the owner's entitlements, such an invasion is not necessarily unlawful. The reason was that the right to property is inherently restricted, which means that any interference with the right to property can be justified if the owner makes use of his rights in a socially irresponsible manner. An example is where the owner leaves his property vacant for extended periods of time without good reason while there are dire housing shortages. In such circumstances squatting can be perceived as lawful if it is carried out in a socially responsible manner. The point of departure is that owners can exercise their rights within the confines of the law, which also means that the protection of their rights might in certain circumstances be limited in the light of social concerns: Van der Walt 1991 337. It has been argued that the concept of property should be differentiated on the basis of the different social functions that property objects may have. Land, and specifically residential property, might therefore be subject to greater inherent restrictions and obligations, while the owner of vacant buildings might enjoy very limited protection against homeless squatters, especially if the owner left the buildings vacant for speculation purposes and if there is a housing shortage: Van der Walt 1991 *Recht en Kritiek* 338. See also Hoogenboom "Rechtsbeskerming" 57.

<sup>150</sup> Hoogenboom "Rechtsbeskerming" 50-51.

<sup>151</sup> Chap II, ss 5-6 of the Act.

<sup>152</sup> Chap III, ss 7-11.

state to exercise and improve control over vacant buildings by means of a simplified claims procedure.<sup>153</sup> The aim of the Act was to discourage owners from leaving their properties vacant, especially in areas where there were serious housing shortages,<sup>154</sup> although it also discouraged the unlawful invasion of registered vacant buildings.<sup>155</sup>

In essence, the Act provided that the owners of vacant buildings<sup>156</sup> had to register their properties with the local authority, who could claim those empty buildings and make them available to homeless persons on the basis of short-term leases.<sup>157</sup> It is therefore clear that the Act affected three parties, namely the local authority, the owner and the home-seeker.<sup>158</sup> The obligation to register the vacancy of the building rested on the owner, who had to report its vacancy within a month of its becoming vacant.<sup>159</sup> The advantage of registering the property was that unlawful occupiers would be prosecuted and evicted.<sup>160</sup> Registered buildings were therefore regulated strictly in the sense that they were safeguarded from *krakers*.<sup>161</sup>

The state's decision to claim a vacant building had to be directed at the owner, who could make objections against the proposed claim. The objections had to be taken into account by the state, although the state also took into account the interests of home-seekers and the remaining public interest in promoting an equal distribution of

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<sup>153</sup> Kleyn "Opening" 9-10.

<sup>154</sup> Van der Walt 1992 *TSAR* 50.

<sup>155</sup> Van der Walt 1991 *Recht en Kritiek* 336. Registered buildings enjoyed protection against unlawful invasion: Wemes "De Leegstand" 42.

<sup>156</sup> The vacancy of the building referred to the actual (feitlijke) vacancy: Besemer "Uitvoering" 27.

<sup>157</sup> Besemer "Uitvoering" 26; Van der Walt 1992 *TSAR* 50; Van der Walt 1991 *Recht en Kritiek* 336. The state therefore made the vacant properties available periodically.

<sup>158</sup> Hoogenboom "Rechtsbeskerming" 50.

<sup>159</sup> Besemer "Uitvoering" 27. Failure to register the property could lead to a punishable offence: 29. The maximum punishment was either (the then) *f* 25000 or four weeks in custody. If the owner failed to register the property, a home-seeker could report the vacant building and request that the state nominate him as tenant. The owner would still be prosecuted and if the owner did not accept the home-seeker as his new tenant, the state could still claim the property and make it available to the home-seeker. In such a case the property would be reported in the vacancy register and enjoy protection against *krakers*: Wemes "De Leegstand" 41-42.

<sup>160</sup> Van der Walt 1992 *TSAR* 50. The unlawful occupation of registered buildings was therefore a crime, although these unlawful occupiers could also be sued on the basis of civil proceedings without citation: Van der Walt 1991 *Recht en Kritiek* 336. The town mayor was obliged to ensure that the eviction took place, which was also in line with the overall goal of an effective distribution of residential space: Wemes "De Leegstand" 44.

