Reflecting on Evictions and Unlawful Occupation of Land in South Africa: Where Do Some Gaps Still Remain?

ZT Boggenpoel* and S Mahomedy**

Online ISSN
1727-3781

P·E·R
Pioneer in peer-reviewed, open access online law publications

Author

Zsa-Zsa T Boggenpoel
Sameera Mahomedy

Affiliation

Stellenbosch University
University of Witwatersrand
South Africa

Email

zsazsa@sun.ac.za
sameera.mahomedy@wits.ac.za

Date Submitted

4 September 2022

Date Revised

23 August 2023

Date Accepted

23 August 2023

Date Published

19 January 2024

Editor Prof G Viljoen

How to cite this article

Boggenpoel ZT and Mahomedy S "Reflecting on Evictions and Unlawful Occupation of Land in South Africa: Where Do Some Gaps Still Remain?" *PER / PELJ* 2023(26) - DOI http://dx.doi.org/10.17159/1727-3781/2023/v26i0a14687

DOI
http://dx.doi.org/10.17159/1727-3781/2023/v26i0a14687

Abstract

The issue of unlawful occupation and homelessness has been a very prominent topic for many decades. While our approach to evictions and unlawful occupation has clearly shifted from a draconian approach under the *Prevention of Illegal Squatting Act* 51 of 1951 (hereafter PISA) to an approach that focusses on human rights under the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (hereafter PIE), there are still various aspects that potentially fall short in protecting the rights of the various stakeholders involved in these disputes. In particular, this paper focusses on three areas where PIE potentially falls short. In this regard we examine cases of the impossibility of eviction orders, our current understanding of the notion of "home", and whether or not PIE applies to both occupied and unoccupied structures. We also briefly explore issues relating to the non-implementation of PIE, especially in relation to the government's goal of preventing unlawful occupation. Central to these discussions is whether our current approach is sufficient and in line with constitutional obligations or whether we need to rethink our approaches to ensure that we do not undo the progress made since apartheid.

Keywords

Evictions; unlawful occupation; PIE.

.....

1 Introduction

On 11 March 2020 the World Health Organisation declared Covid-19 a global pandemic and many jurisdictions, including South Africa, proceeded to put mechanisms in place to manage the effects of the disease.[1] Pandemics of this nature tend to show the stark inequality that exists in any country.[2] In South Africa this was certainly no different and in fact Covid-19 has provided the impetus for us to reflect on various fault lines and cracks in the system, including the system that purports to regulate property. In the context of this contribution, we will argue that Covid-19 has made us rethink the sustainability of laws regulating evictions and the unlawful occupation of land.[3] By way of various examples of cases decided on eviction and the unlawful occupation of land, especially during Covid-19 but not limited thereto, we will highlight some of the issues that persist in this area of the law.[4] In particular we draw on three examples to make the argument that it

* Zsa-Zsa Temmers Boggenpoel. BCom LLB LLD (US). Professor in Private Law, Stellenbosch University, South Africa. Email: zsazsa@sun.ac.za. ORCiD: https://orcid.org/0000-0001-7816-3393.

** Sameera Mahomedy. LLB LLM LLD (US). Senior researcher in law and policy, SAMRC/Wits Centre for Health Economics and Decision Science – PRICELESS SA University of Witwatersrand, South Africa. Email: Sameera.mahomedy@wits.ac.za. ORCiD: https://orcid.org/my-orcid?orcid=0000-0002-8810-3834. The financial assistance of the NRF is hereby acknowledged. Opinions expressed are those of the authors and are not attributable to the NRF.

1 President Cyril Ramaphosa declared a National State of Disaster on 15 March 2020 due to the outbreak of Covid-19. Opting for the recognition of Covid-19 as a state of disaster meant that the Minister of Cooperative Governance and Traditional Affairs, Dr Nkosazana Dhlamini Zuma, could make regulations in terms of the *Disaster Management Act* 57 of 2002 to manage the pandemic. Consequently, the South African government's response to Covid-19 was to issue numerous regulations and guidelines (or directions) at five different stages or levels, all impacting on various rights that citizens were ordinarily used to, including property rights. For a full overview of the list of regulations and guidelines issued by the South African government, see Government of the Republic of South Africa 2019 https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19.

2 See e.g. Etienne 2022 *Nature Medicine* 17; De Groot and Lemanski 2021 *Environment and Urbanization* 255-272; Rochelle and Gordon 2021 *Gender, Work and Organization* 795-806; Brandon and Kobayashi 2020 *Dialogues in Human Geography* 217-220.

3 This is particularly important in the light of the growing impatience in relation to the slow pace of land reform. See e.g. Xaba "South African Land Question" 79-99 in relation to the increase in service delivery protests; Ngam 2021 *African Sociological Review* 131-152 in relation to the recent looting; Wenzel 2000 *Modern Fiction Studies* 90-113 in relation to farm murders.

4 It should be noted at the outset that this area of the law was not unproblematic before Covid-19 arrived on South African shores. However, the pandemic exacerbated the problems in this context considerably as the tension between the protection of property rights and the eviction of unlawful occupiers was heightened as a result of the call to "stay at home", which underlay the very premise behind the Covid-19

is necessary to rethink some aspects of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (hereafter PIE).[5] This is because the piece of legislation as it is may not be sufficient to give adequate effect to sections 26(3) and/or 25 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution). In making this argument we intend to draw on various court decisions that have given guidance on the meaning of sections 26(3) and 25. These judgments show three instances where PIE may need to be amended. It is important to reflect on whether a piece of legislation with very specific goals and ideals[6] is in fact living up to the task that the legislature has set. It is in this context that we consider whether PIE is as effective as it could be in preventing illegal evictions *and* preventing the unlawful occupation of land, as its name suggests.

Reflecting on the efficacy of PIE is important. South Africa is purportedly engaged in "a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction".[7] But, what does this mean, and how far have we come with the project of transformative constitutionalism in the context of evictions and the unlawful occupation of land? Moreover, what has this project of transformative constitutionalism meant to the endeavour to ensure that evictions take place in a humane and dignified manner, and has a concerted effort been made to regulate the unlawful occupation of land without trampling on human rights?[8] The underlying hypothesis of this contribution is that if we are truly committed to a constitutional democracy that is transformative and is based on human dignity, equality and freedom, we need to take note of some loopholes in PIE that threaten to uphold power relationships that are at odds with the ethos of our Constitution.[9] To prove

---

regulations. In addition, it is important to highlight the multifaceted nature of the issues relating to evictions and PIE. It should be mentioned that this contribution cannot cover all the gaps, but will aim to provide a starting point for broader discussion.

5 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE).

6 See the Preamble of PIE, which indicates that it was enacted to give effect to ss 26(3) and 25 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution).

7 See Klare 1998 *SAJHR* 150. Also see Kennedy 1976 *Harv L Rev* 1713-1724; Botha 2000 *THRHR* 567; Van der Walt 2006 *Fundamina* 1-47. For a really interesting critique of the notion of transformative constitutionalism, see Sibanda 2020 *LLD* 384-412.

8 Kennedy 1976 *Harv L Rev* 1713-1724; Botha 2000 *THRHR* 567; Van der Walt 2006 *Fundamina* 1-47.

9 Transformation of the law more specifically, and transformation of society generally, are imperative and must be foregrounded. However, it is not always easy to determine what such transformation should look like. Should transformation of the law be centred on the notion of justice? And, if so, what do justice and/or

this premise we will evaluate three scenarios or examples that show various ambiguities in the application, interpretation and/or implementation of PIE. These ambiguities in our view result in the Act being ill-equipped to meet its goals of giving effect to sections 26(3) and/or 25. PIE is silent in all three examples and does not adequately provide clarity on how to solve the issues at hand, which results in courts having to find *ad hoc* solutions to particular problems. While this may not be problematic in all cases, as remedies may be provided on *ad hoc* basis, it may result in hierarchies being upheld and/or constitutional rights being violated in some of these instances. It is here that we hope to shed some light.

The contribution will begin in part 2 by first setting out a brief background to the phenomena of evictions and the unlawful occupation of land in South Africa. This is done as a basis for outlining the context for the enactment of PIE with emphasis on the specific goal that the legislation was intended to achieve. The article then turns to reflect on the three examples where we argue that PIE potentially falls short of its obligation to give effect either to the section 26(3) right not to be arbitrarily deprived of one's home on the one hand, and/or the section 25(1) constitutional right to property, on the other. Throughout the discussion of the three examples in parts 3-6, we analyse whether there are key pronouncements in court cases on the interpretation of PIE and/or sections 26(3) and 25 of the Constitution. It will become clear from the discussion that the courts have had to be creative to account for the shortfall(s) in PIE. The three examples (together with the guidance provided by the courts) will set the platform for a critical investigation into whether PIE may need to be amended if it is to adequately meet its goals, or whether the *ad hoc* remedies that were created in specific

transformation mean in this context? If it is not centred on justice, what should transformation of the law look like? What part of the law should be kept and what part must go, and why? In addition, and very crucially, have we seen transformation take place in line with the ethos of the Constitution? See, for instance, Froneman 2005 *Stell LR* 3-20; Zitzke 2018 *SAJHR* 492-516; Davis 2018 *SAJHR* 359-374; Albertyn 2018 *SAJHR* 441-468. Transformation is a notoriously difficult concept to unpack. As difficult as transformation is to understand, so too the notion of justice is especially complex. See, for instance, Minow 2015 *CLR* 1615-1646; Boudreaux 2010 *Economic Affairs* 13-20; Van der Walt 2008 *Stell LR* 325-346; Arbour 2007 *New York University Journal of Law and Politics* 1-28; Mostert 2002 *SALJ* 400-428. See further Kennedy 1976 *Harv L Rev* 1713-1724; Botha 2000 *THRHR* 567; Van der Walt 2006 *Fundamina* 1-47. For an interesting recent account of the potential barriers to interpreting s 25 in a transformative manner, see Dugard 2019 *CCR* 135-160, where Dugard asserts that s 25 arguably sets the legal framework (and in fact makes it mandatory) to pursue land reform in a transformative manner. However, judicial interpretation of the extant legal framework (in s 25) will also have to play its part in ensuring that there are no barriers to transformation in this context. In this regard, Dugard and Seme make the same (type of) argument in their analysis of what they call a "pro-status quo approach" as opposed to a "transformative approach" in the context of the court's interpreting s 25 in restitution and expropriation cases. See Dugard and Seme 2018 *SAJHR* 35.

instances are sufficient to give effect to sections 26(3) and 25 as PIE was initially intended to do. In the final analysis the article will conclude with some thoughts about the way forward for evictions and the unlawful occupation of land in South Africa. In this regard we are particularly interested in determining what these conclusions potentially tell us about how far we have come in our constitutional democracy in the context of evictions and the unlawful occupation of land. The hope is to reflect on these court decisions that have assisted in framing or guiding the interpretation of sections 26(3) and 25(1) of the Constitution, especially where PIE falls short. In our view, this would be valuable in determining the extent to which PIE may need to be amended, or whether courts have done enough to ensure that constitutional rights are adequately protected.

2 Setting the scene: the constitutional approach to evictions

The Preamble of the South African Constitution states unequivocally that we, the people of South Africa, recognise the injustices of our past and strive towards a society based on democratic values, social justice and fundamental human rights.[10] This unequivocal commitment is necessary because in South Africa we are mostly still fighting the after-effects of a colonial and/or apartheid system that has ensured a legacy of oppression, inequality, injustice, poverty and marginalisation.[11] There is arguably no better place to see that than in the context of evictions and the unlawful occupation of land. Here, the tension between the protection of extant property rights and the plight of those without secure rights to land is increasingly evident.

The law regulating evictions and the unlawful occupation of land has always been difficult to navigate in South Africa. Evictions are a particularly sensitive issue in the light of the history of forced removals and demolitions under apartheid.[12] In the pre-constitutional period evictions mostly[13] took place in terms of the *Prevention of Illegal Squatting Act* (hereafter PISA),[14] which sought to criminalise, amongst other things, the unlawful occupation of land. Evictions were essentially politically and ideologically charged and were specifically aimed at furthering the segregation plans of apartheid by expelling so-called "squatters" from land, using criminal proceedings. The underlying motive was to forcibly remove black people from land and

10 Preamble of the Constitution.
11 Van der Walt 2006 *Fundamina* 4.
12 Pienaar *Land Reform* 662-667; Muller 2013 *Fundamina* 367-396; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 8-13.
13 There were clearly other pieces of legislation that were also used to ensure forced relocations. See Pienaar *Land Reform* 664.
14 *Prevention of Illegal Squatting Act* 51 of 1951.

relocate them to racially designated areas. The aim of evictions in the pre-constitutional period was therefore to ensure that the matter of unlawful occupation was resolved as quickly as possible. This was regardless of how long the occupiers had spent on the land and whether they considered it their home. Considerations other than ownership and the unlawful occupation of land were therefore largely irrelevant in dealing with evictions in the pre-constitutional period.

The idea that owners are entitled to possession unless a valid defence could actually be raised by the occupier essentially formed part of Roman-Dutch law and was incorporated into South African law.[15] It is the basis upon which the common-law remedy of the *rei vindicatio* ordinarily allowed an owner the right to evict unlawful occupiers from immovable property, without taking the circumstances of such an occupier into account.[16] Van der Walt explains this situation as follows:

> [T]he protection afforded by this [vindicatory] action is very strong, as it is based on the 'normality assumption' that the owner is entitled to exclusive possession of his or her property – this is what is considered the 'normal state of affairs', and what will most likely be upheld in the absence of good reason for not doing so. Any defence has to be raised and proved by the defendant as an exception to this rule. The 'normality assumption' that the owner is entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of the Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law.[17]

This strong common-law position was very often abused to further apartheid laws by exploiting the weak position of black people through various legislative interventions, thus making it easier to evict and remove people with absolutely no regard for any of their rights.[18] This brief history, albeit only partial and therefore not complete, is sufficient to highlight one important point, which is that section 26(3) of the final Constitution was enacted to serve as a break from this way of dealing with evictions in the constitutional dispensation. The inhumane and undignified treatment of those evicted under the apartheid regime was prohibited and PIE was enacted to prevent illegal evictions.

---

15 *Chetty v Naidoo* 1974 3 SA 13 (A). Also see Van der Walt *Property in the Margins* 53-54.

16 See Van der Walt 2002 *TSAR* 254-289, where Van der Walt discusses the nature of the remedy in the context of the use thereof in eviction cases. He specifically looks at the influence of land reform legislation on the owner's ability to use the *rei vindicatio* in the light of the statutory measures enacted in terms of s 26(3) of the Constitution.

17 Van der Walt 2002 *TSAR* 257-258.

18 It is on this basis that the use of the *rei vindicatio* as the vindicatory remedy to restore ownership of immovable property (thereby ensuring eviction) has become impossible in the new constitutional dispensation in the light of PIE. See s 4(1) of PIE.

The landscape therefore changed considerably when PIE commenced.[19] PIE seeks to give effect to section 26(3) of the Constitution, which makes provision for the right *not* to have your home or shelter demolished without a court order. Such an order may be granted only after all relevant circumstances had been considered.[20] Moreover, an eviction order must be just and equitable.[21] Interestingly, in contrast to the criminalisation of the unlawful occupation of land in terms of PISA, section 8(3) of PIE actually makes it a criminal offence to evict someone without a court order. Therefore, a significant contrast exists between the constitutional period and the pre-constitutional era as far as evictions are concerned. During the pre-constitutional era there was a focus on criminalising squatting or the unlawful occupation of land. However, in the constitutional era the focus is essentially on criminalising illegal evictions, with the emphasis being on the need to ensure that evictions comply with the necessary substantive and procedural safeguards. Very importantly in this regard, this does not mean that evictions can never be granted. In fact, it should be remembered that PIE was also enacted to give effect to section 25(1) of the Constitution, protecting the right not to be arbitrarily deprived of property. Ensuring that a balance is struck between sections 25(1) and 26(3) of the Constitution has proven particularly tricky, as will be illustrated in the various examples discussed below of instances where PIE potentially falls short of its constitutional mandate.

However, before we proceed to the examples where PIE is arguably problematic, it may be worth providing some remarks at the outset about the underlying ethos behind PIE. When considering the approach to evictions in terms of PIE, it is important to note that evictions in the new constitutional dispensation impact on socio-economic issues. As such, they cannot be seen from a merely legalistic point of view, as evidently done in the apartheid era. Instead, the approach to evictions should be informed by concepts such as fairness, morality, social values, humanity and dignity.[22] This is required because of the historical injustices associated with apartheid evictions and limited access to land for the black population. This should form the backdrop for the interpretation and implementation of PIE, as emphasised in *PE Municipality v Various Occupiers* (hereafter *PE*

19 Liebenberg *Socio-Economic Rights* 311-316; Van der Walt *Property in the Margins* 6-3; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

20 See Liebenberg *Socio-Economic Rights* 344-350; Van der Walt *Property in the Margins* 146-160, Pienaar and Muller 1999 *Stell LR* 370-396; Pienaar '"Unlawful Occupier' in Perspective" 309-330. Of specific importance is s 8(1) of PIE, which explicitly prohibits evictions without a court order.

21 Sections 4(6) and (7) of PIE; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 25.

22 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 33; *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC) para 47.

Municipality).[23] The courts have wide discretion when it comes to managing eviction proceedings. PIE makes it clear that evictions may be granted only if it is just and equitable to do so after considering all the relevant factors, which may include factors not specifically listed in PIE.[24] Additionally, the landowners' circumstances should also be considered and a balance should be struck between the landowners' rights under section 25 and the occupiers' rights in terms of section 26.[25]

In sum, therefore, the aim of PIE is specifically to prohibit illegal evictions and to provide procedures for evicting unlawful occupiers. The Act therefore attempts to protect both unlawful occupiers and landowners. In this regard occupiers are protected by section 26(3), which provides for the right not to be arbitrarily evicted. Very importantly, PIE also stipulates that it is aimed at protecting landowners, in the sense that should they wish to evict, they should do so in terms of the procedures as set out in PIE to protect their constitutional property rights. Upon reflection, it is clear that people still lose their shelter or homes without a court order being granted, even though section 26(3) specifically requires it – and PIE was enacted to give effect to this constitutional provision. On the other hand, landowners who would otherwise be successful in securing an eviction order are sometimes left in unfortunate situations where the execution of eviction orders is simply not possible. In addition, the Act does not provide much guidance in terms of preventing unlawful occupation, except for section 3, which in any event does not go very far in terms of providing a sufficient indication of how the unlawful occupation of land can be avoided.[26] These are just some of the

23 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

24 Interestingly, in this regard s 4(7) of PIE states that: "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."

25 *Absa Bank Ltd v Murray* (CA338/2017) [2018] ZAECGHC 75 (28 August 2018) is an example of this. Here the court had to consider the circumstances of the former landowners and the need for institutional lenders to be reasonably assured that their security is effective. Additionally, the manner of occupation was also considered. *Ndlovu v Ngcobo; Bekker v Jika* 2002 4 All SA 384 (SCA) found that the onus rests on the applicant to prove ownership of the land, after which the onus shifts to the respondent to provide the court with specific information such as whether the household is female-headed or whether those involved are children, disabled or elderly. However, it is unclear whether the court will take these circumstances into account on its own if the respondent does not provide the necessary information. One would assume that this would be necessary under s 26(3) of the Constitution.

26 This section deals with the prohibition of the receipt or solicitation of consideration in respect of the unlawful occupation of land.

aspects that leave landowners and unlawful occupiers in very precarious positions as far as evictions and unlawful occupations are concerned.[27] So, why exactly does this happen, and to what extent does PIE need to be amended to address these issues? The three examples discussed next will hopefully outline where exactly this happens and how courts have had to address the shortcomings of PIE.

3 Impossibility of eviction orders

3.1 Introduction

The first aspect of evictions law that may need to be reconsidered in light of the potential shortcomings in PIE exists in the context where it is found that an eviction order – although just and equitable – cannot be executed or enforced for some reason. PIE does not make provision for such a situation.[28] It will become clear from the discussion below that the different judgments in the *Modderklip* matter, which is an example of where this problem potentially arises, require some reflection. This is because of the various rights that were infringed when the eviction order could not be executed. Therefore, it is necessary to identify this issue as one potential area of evictions law that may require some development in future,

27 There is also a number of interesting ancillary issues that relate to evictions and the unlawful occupation of land that we cannot address in this contribution. See, for instance, Viljoen 2020 *Stell LR* 201-225; Muller and Marais 2020 *TSAR* 103-124. In both instances the authors challenge one to think about approaching evictions from a systemic point of view. Viljoen considers whether administrative law has a more active role to play in evictions that are undertaken by the state. Muller and Marais in turn identify counter-spoliation as a potential remedy in the context of eviction in the light of an earlier argument made by Scott in the same journal calling for the use of this common law remedy in response to unlawful occupation of land. See Scott 2018 *TSAR* 158-176. This is of course an interesting line of argument if one considers the very recent judgment of *South African Human Rights Commission v City of Cape Town* (WC) (unreported) case number 8631/2021 of 15 July 2022, in which the Court had to determine whether the City of Cape Town's reliance on counter-spoliation when demolishing structures passes constitutional muster. The Court found that when properly interpreted and applied, counter-spoliation is not unconstitutional or invalid. However, the use of counter-spoliation would be inconsistent with the Constitution when incorrectly interpreted and applied in cases where it allowed for evictions and demolitions. Interestingly, the Court includes "whether occupied or unoccupied" in its understanding of an informal dwelling, when looking at counter-spoliation as a defence. See paras 22-100 and 159.1.7.1.

28 Although this is a particular shortcoming that existed before the Covid-19 pandemic struck, as will be discussed below, one could quite easily imagine that times of crisis may impact on the execution or enforcement of eviction orders. Interestingly, a moratorium was placed on evictions during the level 5 Covid-19 lockdown. While this may be viewed as a laudable step in the state's attempts at minimising homelessness during this period, given the severity of the effects of evictions on a large portion of the population, there is a clear need to think about more long-term, sustainable solutions.

especially since the impossibility of effecting an eviction order (for whatever reason) could affect constitutional rights.

3.2 When evictions are impossible to enforce

The question of the impossibility of effecting eviction orders arose in *President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery Bpk (Pty) Ltd*.[29] What is clear from the line of the *Modderklip* judgments is that the manner in which eviction orders are executed will depend on the facts of each case. The challenge in *Modderklip* arose because unlawful occupiers occupied land owned by a private company called Modderklip Boerdery (Pty) Ltd. At the time when Modderklip instituted eviction proceedings against the unlawful occupiers in October 2000, there were about 4 000 residential units on the agricultural property occupied by approximately 18 000 people.[30] Modderklip was granted an eviction order in the High Court in April 2001.[31] However, this court order could not be executed. In this regard, more than 40 000 occupiers had to be evicted and as such, it was difficult to enforce the eviction order. The (informal) settlement eventually grew to such an extent that it consisted of streets, properties that were fenced and numbered, and even shops.[32] As Modderklip was unable to enforce the eviction order initially granted, it approached the Pretoria High Court and sought to compel the state to enforce the eviction order. In the meantime Modderklip was required to be patient and show a measure of tolerance. This was because the enforcement of the eviction order became near impossible. Modderklip was successful in the Pretoria High Court in securing an enforcement order, which required the state to provide a comprehensive plan of the steps it would take to implement the initial court order.[33] The state consequently appealed against the enforcement order.

The matter went to the Supreme Court of Appeal (hereafter SCA) and the Constitutional Court. Both courts decided to award Modderklip constitutional damages for the violation of its constitutional rights.[34] This remedy allowed for Modderklip's constitutional rights to be vindicated while also allowing the

---

29 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

30 See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 6-7.

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

32 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 8.

33 See *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 6 BCLR 638 (T) for the enforcement order.

34 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery* 2004 3 All SA 169 (SCA) para 52; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 68.

occupiers to have accommodation until suitable alternative accommodation was identified. This purportedly made constitutional damages an effective remedy in the particular circumstances. Interestingly, Modderklip was initially hesitant to evict the occupiers despite the prompting by the state to do so, and requested the state to expropriate (or purchase) the property. This may be indicative of its sense of wanting the state to resolve the issue without having to resort to the eviction of the occupiers.