<sup>161</sup> Registered buildings basically formed part of the distribution stock and if one of these buildings was unlawfully occupied the state could evict the *kraker* by relying on the *Woonruimtetwet* in order to make the premises available to a home-seeker: Wemes "De Leegstand" 43.

residential space.<sup>162</sup> A decision not to claim vacant property was the exception rather than the rule,<sup>163</sup> and once it was decided that the property should be claimed the fact had to be indicated on the register.<sup>164</sup> Properties could be removed from the register either when the owner reported that he/she would make use of the property, and the state approved this proposition, or when the property was in fact claimed by the state. Once the property had been claimed and the whole claims procedure had been finalized, the state had to identify an "urgent" home-seeker(s) and enable that person(s) to take occupation.<sup>165</sup> In terms of the Act, the legal relationship that was created among the owner, occupier and state was unclear, although the assumption was that a landlord-tenant relationship existed between the state and the occupiers, while the owner was absent from this agreement.<sup>166</sup> Nevertheless the owner was in consultation with the local authority regarding the temporary use of the property.<sup>167</sup> In addition, a number of municipalities bought the buildings that were being occupied by the squatters and consequently legalised the occupiers' occupation.<sup>168</sup> Most of the buildings were given to established housing associations, which concluded lease agreements with the squatters. Part of this legalisation process required negotiations between the squatters and the state,

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<sup>162</sup> Besemer "Uitvoering" 32-33. If the owner decided to alienate the property during the claims process, the claim would also bind the successor in title.

<sup>163</sup> In terms of Chap V of the Act, owners of vacant buildings could, in exceptional circumstances, escape the claims procedure if they could indicate that the property would be let on a short-term basis. The owner had to show that the property was in fact registered; that there was no other use for it; that it would be sufficiently occupied; and, if renovations were required, that such renovations would constitute a profound restoration. If the owner satisfied all the requirements he could apply for a permit allowing him to lease the property on a short-term basis, although not exceeding a maximum of three years. The maximum rent had to be determined by the local authority: Wemes "De Leegstand" 47. This allowance in terms of which the owner could lease his property was beneficial to both the home-seeker (the short-term tenant) and the owner. The home-seeker's position in acquiring housing could not be compromised as a result of the fact that he had entered into a short-term lease, while the owner's property was taken into occupation, remained occupied and was kept free of damage. In addition, the owner acquired the rental income while he could negotiate with prospective buyers: Wemes "De Leegstand" 48.

<sup>164</sup> Besemer "Uitvoering" 30. There had to be a good reason not to claim vacant property.

<sup>165</sup> Wemes "De Leegstand" 46. Communication between the owner of the vacant building and the chosen occupier generally did not take place before the whole procedure was completed.

<sup>166</sup> Hoogenboom "Rechtsbeskerming" 54-55.

<sup>167</sup> Besemer "Uitvoering" 28.

<sup>168</sup> The municipality of Amsterdam bought two hundred buildings that were unlawfully occupied: Pruijt 2003 *Int J Urban Reg Res* 139.

which often led to the state making repairs to some of the unlawfully occupied buildings to ensure that the buildings remained habitable.<sup>169</sup>

It had been argued that the Act introduced a positive duty on owners to use their private property, while the "reflexive effect" of this duty was to render the unlawful occupation of vacant buildings lawful.<sup>170</sup> The effect of the Act was to place a higher value on the use value of the property than the exchange value. During housing shortages the Act allowed self-help in the sense that homeless persons could identify unregistered vacant buildings and appropriate them for housing purposes. This also shows how the Act forced property owners to take responsibility and ensure that their property was put to use either by themselves or by the state.

#### **4.2 English law – Empty Dwelling Management Orders**

In English law, a local housing authority may acquire houses or buildings, which may be made suitable for housing purposes, either by agreement or compulsorily with the authorisation of the Secretary of State.<sup>171</sup> One of the main uses of the local authority's compulsory purchase power is to acquire land for housing development, empty properties to be made available for housing purposes, or dilapidated houses with a view to improving them as housing accommodation. Once acquired, the land or property is often disposed to Housing Associations or owner-occupiers, both

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<sup>169</sup> Pruijt 2003 *Int J Urban Reg Res* 139.

<sup>170</sup> Van der Walt 1992 *TSAR* 50. However, it was unlikely that the effect of the Act would be to create a subjective right to housing. See also De Vries, Schutte and Vranken *Eigendom* 88, where the authors argue that even though the Act placed an obligation on owners to either use or register their buildings, the Act did not create a right to housing. The Act did also not create a material right for squatters to take occupation of vacant buildings.