It should be noted that the SCA and the Constitutional Court in *Modderklip* concluded that the appropriate remedy for the breach of constitutional rights was constitutional damages. However, the SCA awarded the remedy for the breach of sections 25 and 26(1) and (2), whereas the Constitutional Court awarded constitutional damages on the basis of the violation of sections 1 and 34 of the Constitution. In the Constitutional Court, Langa ACJ further emphasised that many factors had to be taken into account to determine what would be appropriate relief in the particular case.[35] These factors were: (a) that the occupiers had formed themselves into a settled community and built homes for themselves; (b) that the occupiers had no other option but to remain on Modderklip's property; (c) that their investment in their own community on Modderklip's farm had to be weighed against the financial waste that their eviction would represent; and that the cost of avoiding such waste would be minimal; (e) that the state was and had always been involved in matters concerning the unlawful occupation of Modderklip's farm; that the state had given notice to Modderklip, in terms of section 6(4) of PIE, to institute eviction proceedings in response to which Modderklip had made various requests for assistance from various organs of state; and (f) that the responses of the state had been consistently negative and unhelpful.[36] These factors were taken into account to determine what would constitute appropriate relief in the particular case, and what would be the possible justifications for limiting the owner's right to exclude. This right would otherwise have been enforced by the granting of the eviction order, but was now specifically excluded in these circumstances.

Therefore, the outcome in *Modderklip* was that (re)moving the occupiers, in this case, was not the appropriate remedy and that compensation (in the form of constitutional damages) would be more appropriate based on the specific circumstances in the case. The implication is that "landowners must accept a reasonable delay in having an eviction order enforced, allowing the responsible authorities time to ensure that the evictees would not be rendered homeless."[37] The constitutional damages awarded in *Modderklip*

35 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 54.

36 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 54.

37 Van der Walt 2015 *European Property Law Journal* 213.

was granted in order to reconcile the state's duty to the landowner, on the one hand, with the obligation on the state towards the homeless, on the other. Although the outcome in *Modderklip* in this regard can be applauded[38] for the way the court carefully considered the rights that PIE seeks to give effect to, it is important to consider whether the outcome is necessarily the most favourable one. We would like to assess this outcome from a practical and normative perspective.

Let us begin by providing some thoughts on what this case illustrates about the normative system that purports to regulate property in South Africa. In the context where PIE does not provide a solution to the particular problem at hand, courts are required to intervene and provide a remedy where the law falls short.[39] The mandate for a court to develop a constitutional remedy in general is contained in section 38 of the Constitution, which provides that:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.[40]

Section 172 of the Constitution provides further guidance when a court seeks to develop a constitutional remedy and states that:

> When deciding a constitutional matter within its power, a court – *(a)* must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and *(b)* may make any order that is

---

38 Van der Walt 2005 *SAJHR* 161. Also see Brand "'Politics of Need Interpretation'" 35, where Brand notes that the ability of Harmse J in *Modderklip* to find a remedy where the state had initially indicated that there was no remedy should be applauded. Therefore, Brand argues that "Harmse J's 'can do' rhetoric powerfully … underscores a participatory understanding of democracy and a discursive understanding of politics and counteracts the idea that it is only the State who can engage politically with the issues and then hand down solutions from on high." Also see Liebenberg 2014 *Nordic Journal of Human Rights* 319. In terms of participatory approaches to remedies for the protection of socio-economic rights, the South African Constitutional Court has adopted its jurisprudence on meaningful engagement. For further commentary on the remedy of meaningful engagement, see Chenwi 2009 *CCR* 371-393; Ray 2011 *SAJHR* 107-126; Muller 2011 *Stell LR* 742-758; Chenwi 2011 *SAPL* 128-156; Liebenberg 2012 *AHRLJ* 1-29; Van der Berg 2013 *SAJHR* 376-398; Mahomedy *Potential of Meaningful Engagement*.

39 This is in line with what the Constitutional Court stated in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69: "Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."

40 The provision goes further to stipulate that: "The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members." See s 38 of the Constitution.

> just and equitable, including – (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.[41]

These two provisions provide the (constitutionally mandated) platform from which a court can assume a broad discretion when it comes to finding appropriate remedies for the infringement of constitutional rights. In this regard South African courts instinctively protect existing property rights, and generally find it difficult to develop solutions that are innovative and unorthodox or, very importantly, that cause too much of an inroad into property rights.[42] The difficulty in this regard is exacerbated where no explicit authority exists (especially in legislation) to create rights that did not exist previously – especially rights in favour of unlawful occupiers. In this respect the judiciary may be required to do more than what they may have been required to do in the past.[43] The extent to which courts can and should advance transformative goals or effect social change has been contested.[44] In the eviction framework this arguably restricts the courts' power in so far as remedies are concerned.[45] Strydom and Viljoen point out that in the eviction context 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.[46] Van der Walt in turn makes

41 Section 172 of the Constitution. O'Regan explains that "[t]o determine a case, a court must start with the clear mandate granted by section 172 and determine the constitutionality of any law or conduct that is challenged before it. There is no place for a portmanteau principle of non-justiciability on prudential concerns alone." See O'Regan 2012 *MLR* 2.

42 Boggenpoel 2019 *Stell LR* 234-249; Cloete and Boggenpoel 2018 *SALJ* 432-446; Boggenpoel and Slade 2020 *CCR* 379-399. Interestingly, Fennel argues that "[t]he work of refining property law to strike the right balance between access and exclusion is always ongoing". See Fennel 2007 *U Pa L Rev* 278. Also see Peñalver and Katyal 2007 *U Pa L Rev* 1095-1186.

43 See Dixon 2007 *ICON* 418: "dialogue theory is distinguished from the other theories by treating courts as having a much greater capacity *and* responsibility to confront political failures in the realization of socioeconomic rights." Also see Davis 2012 *PELJ* 7, where Davis contends that "[f]rom the commencement of the court's engagement with socio and economic rights, there was a concern about the definition of the role and scope of courts in the development and enforcement of social and economic rights."

44 See, for instance, Davis 2012 *PELJ* 9: "[T]he judiciary, because it does not 'run the country', should not intrude into core areas of social and economic policy." Also see Rosenberg *Hollow Hope* ch 1.

45 Strydom and Viljoen 2014 *PELJ* 1223. The authors assert that "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." See specifically Strydom and Viljoen 2014 *PELJ* 1219. For further observations of the limitations on the use of common law remedies in the eviction context, see Boggenpoel 2014 *Stell LR* 72-98; Boggenpoel and Pienaar 2013 *De Jure* 998-1021.

46 Strydom and Viljoen 2014 *PELJ* 1223.

the argument that ownership discourse, dominated as "it is by the vocabulary, rhetoric and logic of exclusion, tends to pre-determine the outcome of property disputes so that sharing, its conceptual opposite, is under-represented in property remedies. Consequently, courts are constrained in their remedial options, even when the intentions, expectations of fairness and sense of reliance of either or both parties point away from exclusionary outcomes."[47] This is often the case despite the stark warning by Sachs J in *PE Municipality v Various Occupiers*[48] of what is expected of judges adjudicating eviction matters as follows:

> In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. … The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. *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.[49]

Theunis Roux writes that the Constitutional Court's judgment in *PE Municipality* illustrates the fact that the Court indicated a particular preference for "context-sensitive balancing" specifically regarding the relationship between section 25 and section 26 of the Constitution.[50] Roux goes on to explain that in so far as reconciling the right to property with the right to housing as far as section 26 is concerned? *PE Municipality* does not attempt to provide a thorough theory on the Constitution's property rights but rather attempts to indicate an ethic of compassion both with regard to courts and state agencies that are tasked with the job of mediating competing property interests. Therefore, in Roux's view, "s[ection] 26(3) may be said to have created a new form of property right, one that does not provide an absolute barrier against eviction, but which rather requires the courts to treat common-law ownership rights and the right not to arbitrarily be evicted from one's home in a non-hierarchical way."[51] In this regard the outcome of the enforcement order and the SCA judgment in *Modderklip*, with its focus on giving effect to section 25, shows the "quintessentially post-1994 perspective on eviction" in the sense that "the applicant is entitled to

47 Van der Walt 2015 *European Property Law Journal* 162.

48 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

49 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23 (own emphasis added).

50 Roux *Politics of Principle* 327. Roux mentioned that other judgments in the context of property rights also show the same trend, e.g. *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* 2002 4 SA 768 (CC) and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

51 Roux *Politics of Principle* 326.

implementation of his eviction order, but for it to be carried out provision has to be made for the future accommodation of the unlawful occupiers once they have been removed."[52] Therefore, "[t]he 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."[53]

From a normative perspective and judging by these observations regarding the outcome in *Modderklip*, it may not be entirely presumptuous to suggest that the hierarchies of property are still very much in place in democratic South Africa. Therefore, despite various limitations on ownership, especially the limitations caused in the eviction context, we are still a society that views and values ownership highly.[54] This is evident from the remedies that can be used to protect ownership, which are essentially targeted at playing a stabilising role in society. For the most part, property law is fundamentally structured around this stability.[55] This is potentially why Stuart Wilson contends that the normality assumptions in favour of the owner have resulted in the slow pace of development of the common law in line with constitutional ideals generally and the standard for evictions specifically.[56] Therefore, the judicial enquiry into whether an eviction order can be enforced "must be assessed in its proper historical context and against the background of the constitutional obligation to balance the right of access to adequate housing against the property rights of an owner who wishes to evict, taking cognisance of the actual use of the land by and its importance for both the landowner and the unlawful occupiers."[57]

From a practical point of view, many may argue that *Modderklip* shows perfectly how the balancing of rights should be done and that the case created a win-win situation for the landowner and the unlawful occupier. But was it really a victory for an owner who is now unable to use his property

---

52 Van der Walt 2005 *SAJHR* 150.

53 Strydom and Viljoen 2014 *PELJ* 1234. The authors argue that the state's failure to give effect to the eviction order that was granted in Modderklip's favour amounted to an arbitrary deprivation of Modderklip's property, which would not have survived s 25(1) scrutiny.

54 Boggenpoel 2019 *Stell LR* 234-249. Also *see* Muller *et al Silberberg and Schoeman's The Law of Property* 103; Wilson *Human Rights and the Transformation of Property* 11-13.

55 See for instance, Peñalver and Katyal 2007 *U Pa L Rev* 1133. Van der Merwe explains that because real rights are absolute, the remedies aimed at protecting the right are extensive. See Van der Merwe *Sakereg* 12: "Omdat saaklike regte absoluut is, is die remedies waarmee dit beskerm word, omvattend." However, see Muller *et al Silberberg and Schoeman's The Law of Property* 103; Wilson *Human Rights and the Transformation of Property* 103-107.

56 Wilson 2009 *SALJ* 271-272.

57 Van der Walt 2015 *European Property Law Journal* 212. Also see *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.

because unlawful occupiers are continuing to reside on part of the land? And are the unlawful occupiers not still left in a precarious and uncertain position as far as security of tenure is concerned? What land rights do these occupiers (continue to) have? These are just some of the practical questions that illustrate that the outcome in *Modderklip*, although commendable in a sense, is not tenable. We would argue that these are not long-term, sustainable solutions, but *ad hoc* arrangements that result in further uncertainty and conflicts between those that have property and those that do not. Jackie Dugard has made a similar observation where she suggests that expropriating property in the case where the eviction of unlawful occupiers is not just and equitable may be the best long(er)-term solution.[58]

Dugard points towards the *Expropriation Act*[59] and the *Housing Act*[60] as providing ample authority for the state to use its expropriating power to advance access to adequate housing for those in need thereof, while at the same time ensuring that landowners' rights are considered and adequately taken into account.[61] While these two Acts do not authorise the courts to compel the state to expropriate, in the sense of allowing for judicial expropriation, Dugard does question whether it is "possible that, where legislation empowers the state to expropriate in the public interest, courts can oblige the state to consider this option".[62] She maintains that the *Fischer* judgment certainly created something to that effect, blurring the lines between administrative and judicial expropriation – the latter of which is purportedly not accepted in South African law.[63] One could take Dugard's suggestion a step further: Perhaps the best solution to this problem would be to amend PIE to provide for expropriation in certain cases. Stated differently, where the justice and equity of an eviction order hinge on its enforceability, there should arguably be a provision in PIE that allows for the state to expropriate the property. It could potentially be similar to the expropriation provision in the *Extension of Security of Tenure Act*.[64] In this regard courts are already in the habit of using the compensation provision in the *Expropriation Act* as the measure to determine constitutional damages, and it would therefore not be foreign to continue doing so. There is of course no guarantee that the state would actually use its power to expropriate once the power is contained in PIE,[65] but we must agree with

58 Dugard 2018 *PELJ* 1-20.
59 *Expropriation Act* 63 of 1975.
60 *Housing Act* 107 of 1997.
61 Dugard 2018 *PELJ* 1-20.
62 Dugard 2018 *PELJ* 16.
63 Dugard 2018 *PELJ* 17.
64 See s 26 of the *Extension of Security of Tenure Act* 62 of 1997.
65 One of the big issues in land reform is that the state has essentially been dragging its feet to effect real change when it comes to land reform. A number of judgments was decided in 2019, where courts spoke out against the slow pace of land reform. See for instance Davis J in the judgment *Rakgase v Minister of Rural Development*

Dugard that it does create an option which is a better solution than constitutional damages.[66]

Constitutional damages is always granted for a failure to adequately give effect to constitutional rights; it is retrospective for something that has gone wrong.[67] For instance, in *MEC, Department of Welfare, Eastern Cape v Kate*,[68] the SCA had to decide whether constitutional damages was the appropriate remedy for the unreasonably long delay in the state granting Kate's social grant. Kate waited approximately 40 months for the approval of her social grant, in a process that should otherwise have taken no longer than three months. The Department of Welfare could not provide reasons for the delay and Kate consequently approached the Court claiming that there was a breach in her right to social assistance as encapsulated in section 27 of the Constitution.[69] The Court explained that:

> Kate's case, simply put, is that the unreasonable delay in considering her application deprived her during that period of her constitutional right to receive a social grant, and for that deprivation she ought to be recompensed by an order for damages.[70]

An important conclusion that can be drawn from the *Kate* decision is that the need for constitutional damages arose because the state failed to adequately give effect to the constitutional right to social assistance (in terms of section 27 of the Constitution) caused by its tardiness in awarding the social grant. The remedy was borne from the wide discretion that courts

---

and Land Reform (33497/2018) [2019] ZAGPPHC 375 (4 September 2019) para 5.4.1, where he remarked that "[s]ince the birth of democracy in our country in 1994, land reform, despite it being a Constitutional imperative, has been slow and frustratingly so." The transition from vastly unequal land distribution effected by years of colonial and apartheid separation mechanisms towards more equitable land access and more equal land ownership patterns (if ownership transfer is indeed the goal) will need to be facilitated (and prioritised) by the state in the laws that it enacts and, very importantly, implementation will be key to ensuring that laws ensure real, substantive change. Juanita Pienaar warns that "if we are to avert systemic failure in the context of land reform, a concerted effort needs to be made to ensure that the programme is 'pursued conscientiously' and meticulously." See Pienaar 2020 *TSAR* 546.

66 It should be noted that constitutional damages is not the same as compensation for expropriation, although the lines between these two remedies are undeniably blurred, especially when it comes to quantifying the amounts in each case.

67 Bishop "Remedies" ch. 9, 79.

68 *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA).

69 Section 27 of the Constitution places an obligation on the state to achieve the progressive realisation of the right that everyone has to social security, which includes appropriate social assistance if they are unable to support themselves and their dependants. This requires that the state should take legislative and other measures within its available resources to realise the right. The state enacted the *Social Assistance Act* 59 of 1992 in order to give effect to s 27 of the Constitution. It was in terms of this piece of legislation that Kate was awarded a disability grant, albeit subject to a lengthy delay.

70 *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) para 17.

have in terms of section 38 of the Constitution to create remedies to give effect to the rights in the Constitution. Similarly, in *Modderklip* both the SCA and the Constitutional Court concluded that the appropriate remedy for the breach of constitutional rights was constitutional damages, although as already mentioned, the SCA awarded the remedy for the breach of sections 25 and 26(1) and (2), whereas the Constitutional Court awarded constitutional damages based on the violation of section 34 of the Constitution.[71]

It should be noted that the SCA in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[72] pointed out that *Modderklip* does not provide the overall authority for the fact that constitutional damages is always available, or even appropriate, where there has been a breach of a fundamental right.[73] This is because the remedy in *Modderklip* was awarded on the basis of the existence of a unique set of facts in the case.[74] Therefore, it is not entirely clear whether we will see a *Modderklip*-type constitutional damages award again unless exceptional circumstances exist that justify replacing a property right with compensation. However, it should not be too hard to imagine given the increasing demands for land and the continued failure to effect large-scale land reform that a *Modderklip*-type situation could arise in future again – as

71 Van der Walt comments that "[t]he Constitutional Court decision was therefore not based on the state's duty to protect s 25 or 26 (or even s 34) rights, but simply on the duty, arising directly from s 34, to provide suitable and effective enforcement procedures and to assist in implementing them when necessary. In this regard, the Constitutional decision is different from the SCA decision, at least as far as its ostensible basis is concerned." See Van der Walt 2005 *SAJHR* 158.

72 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA).

73 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 70. The court stated that "[i]n our view, the peculiar facts of Modderklip render it distinguishable and it certainly is not authority for the proposition that constitutional damages is always available, or ordinarily appropriate, as a remedy whenever a fundamental right has been breached."

74 See Van der Walt 2015 *European Property Law Journal* 212, where Van der Walt explains that "[f]irstly, the compensation order in Modderklip was made after an eviction order had been obtained but proved to be practically unenforceable, at least for the foreseeable future, whereas the landowner in Blue Moonlight had every prospect of successfully evicting the unlawful occupiers in the short term. Secondly, the compensation order in Modderklip resulted from the state's failure to assist the landowner in protecting its property rights, whereas it was clear that the owner should succeed with eviction in Blue Moonlight. Thirdly, the large number of unlawful occupiers had rendered eviction a practical impossibility in Modderklip, whereas it was possible to evict the relatively small number of occupiers in Blue Moonlight. And finally, in Modderklip the landowner was the innocent victim of a large unlawful land invasion and he had taken all the necessary steps, in good time, to obtain an eviction, whereas the owner in Blue Moonlight was aware of the unlawful occupiers when it acquired the property." Also see Strydom and Viljoen 2014 *PELJ* 1230-1235; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 71.

is now clear from the *Fischer* judgment.[75] This may be another reason why it is arguably necessary to provide clearer and more concrete solutions – and (compensation for) expropriation provides for such a possibility. If both remedies, namely constitutional damages and compensation for expropriation would in any event result in money from the state going into private hands to account for the impact on (or loss of) constitutional property rights, the solution that would be systemically more sound should in our view be the one that is favoured.

4 PIE does not provide a definition of "home"[76]

Another potential shortcoming of PIE relates to the fact that while PIE is set up to protect unlawful occupiers against illegal eviction from their “homes” in line with section 26(3), it does not define what a “home” is or cater for the fact that a “home” is simply not the same for everyone. This issue was raised in the recent case of *South African Human Rights Commission v City of Cape Town*[77] decided during the Covid-19 Lockdown Regulations where the City argued that a structure that is in the process of being erected cannot constitute a home within the meaning of section 26(3) of the Constitution, and is therefore not protected in terms of PIE. This raises important questions about whether PIE can apply to partially erected structures and whether these structures then in fact constitute "homes", which would elicit the protections of the Constitution.[78]

It should be mentioned at the outset that PIE is clear in so far as it defines a "building or structure" to include "any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter."[79] Such a building or structure can furthermore be made up of various materials that are put up or assembled, crafted or manufactured. However, the meaning of “home” has essentially been left to the courts. The courts must therefore determine whether the building or structure suffices to ensure adequate protection in terms of section 26(3) of the Constitution and the concomitant protection provided under PIE.

---

75 *Fischer v Persons Whose Identities are to the Applicants Unknown and Who Have Attempted or are Threatening to Unlawfully Occupy Erf 150 (Remaining Extent) Philippi in re: Ramahlele v Fisher* 2014 3 SA 291 (WCC).

76 Various scholars have written on this issue. See, for example, Robbertze and Muller 2005 *De Jure* 332-352; Fox O'Mahony *Conceptualising Home*.

77 *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC). Also see Boggenpoel and Mahomedy 2021 *Stell LR* 482-495.

78 The issue of home also came up in *South African Human Rights Commission v City of Cape Town* (WC) (unreported) case number 8631/2021 of 15 July 2022 para 32, where the City argued that the defense of counter-spoliation may be used "at any stage before a fully constructed informal structure becomes *occupied* as a *home*" (own emphasis added).

79 Section 1(i) of PIE.

As will be elaborated on below, this has also been an issue in various cases, especially considering that there is no clear legal definition for "home". This problem is further exacerbated by the fact that interpretations often focus on the physical nature of a structure and when a structure becomes a home instead of the core function of what a home is essentially supposed to do, which was the issue in the *SAHRC* case. When dealing with what constitutes a home for the purposes of PIE, courts have focussed on different elements, such as the type of structure or the length of occupation.

In this regard it should be noted that what constitutes a home may be fundamentally different for different people. This nuance and complexity is sometimes explicitly ignored and often disregarded intentionally. Arguably in *SAHRC* it was disregarded intentionally because the City did not believe partially erected structures could constitute a home, most likely to avoid the need to comply with PIE. The Western Cape High Court challenged this practice of the City of Cape Town and held that "[w]hether such structures are complete, incomplete, or in the process of being built, they are capable of providing shelter from the elements especially during the winter season."[80] Therefore, the Court held that even though the structures were incomplete, they were still subject to protection against evictions in terms of the legislative and constitutional protections in place, especially under the Regulations during Covid-19. This decision implies that the structures constituted a home worthy of protection under the Regulations and legislative framework.

A plethora of cases has had to grapple with the definition of a home for the purposes of PIE. As mentioned above, different elements have been considered by the courts when deciding what constitutes a home. In *Barnett v Minister of Land Affairs*[81] the SCA found that a home requires some degree of permanence and regular occupation.[82] When dealing with permanence the *Fische*r case relied on *Barnett* but differentiated between the two cases as the latter dealt with holiday homes unlawfully erected by people who were "literate and sophisticated". These holiday homes were only temporarily occupied during certain parts of the year as the occupiers had permanent homes elsewhere. As such, the protection of PIE could not be claimed in *Barnett*. The difference between these two cases shows the importance of taking into account the circumstances of each case. The judgment of *Breedevallei Munisipaliteit v Die Inwoners van Erf 18184*[83] in turn accepted that an occupation period of ten days was sufficient to meet

80 *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC) para 55.

81 *Barnett v Minister of Land Affairs* 2007 6 SA 313 (SCA).

82 *Barnett v Minister of Land Affairs* 2007 6 SA 313 (SCA) para 38.