<sup>171</sup> S 17 of the *Housing Act* 1985. The latter are generally referred to as compulsory purchase orders (CPOs) and are similar to expropriations in South Africa. Compulsory purchase orders should be made only if doing so is in the public interest, and the authorising authority must be sure that the purpose of the CPO justifies the interference with human rights of those affected, including Art 1 of the First Protocol and Art 8 (in the case of a dwelling) of the *European Convention on Human Rights*. Each case should be considered on its own merits and the acquiring authority must indicate that it requires the land immediately to secure the purpose for which it was acquired. Specifically land should be acquired by the state only if the public benefit would undoubtedly outweigh the private loss: Office of the Deputy Prime Minister 2004 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/7691/191888](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7691/191888) paras 17-19 of Part 1.

forming part of the private sector.<sup>172</sup> The issue regarding empty homes was raised in May 2004 when the office of the Deputy Prime Minister published a Consultation Paper highlighting the problems associated with vacant buildings.<sup>173</sup> In terms of the paper an empty home is a wasted asset in the sense that the owner can receive an income from it by either selling or letting it, people are in need of housing, and the community has to bare the burdens created by empty dwellings.<sup>174</sup> The existing statutory powers that have generally been used by local authorities to ensure the re-occupation of empty dwellings are compulsory purchase orders<sup>175</sup> and enforced sales.<sup>176</sup> However, the paper indicated that these powers do not always provide an effective means of securing the re-use of empty dwellings, because they involve complicated legal procedures that are both time consuming and resource intensive for the local authority.<sup>177</sup> It was concluded that these powers may be over-prescriptive and that a change in ownership is not necessarily required to address the issue of empty dwellings.<sup>178</sup>

What followed was the enactment of the *Housing Act 2004*, and in April 2006 empty dwelling management orders (EDMOs) were introduced into the Act. In terms of Chapter 2 the local authority can make both interim and final EDMOs in respect of

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<sup>172</sup> S 18(2) of the *Housing Act 1985*; Office of the Deputy Prime Minister 2004 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/7691/191888](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7691/191888) para 4 of Appendix E. See also *Joyce v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2213 (Admin) paras 18-20.

<sup>173</sup> Office of the Deputy Prime Minister 2003 <http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/documents/housing/pdf/138826.pdf>. The private sector accounted for more than eighty per cent of the empty homes, while half of these homes had been vacant for more than six months.

<sup>174</sup> In 2010, 8.1 per cent of all households (roughly 1.75 million) were on local authority waiting lists for housing, while in 2012 it was estimated that there were 930 000 empty homes in the United Kingdom: Baker 2012 *Journal of Housing Law* 45.

<sup>175</sup> In terms of Annexure 7, the local authority should first aim to purchase the property from the owner by agreement. The compulsory purchase order may be exercised in terms of the empowering legislation only.

<sup>176</sup> Office of the Deputy Prime Minister 2003 <http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/documents/housing/pdf/138826.pdf> 21. Enforced sale is described in Annexure 7 of the paper.

<sup>177</sup> Office of the Deputy Prime Minister 2003 <http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/documents/housing/pdf/138826.pdf> 22. A compulsory purchase order requires a change in ownership and can therefore take up to two years to be finalised.

<sup>178</sup> Office of the Deputy Prime Minister 2003 <http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/documents/housing/pdf/138826.pdf> 50.



certain dwellings.<sup>179</sup> An interim EDMO enables the local authority, with the consent of the proprietor,<sup>180</sup> to take certain steps to ensure that a dwelling becomes and continues to be occupied, while a final EDMO merely secures the interim order.<sup>181</sup> Interim EDMOs can be made in relation to dwellings that are wholly unoccupied, which means that no part is occupied either lawfully or unlawfully. The Act also requires that the local authority must acquire authorization from a residential property tribunal to make an interim EDMO.<sup>182</sup> In essence, an EDMO gives the local authority the right to possess and manage the property, provided that it has acquired authorization from the tribunal.<sup>183</sup> The tribunal must ensure that the application does not fall within one of the exceptions<sup>184</sup> and that all the requirements are met, namely that a) the dwelling has been wholly unoccupied for at least six months; b) there is no reasonable prospect that the dwelling will become occupied in the near future; c) the award of an interim EDMO will result in a reasonable prospect that the dwelling will become occupied; and d) the local authority has complied with section 133(3) of the Act.<sup>185</sup> The abovementioned requirements were amended in 2011 to increase the period that the property had to be empty from six months to two years, and to oblige the local authority to notify the proprietor three months before making an application for an interim EDMO. These amendments aim

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<sup>179</sup> A "dwelling" is defined as either a building or part of a building intended to be occupied as a separate dwelling; s 132(4) of the *Housing Act 2004*.