83 *Breede Vallei Munisipaliteit v Die Inwoners van Erf 18184* (A369/12) [2012] ZAWCHC 390 (13 December 2012).

the permanence requirement. In this case the Court highlighted the fact that, regardless of the occupation period, the occupiers considered the structures in question to be their homes. The Court emphasised that when considering the permanence of a structure in the case of occupiers, a lower standard should be adopted. In *City of Cape Town v Rudolph*[84] the Court similarly focussed on the type of structure when defining a home. The Court held that the definition of a home should include informal structures, especially because those living in such structures had nowhere else to live.[85]

Based on *Barnett* and *Breedevallei*, the Court in *Fischer* afforded a more generous definition for the term home. The Court held that a home includes informal structures that are fashioned from whatever resources the occupiers could find. This is regardless of the shortness of the period of occupation. Additionally, Gamble J in *Fischer* held that incomplete structures or structures that are being erected are still able to fulfil the function of sheltering the occupiers from the elements. However, this decision was set aside by the SCA, which was specifically critical of the court *a quo's* willingness to include structures that had recently been erected as qualifying for the protection of PIE. Furthermore, the SCA criticised the High Court judgment for accepting that the existence of a structure coupled with an intention to occupy that structure was sufficient to claim protection under PIE. The Court *a quo's* decision has also been criticised by Cramer and Mostert for being overly wide, with the standard for permanency being set too low.[86] However, when dealing with the issue of defining a home for the purposes of PIE we would argue that one should be careful not to interpret the term “home” too narrowly. This is especially the case given that, as pointed out in the *SAHRC* case, these occupiers are often "the poorest of the poor, the homeless, downtrodden and unemployed." As such, their shelters are rudimentary, and that should not necessarily bar the shelters from being viewed as their homes. This sentiment was also expressed in *Ngomane v City of Johannesburg Metropolitan Municipality*,[87] where the occupiers indicated that "[o]ur belongings are meagre and our homes may appear ramshackle, but this is all we have, and this is what affords us the only bit of dignity which we enjoy."[88] Interestingly in this regard, previous judgments have pointed out that there will be cases in which the shelter protected under PIE may not equate to adequate housing and may not fall under the colloquial understanding of what a home is.[89] Nevertheless, such

84 *City of Cape Town v Rudolph* (89700/01) [2003] ZAWCHC 29 (7 July 2003).
85 *City of Cape Town v Rudolph* (89700/01) [2003] ZAWCHC 29 (7 July 2003) 20.
86 Cramer and Mostert 2015 *Stell LR* 600.
87 *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 1 SA 52 (SCA).
88 *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 1 SA 52 (SCA) para 24.
89 *Dladla v City of Johannesburg* 2018 2 SA 327 (CC) para 43.

shelters should still be recognised as homes until the residents thereof have access to adequate housing.

This wider interpretation that we argue for is in line with Lorna Fox O'Mahony's research on the meaning of “home”, which was used by the court *a quo* in *Fischer*. Fox O'Mahony notes that

> the extent to which the law seeks to recognise and protect the status of home – whether as a refuge or sanctity from the outside world, a place of security, privacy or safety, or even in the most basic sense as a shelter – varies, in a more or less *ad hoc* fashion, depending on the context in which legal issues arise and particularly, on the weight of the competing interest(s) at stake in any given case.[90]

She highlights the need for proper engagement on what constitutes a home for legal purposes and argues that a home is more than a physical structure that provides shelter from the elements.[91] Other factors need to be considered, which include social, psychological, cultural and emotional factors. Our courts have attempted to recognise the importance of some of these aspects, as can be seen in *PE Municipality.*[92] The Court emphasised the need to recognise these structures as "a secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world."[93] In this case Sachs J also emphasised that a home provides more than shelter as it is a space where people seek privacy and security. Additionally, the Court in *Government of the Republic of South Africa v Grootboom* highlighted that a home is "more than bricks and mortar",[94] which confirms that it should serve as more than just a shelter. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[95] expressed similar sentiments by underscoring the importance of a home, regardless of how humble it may be. While these judgments are definitely steps in the right direction, our current understanding of a home, especially in the context of occupiers, is still extremely limited and too focussed on the physical aspects of a house. Even our understanding of the physical dimensions of a home is limited if one looks at the criticisms against the *Fischer* case's interpretation of what constitutes a home.[96] We need to move towards an understanding that seemingly incomplete structures can still be a house for someone and recognise that people often work with what they

---

90 Fox O'Mahony *Conceptualising Home* 4.

91 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17.

92 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

93 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17.

94 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35.

95 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 231.

96 See e.g. Mostert and Cramer 2015 *Stell LR* 590-600, who disagree with the court *a quo* in *Fischer*. For a wider interpretation of the meaning of “home”, see Du Plessis "Ways of Living in a Transformative Democracy" 11-14.

have and incrementally develop these shelters as they are able to and within their current means.

5 PIE does not distinguish between occupied and unoccupied structures

In the *SAHRC* judgment, as highlighted above, the City of Cape Town argued that PIE did not apply to unoccupied structures. Therefore evictions from and demolitions of unoccupied structures purportedly did not (or do not) elicit the constitutional protection afforded by PIE. A remaining shortfall in the law is therefore the question of whether PIE applies in the case of occupied and unoccupied structures. In this regard it should be noted that although PIE is set up to protect unlawful occupiers against illegal eviction from a building or structure, the legislation does not pertinently distinguish between occupied and unoccupied structures or buildings as a mechanism to determine whether the Act is in fact applicable or not. Consequently in *SAHRC* the City noted that it "does not accept that unoccupied structures attract the protection of PIE."[97] It also did "not accept that evictions from and demolitions of *unoccupied* structures can only occur in terms of court orders."[98]

Upon reflection it appears that there is scant authority for this view in jurisprudence or academic literature. In the current definition of "building or structure" in the Act there is also no specific reference to the fact that the building or structure should specifically be occupied for PIE to be applicable. However, PIE does define "evict" as a "means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected". This definition seems to imply that no eviction will take place unless there was occupation of a building or structure. Although the City did not make this clear, this definition may have been the basis upon which the City argued that the Constitution (and consequently PIE) would not be applicable if there was no occupation of the building or structure.

PIE may need to be amended in future to make it clearer whether it applies to occupied and unoccupied structures so that the concerns briefly alluded to in this part of the article are adequately accounted for. The risk associated with the potential violation of various constitutional rights is simply too big to leave the discretion in the hands of private landowners, or the state for that matter, to decide whether PIE applies to unoccupied structures or not. In this regard, at least in the context of municipalities, Van Wyk points out that local government has a constitutional obligation to ensure that it reacts to

97 *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC) para 40.

98 *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC) para 40.

and deals with evictions in a constitutionally compliant manner.[99] For one, this means that steps taken in relation to potential evictees must be reasonable and that the values enshrined in the Constitution should underscore evictions so that they take place in a humane way.[100] As Van Wyk notes, municipalities are obliged in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. Furthermore, in terms of section 10 of the Constitution they are to safeguard the human dignity of every person.[101] The point is that if we are unsure whether or not PIE applies to unoccupied structures, and this gap is exploited to evict occupiers from homes which are purportedly not "occupied", human rights may be violated in the process.

Several further problems may potentially arise with an interpretation of PIE that allows for the Act to be applicable only to occupied buildings or structures. First, who is going to be tasked with the responsibility of deciding whether a particular building or structure is occupied or not? Second, on what basis will this decision be made? At the moment the discretion to decide whether an eviction is just and equitable (and the conditions under which such an eviction order should take place) rests with the Courts.[102] This oversight by the Courts has specifically been put in place to ensure that the infringement of section 26(3) of the Constitution is prevented; more importantly, that apartheid-style forced removals and illegal evictions never happen again (as elaborated on in part 2 of this contribution). Courts are saddled with the responsibility of taking both the landowners' rights (under section 25 of the Constitution) and the unlawful occupiers' rights (in terms of section 26(3) of the Constitution) into account to ensure that an appropriate balance is struck between these two rights.[103] Non-implementation of PIE and the concomitant oversight by Courts that PIE ensures in this context would be highly problematic as the next part of this article will attempt to illustrate. This is especially so if this is done under the guise of the prevention of the unlawful occupation of land.

6 Bypassing PIE to prevent the unlawful occupation of land: back to criminalisation?

Both issues discussed under parts 4 and 5, namely the gap in PIE in terms of the definition of “home” as well as the lack of a distinction between occupied and unoccupied structures cannot be discussed by simply looking at the legislation and court cases. They require some appreciation and

99 Van Wyk 2011 *PELJ* 50-51.

100 See Van Wyk 2011 *PELJ* 51.

101 Also see *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 17.

102 Sections 4(8) and 6(3) of PIE.

103 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

exposure to the deeper problems of poverty, inequality and marginalisation, and the underlying issue of South Africa's inability to deal effectively with these social ills. More specifically, there is an overarching need for academic research to also focus on the lack of implementation of the legislation. What is equally important is the lived realities of the people affected by the legislation. This is especially important, given the fact that South Africa essentially finds itself in a housing crisis that often results in the largescale unlawful occupation of land – with no appropriate way to deal with this reoccurring issue. At local government level, municipalities are trying to find various ways of dealing with the unlawful occupation of land, which often arises in response to the growing need for land given the persistent inequality of land relations in South Africa. The terrain of the unlawful occupation of land and evictions law is becoming an increasingly complex issue given the ongoing social ills mentioned above. In this context, various strands of arguments are surfacing about what is possible (or not) in terms of existing law. A gap has arguably emerged in the law between the prevention of unlawful occupation and the applicability and/or use of PIE. Therefore we would like to focus the attention in this part on the issue of the lack of implementation of PIE in certain instances, purportedly in cases where government attempts to deal with the unlawful occupation of land.

Government, especially municipalities, often relies on the above-mentioned gaps in PIE to argue against its responsibility to comply with the constitutional standards in the context of evictions.[104] PIE is often circumvented in instances where government has tried to argue in a number of judgments in courts that structures do not classify as homes or are unoccupied. There have also been numerous media reports of similar incidents.[105] In particular, instead of implementing PIE the attempts to prevent the unlawful occupation of land often result in the use of the "Red Ants" and other private companies in so-called "city clean-up" operations. The operations target homeless people and result in the criminalisation of unlawful occupation, which has been particularly prevalent.[106] A number of ancillary issues arise, and we cannot deal with all of them in this

104 This was seen in *South African Human Rights Commission v City of Cape Town* (WC) (unreported) case number 8631/2021 of 15 July 2022 para 35, where the City attempted to use the defense of counter-spoliation coupled with a narrow understanding of "home" to circumvent the application of PIE as well as its constitutional obligation to provide emergency accommodation.

105 Evans 2022 https://www.news24.com/news24/southafrica/news/you-will-die-here-red-ant-recounts-eviction-battle-in-knysna-20220409; Bhengu 2021 https://www.news24.com/news24/southafrica/news/we-are-powerless-red-ants-evict-people-living-illegally-in-posh-joburg-suburb-20210406; Staff Reporter 2014 https://mg.co.za/article/2014-09-18-joburg-residents-battle-red-ant-evictions/.

106 See e.g. *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 1 SA 52 (SCA).

contribution. For instance, the disregard for the human dignity of those that are "homeless", but who erect informal structures that do not easily conform to a common understanding of "home" for the purposes of PIE, is especially problematic. The language of "cleaning up" the city attests to the fact that those who are ordinarily viewed as "homeless", or people that erect informal structures and are presumably causing the unlawful occupation that the municipalities are trying to prevent, are viewed as a problem or something that needs to be "cleaned up".[107]

Of particular interest for this contribution is the fact that the clean-up operations also often involve the use of excessive force.[108] The companies involved in the operations demolish structures which they argue are unoccupied or do not classify as homes.[109] This is frequently done without a court order, the argument being that it is not an eviction and no court order is needed, given that the structures and materials do not receive protection under PIE. As such, government uses private security firms in an attempt to circumvent the provisions of PIE, often under the overarching rationale of the prevention of unlawful occupation. Given that this has been happening for many years, one has to ask whether this conduct is lawful and whether this should be brought more clearly into the purview of PIE. If it cannot be brought under PIE, questions would need to be asked in relation to where and in what manner vulnerable people and groups in these situations can seek protection.[110] This is the complexity one is dealing with in this case:

---

107 See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 18, which emphasises that society as a whole is demeaned when government amplifies vulnerable groups' marginalisation instead of mitigating it.

108 This includes the use of rubber bullets. See Bornman and Nyoka 2020 https://www.newframe.com/city-of-joburgs-heartless-red-ants-demolitions/; Neille 2020 https://www.dailymaverick.co.za/article/2020-04-22-gauteng-demolitions-red-ants-in-all-out-war-on-the-poor/; Bennie 2017 https://www.dailymaverick.co.za/article/2017-07-14-groundup-red-ants-accused-of-firing-rubber-bullets/.
Additionally, personal belongings such as identity documents and other important documents, mattresses, blankets, clothing, money and even medication are also destroyed or confiscated. Often there is no inventory of what was taken, and their belongings are taken without prior engagement or a court order. See *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 1 SA 52 (SCA) paras 2 and 7; Gillespie *et al* 2021 https://www.newframe.com/part-one-the-red-ants-and-the-city-of-cape-town/.

109 This was one of the issues raised in *South African Human Rights Commission v City of Cape Town* (WC) (unreported) case number 8631/2021 of 15 July 2022 paras 35-36 and 159, where the legality of the Anti-Land Invasion Unit (ALIU) was called into question. See para 13. In addition, the applicants raised the argument that the City uses counter-spoliation to circumvent PIE and s 26 of the Constitution. The Court found that the conduct of the ALIU "is not *per se* unlawful provided that, in discharging its mandate to guard the City's land against unlawful invasions, it acts lawfully."

110 This question is beyond the scope of this paper although we feel that it is important to raise these questions and issues to ensure that certain groups do not fall through the gaps between various pieces of legislation, policies and by-laws.

the interwoven link between the prevention of unlawful occupation of land on the one hand, and the applicability of PIE and its need to ensure that evictions take place in a dignified manner, on the other.

Many different issues are infused in this space, which makes this particular situation very complex and difficult to decipher. It is important to unravel where a municipality's (constitutional) obligations start and end. This depends largely on whether PIE is (or should be) applicable in the two instances mentioned in parts 4 and 5, but it certainly goes further than that as well. For our part, we focus on the issues directly related to PIE, its applicability and the lack of clear guidance in PIE regarding the unlawful occupation of land. What further complicates the matter of the applicability of PIE in the two instances highlighted in parts 4 and 5, and the use of the legislation in the prevention of the unlawful occupation of land, is a municipality's right to enact by-laws that assist it in regulating its affairs – also its affairs in terms of unlawful occupation. Of course, one clearly sees the need for municipalities to have the power to make certain by-laws. However, we would argue that by-laws and overarching legislation (such as PIE) must work together as opposed to against each other, especially when it comes to giving effect to constitutional rights. Stated differently, by-laws should not be used as a mechanism to bypass constitutional obligations that were aimed at giving effect to existing legislation, such as PIE. The lack of clarity on what constitutes a home, the uncertainty of whether occupied and unoccupied structures are included under the purview of PIE (and who is tasked to decide the matter), coupled with the need for a greater understanding of the realities of those threatened with evictions are aspects that are made more difficult to address when by-laws are established to regulate evictions and the unlawful occupation of land. By-laws of this nature can be problematic if they potentially conflict with the purpose and provisions of PIE as set out in part 2 of this article.

The city clean-ups referred to above are often conducted under municipal by-laws. A good example of this is illustrated through the City of Cape Town's by-laws, which have recently been characterised as criminalising homelessness. These by-laws have come into question at the High Court and the Equality Court, where various homeless people, represented by Ndifuna Ukwazi, have challenged their constitutionality.[111] Ndifuna Ukwazi has argued that the *Streets, Public Places and the Prevention of Noise Nuisances By-law*[112] and the *Integrated Waste Management By-law*[113] are

111 Payi 2021 https://www.iol.co.za/weekend-argus/news/city-of-cape-towns-by-laws-challenged-by-homeless-in-court-action-52590643-69fd-40c6-b3e5-81f40b63705b.

112 City of Cape Town: Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2021.

113 City of Cape Town: Integrated Waste Management By-law, 2009. The issue raised in relation to this by-law is that street people's belongings are often seen as "litter"

both unconstitutional and discriminatory. In particular, they argue that the "by-laws criminalise homelessness by making it a crime for persons living on the street to conduct ordinary life-sustaining activities, like sleeping, camping, resting, bathing, erecting a shelter or keeping personal belongings in public."[114] The by-law also provides for the impounding of any materials used for transient shelter or overnight camping. Additionally, the by-laws criminalise begging, lying down, sitting and even standing in a public place. Anyone found contravening these by-laws may "be liable to a fine or imprisonment for a period not exceeding six months, or to both a fine and such imprisonment."[115]

Another by-law, the *City of Cape Town Unlawful Occupation By-law*,[116] also criminalises homelessness. This by-law allows for City officials to arrest occupants without a warrant, to impound their building materials and goods, to search them, and to identify and monitor land and buildings susceptible to unlawful occupations.[117] Provision is specifically made for "structures that are not yet capable of constituting a home"[118] in which case City officials may dismantle the structure and impound the intended occupier's building materials and possessions.[119] The by-law states that officials should "exercise their powers reasonably with due regard to every person's fundamental rights under Chapter 2 of the Constitution."[120] It also requires that "[t]he City must keep a record of unlawful occupations and include the details in a register including the names and details of the persons and possessions removed." However, we have seen that the opposite occurs in practice.[121] It is clear to see how the issues we mentioned in relation to the loopholes in PIE could potentially be exploited with the use of the by-laws. We take this point further below. Interestingly, this by-law defines "structure" to include "any shelter, hut, tent, dwelling [and] structure intended to be occupied as a home". While this may seem to be an expansion of the understanding of a structure, the context results in the outcome that may effectively allow for structures which are intended to be homes to be

and "waste" under this by-law, which should not be the case. Para 5.1 of the notice of motion.

114 Ndifuna Ukwazi 2021 https://nu.org.za/wp-content/uploads/2021/12/NU_press_release_2021_04_07.pdf. Also see City of Cape Town: Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2021.

115 See s 4(1)(b) of the City of Cape Town: Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2021, which amends s 23 of the principal by-law.

116 City of Cape Town: Unlawful Occupation By-law, 2021.

117 Sections 9(2) and (4). Also see s 11 of the City of Cape Town: Unlawful Occupation By-law, 2021.

118 Section 9(2)(b) of the City of Cape Town: Unlawful Occupation By-law, 2021.

119 Section 9(2)(b)(iii) of the City of Cape Town: Unlawful Occupation By-law, 2021.

120 Section 9(5)(i) of the City of Cape Town: Unlawful Occupation By-law, 2021.

121 See e.g. Gillespie *et al* 2011 https://www.newframe.com/part-one-the-red-ants-and-the-city-of-cape-town/.

demolished under this by-law. This once again defeats the purpose of PIE and creates the potential possibility for local government to essentially evict people from their homes without any judicial oversight by evoking the by-law. This speaks to the need for the by-laws and legislation to work together as opposed to against one another. We simply cannot be in a situation where local government can effectively evict people from their homes without a court order using these by-laws, in the process circumventing the procedural and substantive safeguards in PIE.

If one considers these by-laws in the light of some of the loopholes in PIE and the complexities mentioned in this contribution, a number of observations can be made. Firstly, it is clear as highlighted above that the by-laws can complicate the matter of whether a structure is a home and/or whether it is occupied. In fact, the by-law goes further by providing that structures that are intended to be homes can be demolished, which in our view goes against the very grain of what PIE was intended to achieve, which is judicial oversight in instances where an eviction from a home is envisaged. Judicial oversight is absolutely imperative in these instances to ensure that evictions take place in a dignified manner in post-apartheid South Africa. Secondly, the punishment encapsulated in the by-law is both unfortunate and counter-intuitive. If one considers that the homeless population ordinarily do not have employment, a fine as a form of punishment would be nonsensical. Furthermore, criminalising homelessness and the unlawful occupation of land[122] is reminiscent of the approach to unlawful occupation under apartheid through PISA. It goes against the underpinnings of PIE, which seek to ensure that those threatened with eviction are treated with respect and dignity. It has been argued that these by-laws are used as an excuse "for the City's law enforcement officers to threaten, harass, arrest and, in some instances, forcefully displace homeless people, as well as confiscate what little possessions homeless people own."[123] Furthermore, the by-laws potentially discriminate against the homeless and violate their rights to equality,[124] human dignity,[125] freedom and security of the person,[126] privacy,[127] freedom of movement and residence,[128] and property.[129] Given the specific focus of this article, we have considered only the property-related implications of these by-laws. We nevertheless appreciate that more work is required to

122 See Killander 2019 *SAJHR* 70-93.

123 Ndifuna Ukwazi 2021 https://nu.org.za/wp-content/uploads/2021/12/NU_press_release_2021_04_07.pdf.

124 Section 9 of the Constitution.

125 Section 10 of the Constitution.

126 Section 12 of the Constitution.

127 Section 14 of the Constitution.

128 Section 21 of the Constitution.

129 Section 25 of the Constitution.

unravel the constitutional implications more generally of this approach to homelessness and the unlawful occupation of land. Given the underlying historic, systemic socio-economic issues linked to homelessness it is quite unfortunate that efforts and resources are not instead being focussed on providing shelters and houses for those without homes. Clearly, a more proactive strategy to address this issue is required.

In conclusion, while PIE can be commended for its noble intentions of putting mechanisms in place in democratic South Africa to ensure that evictions are performed in a dignified manner, the question that needs to be asked is how much PIE can really do. What was the piece of legislation intended to do, and has it lived up to its noble goals in the light of the social ills mentioned above? This question is especially crucial if one considers that by-laws and a lack of the implementation of PIE in certain instances provide opportunities to circumvent the legislation within the broader imperative of preventing the unlawful occupation of land, hence making cities cleaner and more sanitary – as valuable as the latter goals may be. If vulnerable groups such as the homeless and those living in informal structures have uncertainty about gaining entry into PIE, that uncertainty needs to be clarified.[130] The focus of local government thus far has resulted in criminalising unlawful occupation and homelessness, which is the complete opposite of what PIE aims to achieve. Apart from this reactive approach, which potentially violates various human rights, it is also costly.[131] For example, the council of the City of Cape Town has approved an additional R170.8 million allocation for more security to protect City land against occupiers.[132] While this is an attempt to prevent residents from being in dangerous situations where the land they attempt to occupy is unstable, the focus is largely on the prevention of unlawful occupation through reactive measures as opposed to proactive measures to provide proper housing or upgrade existing settlements.[133] Without the necessary clarification about the applicability of PIE, we may continue to see what

130 Similar trends have been seen in the context of informal settlements, where government has been hesitant to implement the Upgrading of Informal Settlements Programme and instead chooses to evict and relocate communities. This speaks to the broader issue of governments not taking seriously the right to housing and the need to redress historical land patterns. See e.g. Mahomedy *Investigating the Role of Participation* 203-205.

131 It is estimated that the City of Cape Town spends R744 million a year on homelessness. Approximately R345 million (or 45%) of that is spent on enforcement and punitive measures and only R122 million (or 16%) on social development activities. Ndifuna Ukwazi 2021 https://nu.org.za/wp-content/uploads/2021/12/NU_press_release_2021_04_07.pdf.

132 Staff Reporter 2021 https://www.iol.co.za/capeargus/news/city-forks-out-r1708m-more-for-security-in-the-fight-against-cape-land-invasions-411939da-4da6-4967-a113-ba5f40ca5006.

133 See Mahomedy *Investigating the Role of Participation* 303, 307; Pienaar *Land Reform* 717.

effectively results in illegal evictions playing themselves out under the guise of the prevention of unlawful occupation. If we do not see a more integrated and aligned approach between these aspects, we may continue to see an influx of unlawful occupation, with no effective way to deal with the matter. A better strategy is clearly needed to prevent unlawful occupation, something which is currently lacking in PIE and in local government's approach to the problem. The suggested by-laws (in some contexts) arguably worsen the problems instead of contributing to solutions.

7 Conclusion

PIE was adopted to address the abuses of apartheid and to ensure that evictions in future take place in a manner consistent with the values underlying our constitutional democracy. Its provisions must be interpreted against this background, and where it falls short, these shortcomings should be highlighted to ensure that they can be adequately addressed, lest we fall back into old ways of thinking and doing. The approach to evictions and the unlawful occupation of land post-apartheid is informed by the Constitution and PIE. What is very clear is that this approach to evictions essentially embodies a human rights paradigm as opposed to a contravention paradigm under apartheid, where the focus was on ownership rights and eviction proceedings took place in an essentially technocratic and top-down manner.[134] Unlawful occupation is no longer criminalised. Instead, illegal evictions are criminalised. As held in *PE Municipality*, PIE did more than just repeal PISA; it inverted it by decriminalising squatting and setting out various requirements for evictions, including compliance with the rights in the Bill of Rights. There was a shift from the prevention of illegal squatting to prevention of illegal eviction, and emphasis was placed on needing to treat unlawful occupiers with dignity and respect despite the unlawfulness of their occupation. The depersonalised process under PISA that completely disregarded the circumstances of the occupiers was replaced by a humane, individualised and dignified procedure that focussed on achieving fairness, justice and equity for all involved. Common-law remedies were modulated with strong procedural and substantive protections, which are now contained in legislation.