<sup>180</sup> The "proprietor" is either the person who has the freehold estate in the dwelling or, if the dwelling is let under one or more leases with an unexpired term of seven years or more, the lessee with the shortest unexpired term. One should note that the proprietor cannot be a public sector body; s 133(2) of the Act.

<sup>181</sup> S 132(2)-(3) of the *Housing Act 2004*.

<sup>182</sup> S 133(1)-(2) of the *Housing Act 2004*. This application may include another application in terms of paragraph 22 of Schedule 7 of the Act determining a lease or licence of the dwelling; s 133(6) of the *Housing Act 2004*.

<sup>183</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 490.

<sup>184</sup> The Secretary of State made the *Housing (Empty Dwelling Management Orders) (Prescribed Exceptions and Requirements)* (England) Order 2006, which came into force on 6 April 2006. The following are some of the dwellings that are excluded: a) a dwelling that has been occupied principally by the proprietor and is unoccupied because he is temporarily resident elsewhere, he is either receiving or providing personal care, or he is serving in the armed forces; b) a dwelling used as a holiday home; c) a dwelling that is on the market for sale or letting; d) a dwelling that is usually occupied by the employee of the proprietor; and e) a dwelling that is mortgaged where the mortgagee is in possession of the dwelling.

<sup>185</sup> S 134(1)-(2) of the *Housing Act 2004*.

to balance the rights of the owners with the interests of the community more carefully.<sup>186</sup>

Once an interim EDMO is in force, the local authority must ensure that the dwelling becomes and continues to be occupied, while they should also manage the dwelling, pending the making of a final EDMO.<sup>187</sup> At this stage, the authority has the right to take possession of the dwelling; it can do anything with the dwelling that the proprietor would be able to do and may create an interest in the dwelling which has all the incidents of a leasehold.<sup>188</sup> During an interim EDMO, the proprietor is not entitled to rent or any payments made by the occupiers, may not exercise any powers with respect to the management of the dwelling, and may not create any interests in respect of the dwelling.<sup>189</sup>

An interim EDMO is valid for only twelve months,<sup>190</sup> while a final EDMO lasts for seven years.<sup>191</sup> If the local authority concludes that there are no further steps that they can take to secure that the dwelling becomes occupied, the interim EDMO will either be revoked or replaced by a final EDMO.<sup>192</sup> It will likely be replaced by a final EDMO if the local authority considers such an order necessary to secure occupation. A final EDMO therefore does not require the approval of the tribunal.<sup>193</sup> The local authority may also make a final EDMO if the dwelling remains unoccupied despite their efforts to secure occupation.<sup>194</sup> This means that the local authority will take all the necessary steps to come to an agreement with the owner that the property should be brought back into use. However, if the owner is uncooperative, an interim EDMO may be revoked and replaced with a final EDMO. Once the local authority has

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<sup>186</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 490. The amendments were set in a November 2011 Report by the Department of Communities and Local Government.

<sup>187</sup> S 135(1)-(3) of the Act.

<sup>188</sup> Para 2 of Schedule 7 of the *Housing Act* 2004. The authority can also create a license or apply for an order from the tribunal determining a license or leasehold.

<sup>189</sup> Para 4 of Schedule 7 of the *Housing Act* 2004. The same principles apply in relation to final EDMOs: para 12 of Schedule 7 of the *Housing Act* 2004.

<sup>190</sup> Para 1 of Schedule 7 of the *Housing Act* 2004.

<sup>191</sup> Para 9 of of Schedule 7 of the *Housing Act* 2004; Pascoe 2012 *Conveyancer and Property Lawyer* 490. A final EDMO is considered a local land charge and the authority can apply to have it registered with the Chief Land Registrar: para 10 of Schedule 7 of the *Housing Act* 2004.

<sup>192</sup> S 135(4) of the Act.

<sup>193</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 490.