There is arguably no better place to see a property law system's ideology playing out than in the context of the eviction of an unlawful occupier. It highlights property law's presumptive power of ownership, which assumes that ownership is the pinnacle of all rights and that all other rights are in stages of inferiority to ownership.[135] With the enactment of PIE in 1998 it is clear that the boundaries have shifted somewhat. Although existing property

134 Muller *et al Silberberg and Schoeman's The Law of Property* 103-105.
135 Boggenpoel 2019 *Stell LR* 237, 247.

rights are still strongly protected, we should remember that PIE was also enacted to give effect to section 25 of the Constitution, as there is a notable and persistent push to ensure that those without property rights are afforded the necessary protection by the enforcement of constitutional rights other than property. A broader constitutional lens is therefore imperative, what Sachs J in *PE Municipality* termed a "broad constitutional matrix". However, 30 years down the line challenges in the application and implementation of PIE are clearly emerging. This contribution has zoomed in on areas of eviction law where PIE potentially falls short, leaving the Courts to come up with solutions not provided in the legislation. We hoped to place the solutions under the spotlight firstly to determine on a practical level whether an amendment of PIE is needed or whether the solutions are sufficient to ensure that the constitutional rights that should be protected are done so satisfactorily. Secondly, on a normative level these problems were placed on the table to assess whether we have really shifted in our traditional ways of thinking of ownership and the rights of unlawful occupiers in democratic South Africa. We suggest that the hierarchies of property are still very much in place as we navigate the context of unlawful occupation of land and evictions, especially if one considers the three instances where PIE falls short.

In all instances where PIE falls short of providing clarity, courts have generally been proactive in ensuring that the solutions found have been nuanced and balanced. Most notably, in the context of the impossibility of executing certain eviction orders the courts have tried to reach solutions that would not simply entrench property rights but would also give effect to the rights of unlawful occupiers. In this respect it may be necessary to think creatively about an appropriate remedy that is more favourable, also in terms of a longer-term solution. We argue that it is necessary to provide clearer and more concrete solutions – and (compensation for) expropriation may provide for such a possibility. Developments have certainly been made where uncertainty existed about the notion of "home", and the courts have tried to give effect to a wider interpretation of the notion. However, clarity is needed on this, as may be seen in the *Ngomane* case, where the occupiers clearly viewed their rudimentary (and indeed temporary) structures as homes. Nonetheless, the Court held that:

> not even the most generous interpretation of the words 'building or structure', temporary or permanent, can lead to the conclusion that the material confiscated falls within their meaning. There were simply no buildings or structures that could be demolished, and no demolition occurred. There was, similarly, no eviction.[136]

[136] *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 1 SA 52 (SCA) paras 16-17.

In instances where it is not clear whether PIE applies to occupied and unoccupied structures, it remains important to consider what is at stake if this uncertainty is not clarified. Leaving this decision on the applicability of PIE to individuals leaves too much room for the disregard of human rights and is highly problematic. We would argue that the importance of judicial oversight in the decision of whether a structure is occupied (or not) cannot be overemphasised.

In the final section of this article we explored the issue of the non-implementation of PIE in instances where government purportedly seeks to ensure the prevention of the unlawful occupation of land. The interplay between the use of by-laws and the existence of PIE is also foregrounded. Lest we be (mis)understood for not appreciating the magnitude of the problem or for failing to provide solutions or even for being overcritical of the attempts by local government to deal in some way with the unlawful occupation of land, it may be important to point out that this discussion has modestly sought to highlight that flouting constitutional rights in favour of a broader imperative of prevention of unlawful occupation is not a favourable or sustainable solution to the problem in the long run. Our call is for us to rethink our approach to the problem holistically. There is clearly a need for a more integrated approach under the Constitution to the issue of unlawful occupation, homelessness and evictions. These issues cannot and should not be seen in isolation from each other, which is something that is currently happening. Local government by-laws should give effect to PIE and not undermine its purpose. In this respect, criminalising the unlawful occupation of land is an approach adopted in PISA, and not in PIE. Human dignity should always underpin any approach to these issues. We should be wary of undoing the progress made by resorting to approaches that mirror apartheid and the approaches in PISA – something we are currently dangerously close to doing.

Bibliography

Literature

Albertyn 2018 *SAJHR*
Albertyn C "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" 2018 *SAJHR* 441-468

Arbour 2007 *New York University Journal of Law and Politics*
Arbour L "Economic and Social Justice for Societies in Transition" 2007 *New York University Journal of Law and Politics* 1-28

Bishop "Remedies"
Bishop M "Remedies" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (Cape Town Juta OS 06-08) ch 9

Boggenpoel 2014 *Stell LR*
Boggenpoel ZT "Does Method Really Matter? Reconsidering the Role of Common Law Remedies in the Eviction Paradigm" 2014 *Stell LR* 72-98

Boggenpoel 2019 *Stell LR*
Boggenpoel ZT "(Re)defining the Contours of Ownership: Moving Beyond White Picket Fences" 2019 *Stell LR* 234-249

Boggenpoel and Mahomedy 2021 *Stell LR*
Boggenpoel ZT and Mahomedy S "Evictions During the COVID-19 Pandemic and Beyond [Discussion of *South African Human Rights Commission v City of Cape Town* 2021 2 SA 565 (WCC)]" 2021 *Stell LR* 482-495

Boggenpoel and Pienaar 2013 *De Jure*
Boggenpoel ZT and Pienaar JM "The Continued Relevance of the Mandament van Spolie: Recent Developments Relating to Dispossession and Eviction" 2013 *De Jure* 998-1021

Boggenpoel and Slade 2020 *CCR*
Boggenpoel ZT and Slade BV "Where is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*" 2020 *CCR* 379-399

Botha 2000 *THRHR*
Botha H "Democracy and Rights: Constitutional Interpretation in a Postrealist World" 2000 *THRHR* 561-581

Boudreaux 2010 *Economic Affairs*
Boudreaux K "Land Reform as Social Justice: The Case of South Africa" 2010 *Economic Affairs* 13-20

Brand "'Politics of Need Interpretation'"
Brand D "The 'Politics of Need Interpretation' and the Adjudication of Socio-Economic Rights Claims in South Africa" in Van der Walt AJ (ed) *Theories of Social and Economic Justice* (SUN Media Stellenbosch 2005) 17-36

Brandon and Kobayashi 2020 *Dialogues in Human Geography*
Brandon FM and Kobayashi LC "Structural Inequality in the Time of COVID-19: Urbanization, Segregation, and Pandemic Control in Sub-Saharan Africa" 2020 *Dialogues in Human Geography* 217-220

Chenwi 2009 *CCR*
Chenwi L "A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" 2009 *CCR* 371-393

Chenwi 2011 *SAPL*
Chenwi L "'Meaning Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" 2011 *SAPL* 128-156

Cloete and Boggenpoel 2018 *SALJ*
Cloete CT and Boggenpoel ZT "Re-evaluating the Prescribed Role of Courts Pertaining to the Court System Applicable in PIE Eviction Cases" 2018 *SALJ* 432-446

Cramer and Mostert 2015 *Stell LR*
Cramer R and Mostert H "'Home' and Unlawful Occupation: The Horns of Local Government's Dilemma – *Fischer and Another v Persons Unknown* 2014 3 SA 291 (WCC)" 2015 *Stell LR* 583-611

Davis 2012 *PELJ*
Davis DM "The Relationship between the Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What about Separation of Powers?" 2012 *PELJ* 1-14

Davis 2018 *SAJHR*
Davis DM "Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?" 2018 *SAJHR* 359-374

De Groot and Lemanski 2021 *Environment and Urbanization*
De Groot J and Lemanski C "COVID-19 Responses: Infrastructure Inequality and Privileged Capacity to Transform Everyday Life in South Africa" 2021 *Environment and Urbanization* 255-272

Dixon 2007 *ICON*
Dixon R "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited" 2007 *ICON* 391-418

Du Plessis "Ways of Living in a Transformative Democracy"
Du Plessis E "Ways of Living in a Transformative Democracy" in De Ville J (ed) *Memory and Meaning: Essays in Honour of Lourens du Plessis* (LexisNexis Durban 2015) 1-17

Dugard 2018 *PELJ*
Dugard J "*Modderklip* Revisited: Can Courts Compel the State to Expropriate Property Where the Eviction is not Just and Equitable?" 2018 *PELJ* 1-20

Dugard 2019 *CCR*
Dugard J "Unpacking Section 25: What, if Any, are the Legal Barriers to Transformative Land Reform?" 2019 *CCR* 135-160

Dugard and Seme 2018 *SAJHR*
Dugard J and Seme N "Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act re Restitution and Expropriation" 2018 *SAJHR* 33-56

Etienne 2022 *Nature Medicine*
Etienne CF "COVID-19 has Revealed a Pandemic of Inequality" 2022 *Nature Medicine* 17

Fennel 2007 *U Pa L Rev*
Fennel LA "Order with Outlaws?" 2007 *U Pa L Rev* 269-278

Fox O'Mahony *Conceptualising Home*
Fox O'Mahony L *Conceptualising Home: Theories, Laws and Policies* (Hart Oxford 2006)

Froneman 2005 *Stell LR*
Froneman JC "Legal Reasoning and Legal Culture: Our 'Vision' of Law" 2005 *Stell LR* 3-20

Kennedy 1976 *Harv L Rev*
Kennedy D "Form and Substance in Private Law Adjudication" 1976 *Harv L Rev* 1713-1724

Killander 2019 *SAJHR*
Killander M "Criminalising Homelessness and Survival Strategies through Municipal By-laws: Colonial Legacy and Constitutionality" 2019 *SAJHR* 70-93

Klare 1998 *SAJHR*
Klare KE "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146-188

Liebenberg 2012 *AHRLJ*
Liebenberg S "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" 2012 *AHRLJ* 1-29

Liebenberg 2014 *Nordic Journal of Human Rights*
Liebenberg S "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" 2014 *Nordic Journal of Human Rights* 312-330

Liebenberg *Socio-Economic Rights*
Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Oxford University Press Cape Town 2010)

Mahomedy *Investigating the Role of Participation*
Mahomedy S *Investigating the Role of Participation in the Upgrading of Informal Settlements: Identifying Challenges and Opportunities* (LLD-dissertation Stellenbosch University 2022)

Mahomedy *Potential of Meaningful Engagement*
Mahomedy S *The Potential of Meaningful Engagement in Realising Socioeconomic Rights: Addressing Quality Concerns* (LLM-thesis Stellenbosch University 2019)

Minow 2015 *CLR*
Minow M "Forgiveness, Law and Justice" 2015 *CLR* 1615-1646

Mostert 2002 *SALJ*
Mostert H "Land Restitution, Social Justice and Development in South Africa" 2002 *SALJ* 400-428

Mostert and Cramer 2015 *Stell LR*
Mostert H and Cramer R "'Home' and Unlawful Occupation: The Horns of Local Government's Dilemma: *Fischer and Another v Persons Unknown* 2014 3 SA 291 (WCC)" 2015 *Stell LR* 583-611

Muller 2011 *Stell LR*
Muller G "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" 2011 *Stell LR* 742-758

Muller 2013 *Fundamina*
Muller G "The Legal-Historical Context of Urban Forced Evictions in South Africa" 2013 *Fundamina* 367-396

Muller and Marais 2020 *TSAR*
Muller G and Marais EJ "Reconsidering Counter-Spoliation as a Common-Law Remedy in the Eviction Context in View of the Single-System-of-Law Principle" 2020 *TSAR* 103-124

Muller *et al Silberberg and Schoeman's The Law of Property*
Muller G *et al Silberberg and Schoeman's The Law of Property* 6th ed (LexisNexis Durban 2019)

Ngam 2021 *African Sociological Review*
Ngam RN "Government-Driven Land and Agrarian Reform Programmes in Post-Apartheid South Africa: A Brief History (1994-2021)" 2021 *African Sociological Review* 131-152

O'Regan 2012 *MLR*
O'Regan K "Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa" 2012 *MLR* 1-32

Peñalver and Katyal 2007 *U Pa L Rev*
Peñalver EM and Katyal SK "Property Outlaws" 2007 *U Pa L Rev* 1095-1186

Pienaar 2020 *TSAR*
Pienaar JM "Approaching Systemic Failure? A Brief Overview of Recent Land Reform Case Law" 2020 *TSAR* 536-546

Pienaar "'Unlawful Occupier' in Perspective"
Pienaar JM "'Unlawful Occupier' in Perspective: History, Legislation and Case Law" in Mostert H and De Waal MJ (eds) *Essays in Honour of CG van der Merwe* (Juta Cape Town 2011) 317-338

Pienaar and Muller 1999 *Stell LR*
Pienaar JM and Muller A "The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework" 1999 *Stell LR* 370-396

Pienaar *Land Reform*
Pienaar JM *Land Reform* (Juta Cape Town 2014)

Ray 2011 *SAJHR*
Ray BB "Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation" 2011 *SAJHR* 107-126

Rochelle and Gordon 2021 *Gender, Work and Organization*
Rochelle PB and Gordon E "The Shadow Pandemic: Inequitable Gendered Impacts of COVID-19 in South Africa" 2021 *Gender, Work and Organization* 795-806

Robbertze and Muller 2005 *De Jure*
Robbertze G and Muller G "Conceptualising the Home in Law and Gender" 2005 *De Jure* 332-352

Rosenberg *Hollow Hope*
Rosenberg GM *The Hollow Hope: Can Courts Bring about Social Change*? 2nd ed (University of Chicago Press Chicago 2008)

Roux *Politics of Principle*
Roux T *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press Cambridge 2013)

Sabanda 2020 *LDD*
Sabanda S "When Do You Call a Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism" 2020 *LDD* 384-412

Scott 2018 *TSAR*
Scott TS "The Precarious Position of a Landowner vis-à-vis Unlawful Occupiers: Common Law Remedies to the Rescue?" 2018 *TSAR* 158-176

Strydom and Viljoen 2014 *PELJ*
Strydom J and Viljoen S "Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved" 2014 *PELJ* 1207-1261

Van der Berg 2013 *SAJHR*
Van der Berg S "Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law with Substance" 2013 *SAJHR* 376-398

Van der Merwe *Sakereg*
Van der Merwe CG *Sakereg* 2nd ed (Juta Cape Town 1989)

Van der Walt 2002 *TSAR*
Van der Walt AJ "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254-289

Van der Walt 2005 *SAJHR*
Van der Walt AJ "The State's Duty to Protect Property Owners v the State's Duty to Provide Housing: Thoughts on the Modderklip Case" 2005 *SAJHR* 144-161

Van der Walt 2006 *Fundamina*
Van der Walt AJ "Legal History, Legal Culture and Transformation in a Constitutional Democracy" 2006 *Fundamina* 1-47

Van der Walt 2008 *Stell LR*
Van der Walt AJ "Property, Social Justice and Citizenship: Property Law in the Post-Apartheid South Africa" 2008 *Stell LR* 325-346

Van der Walt 2015 *European Property Law Journal*
Van der Walt AJ "Sharing Servitudes" 2015 *European Property Law Journal* 162-222

Van der Walt *Property in the Margins*
Van der Walt AJ *Property in the Margins* (Hart Oxford 2009)

Van Wyk 2011 *PELJ*
Van Wyk J "The Role of Local Government in Evictions" 2011 *PELJ* 50-83

Viljoen 2020 *Stell LR*
Viljoen S "A Systemically Correct Approach to State Evictions" 2020 *Stell LR* 201-225

Wenzel 2000 *Modern Fiction Studies*
Wenzel J "The Pastoral Promise and the Political Imperative: The Plaasroman Tradition in an Era of Land Reform" 2000 *Modern Fiction Studies* 90-113

Wilson 2009 *SALJ*
Wilson S "Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality" 2009 *SALJ* 270-290

Wilson *Human Rights and the Transformation of Property*
Wilson S *Human Rights and the Transformation of Property* (Juta Cape Town 2021)

Xaba "South African Land Question"
Xaba MB "South African Land Question and the Dilemma of Land Expropriation without Compensation: A Critical Examination" in Akinola AO, Kaseeram I and Jili NN (eds) *The New Political Economy of Land Reform in South Africa* (Springer New York 2021) 79-99

Zitzke 2018 *SAJHR*
Zitzke E "A Decolonial Critique of Private Law Human Rights" 2018 *SAJHR* 492-516

Case law

Absa Bank Ltd v Murray (CA338/2017) [2018] ZAECGHC 75 (28 August 2018)

Barnett v Minister of Land Affairs 2007 6 SA 313 (SCA)

Breede Vallei Munisipaliteit v Die Inwoners van Erf 18184 (A369/12) [2012] ZAWCHC 390 (13 December 2012)

Chetty v Naidoo 1974 3 SA 13 (A)

City of Cape Town v Rudolph (89700/01) [2003] ZAWCHC 29 (7 July 2003)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2011 4 SA 337 (SCA)

Dladla v City of Johannesburg 2018 2 SA 327 (CC)

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 2002 4 SA 768 (CC)

Fischer v Persons Whose Identities are to the Applicants Unknown and Who Have Attempted or are Threatening to Unlawfully Occupy Erf 150 (Remaining Extent) Philippi in re: Ramahlele v Fisher 2014 3 SA 291 (WCC)

Fose v Minister of Safety and Security 1997 3 SA 786 (CC)

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC)

MEC, Department of Welfare, Eastern Cape v Kate 2006 4 SA 478 (SCA)

Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery 2004 3 All SA 169 (SCA)

Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrik 2003 6 BCLR 638 (T)

Modderklip Boerdery (Pty) Ltd v Modder East Squatters 2001 4 SA 385 (W)

Ndlovu v Ngcobo; Bekker v Jika 2002 4 All SA 384 (SCA)

Ngomane v City of Johannesburg Metropolitan Municipality 2020 1 SA 52 (SCA)

Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg 2008 3 SA 208 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 5 SA 3 (CC)

Rakgase v Minister of Rural Development and Land Reform (33497/2018) [2019] ZAGPPHC 375 (4 September 2019)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC)

South African Human Rights Commission v City of Cape Town (WC) (unreported) case number 8631/2021 of 15 July 2022

South African Human Rights Commission v City of Cape Town 2021 2 SA 565 (WCC)

Legislation

City of Cape Town: Integrated Waste Management By-law, 2009

City of Cape Town: Streets, Public Places and the Prevention of Noise Nuisances By-law, 2007

City of Cape Town: Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2021

City of Cape Town: Unlawful Occupation By-law, 2021

Constitution of the Republic of South Africa, 1996

Disaster Management Act 57 of 2002

Expropriation Act 63 of 1975

Extension of Security of Tenure Act 62 of 1997

Housing Act 107 of 1997

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Prevention of Illegal Squatting Act 51 of 1951

Social Assistance Act 59 of 1992

Internet sources

Bennie 2017 https://www.dailymaverick.co.za/article/2017-07-14-groundup-red-ants-accused-of-firing-rubber-bullets/
Bennie A 2017 *GroundUp: Red Ants Accused of Firing Rubber Bullets* https://www.dailymaverick.co.za/article/2017-07-14-groundup-red-ants-accused-of-firing-rubber-bullets/ accessed 10 September 2022

Bhengu 2021 https://www.news24.com/news24/southafrica/news/we-are-powerless-red-ants-evict-people-living-illegally-in-posh-joburg-suburb-20210406
Bhengu L 2021 *"We are Powerless": Red Ants Evict People Living Illegally in Posh Joburg Suburb* https://www.news24.com/news24/southafrica/news/we-are-powerless-red-ants-evict-people-living-illegally-in-posh-joburg-suburb-20210406 accessed 10 September 2022

Bornman and Nyoka 2020 https://www.newframe.com/city-of-joburgs-heartless-red-ants-demolitions/
Bornman J and Nyoka N 2020 *City of Joburg's Heartless Red Ants Demolitions* https://www.newframe.com/city-of-joburgs-heartless-red-ants-demolitions/ accessed 10 September 2022

Evans 2022 https://www.news24.com/news24/southafrica/news/you-will-die-here-red-ant-recounts-eviction-battle-in-knysna-20220409
Evans J 2022 *"You Will Die Here": Red Ant Recounts Eviction Battle in Knysna* https://www.news24.com/news24/southafrica/news/you-will-die-here-red-ant-recounts-eviction-battle-in-knysna-20220409 accessed 10 September 2022

Gillespie *et al* 2021 https://www.newframe.com/part-one-the-red-ants-and-the-city-of-cape-town/
Gillespie K *et al* 2021 *Part One | The Red Ants and the City of Cape Town* https://www.newframe.com/part-one-the-red-ants-and-the-city-of-cape-town/ accessed 10 September 2022

Government of the Republic of South Africa 2019 https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19
Government of the Republic of South Africa 2019 *Regulations and Guidelines: Coronavirus COVID-19* https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19 accessed 10 September 2022

Ndifuna Ukwazi 2021 https://nu.org.za/wp-content/uploads/2021/12/NU_press_release_2021_04_07.pdf
Ndifuna Ukwazi 2021 *Press Statement: Eleven People Who are Homeless Go to Court to Challenge Cape Town's Discriminatory By-laws* https://nu.org.za/wp-content/uploads/2021/12/NU_press_release_2021_04_07.pdf accessed 10 September 2022

Neille 2020 https://www.dailymaverick.co.za/article/2020-04-22-gauteng-demolitions-red-ants-in-all-out-war-on-the-poor/
Neille D 2020 *Gauteng Demolitions: Red Ants in All-Out War on the Poor* https://www.dailymaverick.co.za/article/2020-04-22-gauteng-demolitions-red-ants-in-all-out-war-on-the-poor/ accessed 10 September 2022

Payi 2021 https://www.iol.co.za/weekend-argus/news/city-of-cape-towns-by-laws-challenged-by-homeless-in-court-action-52590643-69fd-40c6-b3e5-81f40b63705b
Payi B 2021 *City of Cape Town's By-laws Challenged by Homeless in Court Action* https://www.iol.co.za/weekend-argus/news/city-of-cape-towns-by-laws-challenged-by-homeless-in-court-action-52590643-69fd-40c6-b3e5-81f40b63705b accessed 10 September 2022

Staff Reporter 2014 https://mg.co.za/article/2014-09-18-joburg-residents-battle-red-ant-evictions/
Staff Reporter 2014 *Jo'burg Residents Battle Red Ant Evictions* https://mg.co.za/article/2014-09-18-joburg-residents-battle-red-ant-evictions/ accessed 10 September 2022

Staff Reporter 2021 https://www.iol.co.za/capeargus/news/city-forks-out-r1708m-more-for-security-in-the-fight-against-cape-land-invasions-411939da-4da6-4967-a113-ba5f40ca5006
Staff Reporter 2021 *City Forks Out R170.8m More for Security in the Fight against Cape Land Invasions* https://www.iol.co.za/capeargus/news/city-forks-out-r1708m-more-for-security-in-the-fight-against-cape-land-

invasions-411939da-4da6-4967-a113-ba5f40ca5006 accessed 10 September 2022

List of Abbreviations

AHRLJ	African Human Rights Law Journal
ALIU	Anti-Land Invasion Unit
CCR	Constitutional Court Review
CLR	California Law Review
Harv L Rev	Harvard Law Review
ICON	International Journal of Constitutional Law
LDD	Law, Democracy and Development
MLR	Modern Law Review
PELJ	Potchefstroom Electronic Law Journal
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PISA	Prevention of Illegal Squatting Act 51 of 1951
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Pa L Rev	University of Pennsylvania Law Review