<sup>194</sup> S 136(1) of the Act. S 136(2) is similar to s 136(1), although it regulates the making of a new final EDMO to replace a final EDMO.

decided to make a final EDMO, it no longer requires permission from the owner to place a tenant in the property.<sup>195</sup> The authority may take possession of the dwelling and create an interest, similar to a leasehold, in the property or a right, similar to a licence, to occupy part of the dwelling.<sup>196</sup> The local authority may decide on a below-market rent, provided that the rent covers the maintenance costs, while the owner is entitled to the balance. The owner is entitled to sell the property while an EDMO is in force, although the tenants' tenure rights will be protected, and the local authority will refuse to revoke the EDMO if the owner owes anything to the authority.<sup>197</sup>

The local authority must consider the interests of the community and the effect that the final EDMO will have on the rights of both the proprietor and third parties when considering the making of a final EDMO. A final EDMO must contain a management scheme explaining how the local authority will carry out its duties and manage the property.<sup>198</sup>

The EDMO regime mandates local authorities to undertake the management of private property that has been left empty for more than six (now twelve) months and make it available for housing purposes to social tenants. The underlying relationship between the state and home-seekers is therefore a landlord-tenant relationship, while the state also has to take responsibility for furniture, fittings and the required fixtures.<sup>199</sup> It has been argued that EDMOs are closer to a type of confiscation for social utility purposes, rather than regulation. These interferences with owners' property rights can be justified on the basis that they reflect the socio-economic consequences of negligent private owners "who fail to carry out their basic stewardship responsibilities in respect of land, thus providing a signal to the landowner of the potential danger that the land could become economically and physically sterile."<sup>200</sup> The EDMO regime affirms the state as the arbiter of limited

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<sup>195</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 490.

<sup>196</sup> Para 10 of Schedule 7 of the *Housing Act* 2004. The authority may also apply to the tribunal for an order determining a licence or lease. This is done in terms of para 22 of Schedule 7 of the *Housing Act* 2004.

<sup>197</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 490.

<sup>198</sup> See para 13 of Schedule 7 of the *Housing Act* 2004 for the full list of compulsory and optional inclusions in such a management scheme.

<sup>199</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 489.

<sup>200</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 489.

resources, while private owners are portrayed as merely recipients of their property rights. This means that their property rights can be regulated by the state with greater ease.<sup>201</sup>

## 5 Conclusion

The direction that the courts have recently taken in eviction disputes is to grant suspended eviction (and consequential relocation) orders, while forcing the state to provide emergency housing alternatives on an interim basis. These orders are generally intended to protect the most vulnerable from being rendered homeless, although they indirectly also suggest that landowners' rights would be unjustifiably restricted in the absence of such an order. The constitutional analysis of *Blue Moonlight*, *Modderklip* and *Olivia Road* shows that each case will have to be decided with reference to the relevant circumstances (specifically pertaining to the parties involved) and that in some instances an eviction order may fail to provide a sufficient solution from a section 26(1) and 25(1) perspective. However, any decision that effectively results in the indefinite seizure of land for housing purposes in conflict with section 25(1) (such as in *Modderklip*) should be avoided. In this regard there may be instances where an eviction order cannot be granted or enforced and where it may be necessary to protect property rights by way of a liability rule (constitutional damages or an equalization payment) instead of a property rule (an enforceable eviction order).

The constitutional analysis of *Blue Moonlight* in particular illustrates the courts' contribution to creating access to housing for indigent persons, but it also clearly shows the limits of the courts' power in creating adequate remedies for difficult cases, while pointing towards the duty of the state to step in and provide long-term solutions. This could be done by means of existing mechanisms, including its power to expropriate property for housing purposes,<sup>202</sup> or the creation of new statutory measures.

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<sup>201</sup> Pascoe 2012 *Conveyancer and Property Lawyer* 489.

<sup>202</sup> The *Property Valuation Bill* GN 1085 in GG 36993 of 1 November 2013 streamlines the valuation process in instances where a state organ intends to purchase land for land reform or any other

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The legislatures in both the Netherlands and England have responded to high vacancy rates amidst housing shortages by empowering the state to take acquisition of these buildings and make them available to home-seekers. These laws affected only the owners' use rights, although the extent of the deprivations in both instances was severe when considering the duration thereof and the fact that no form of damages or compensation was due to the affected landowners. Surely part of the purpose of these laws was to address housing shortages, while the real intention underlying these laws was to bring to book negligent landowners who left their properties vacant for socially unjust reasons. In comparison, the eradication of the current South African housing shortage that is experienced by the most vulnerable and poor must be a state priority and the state should employ all necessary means to give content to section 26(1) of the *Constitution*. Unlawfully occupied inner-city buildings that are in a derelict state are the ideal buildings for the state to expropriate for the following reasons: a) the state would acquire the buildings as landowner, take physical control thereof and consequently be able to upgrade the buildings for future housing purposes; b) the permanent eviction and relocation of the occupiers would be side-stepped; c) the occupiers would eventually (after the buildings have been upgraded) continue living where they established their social circles and in close proximity to their place of work; and d) the compensation for the expropriation would be minimal in the light of the fact that the owners abandoned both their buildings and their municipal rates and taxes responsibilities. Evidently, the state would have to invest state funds to upgrade these buildings, which is a foreseen expenditure in the light of its overall housing obligation. The difference is that the state would now allocate funds to increase its housing stock in the inner cities, where individuals clearly need to live, instead of building free-standing houses

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purpose. This bill read with the Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment of the Office of the Valuer-General as 18 October 2012 (Department of Rural Development and Land Reform 2012 <http://www.ruraldevelopment.gov.za/legislation-and-policies/file/1368>) reiterates that the willing-buyer-willing-seller principle has in some instances posed an obstacle to the land reform process and it suggests criteria for identifying and valuing properties for land reform. In particular, the policy emphasises that government should make greater use of its expropriation powers in the land reform context and that compensation for expropriated properties will be determined with reference to the factors set out in section 25(3) of the *Constitution*. It is desirable that government should adopt a similar approach in respect of vacant and decaying urban structures that could be used to alleviate the housing shortage.

outside the parameters of the city. Of course, both well-maintained and deteriorated buildings that have been left vacant for socially unjust reasons should also come under the radar of the state as possible housing solutions, although the state should carefully scrutinise each case to determine if it would be constitutionally permissible to expropriate the property.

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**List of abbreviations**

Cornell L Rev

Cornell Law Review

EDMO

Empty Dwelling Management Orders

Harv L Rev

Harvard Law Review

Int J Urban Reg Res	International Journal of Urban and Regional Research
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
SALJ	South African Law Journal
SAPL	Southern African Public Law
Stan L Rev	Stanford Law Review
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg



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**UNLAWFUL OCCUPATION OF INNER-CITY BUILDINGS: A  
CONSTITUTIONAL ANALYSIS OF THE RIGHTS AND OBLIGATIONS  
INVOLVED**

**J STRYDOM\***  
**S VILJOEN (MAASS)\*\***

**SUMMARY**

The unlawful occupation of inner-city buildings in South Africa has led to a number of legal disputes between vulnerable occupiers and individual landowners that highlight the conflict between individuals' constitutional right not to be evicted in an arbitrary manner and property owners' constitutional right not to be deprived of property arbitrarily. The cause of this tension is a shortage of affordable housing options for low-income households in the inner cities, a fact which shows that the state is evidently struggling to give effect to its housing obligation embodied in section 26(1) and (2) of the *Constitution*. In the majority of cases the courts assume that any interference with private landowners' rights beyond a temporary nature would be unjustifiable, but they do this without undertaking a proper constitutional analysis to determine whether a further limitation of the individual landowner's property rights might be justifiable and non-arbitrary in the circumstances of each case.

In general the courts can allow, suspend or refuse the eviction of unlawful occupiers, provided that the order does not amount to an arbitrary deprivation of property. Nevertheless, in some instances the arbitrary deprivation of property is unavoidable, despite the court's best efforts to protect property entitlements. These eviction cases

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show the limits of the courts' powers both to provide adequate solutions to protect owners' property rights and to give effect to the constitutional housing provision.

In the light of three eviction cases, namely *Blue Moonlight*, *Modderklip* and *Olivia Road*, this article explains the role of the court and the local authority, together with the entitlements and social obligations of inner-city landowners within the framework of the property clause, in order to analyse the constitutionality of the courts' decisions and to suggest ways in which the inner-city housing shortage may be addressed more effectively. This article also considers how two foreign jurisdictions, namely England and the Netherlands, have managed the precarious relationship between urban landowners – who often allow buildings to decay and stand vacant – and the homeless. These jurisdictions provide innovative alternatives to the expropriation of the ownership of private inner-city properties for housing purposes. Similar measures, tailored to accommodate the South African constitutional, economic and socio-economic landscape, may be a welcome addition to the existing statutory powers of the local authorities tasked with combatting homelessness in urban areas.

**KEYWORDS:** constitutional property; deprivation; expropriation; housing; land law; redistribution; comparative law.