

**THE RIGHTS OF THE EVICTED VERSUS THE EVICTOR: A CRITICAL
ANALYSIS OF THE PREVENTION OF ILLEGAL EVICTION FROM AND
UNLAWFUL
OCCUPATION OF LAND ACT 19 OF 1998. MOVING TOWARDS A PERMANENT
HOUSING SOLUTION IN SOUTH AFRICA.**

RISHONGILE CORRINNE LYNN NKWINIKA

DISSERTATION

Submitted in Partial Fulfilment of the Requirements for the Degree of

MASTER OF LAWS

in


DEVELOPMENT AND MANAGEMENT LAW

RCL NKWINIKA

2021

DECLARATION

I, **RISHONGILE CORRINNE LYNN NKWINIKA**, hereby declare that this dissertation is my own work and has never been submitted in part or in full at any academic institution. All sources that I have used or quoted have been acknowledged employing references. I also accept full responsibility for whatever is written and all the conclusions and findings drawn herein.



R C L NKWINIKA

.....**2021**.....

DATE

DEDICATION

This dissertation is dedicated to my parents Mrs Mhaka Sannie Halala and Dr Peter Halala. They, despite all the difficulties, raised me. I would like to dedicate this work to my brother, Musa Eugene Nkwinika, for his untiring support. Furthermore, I would like to dedicate the work to my late grandmother, Mrs Mihloti Johanna Furumele. Lastly, I would like to dedicate this work to my late uncle, Mr Allan Paul Furumele, who passed on before completing this work. May his soul continue to rest in perfect peace.

ACKNOWLEDGEMENTS

Firstly, I would like to thank the Almighty God for his grace. Had it not been for Him, I would not be where I am today.

I thank my Supervisor, Professor A Anderson, for his guidance, insight, knowledge, comments, and recommendations regarding this dissertation. His contributions, feedback and valuable criticisms have made this dissertation a success. Without him, I would not have succeeded. I am eternally grateful to him for his ideas have inspired much of this study.

I want to express my profound gratitude to my parents, Mrs Mhaka Sannie Halala and Dr Peter Halala, for their sacrifices, endless support, encouragement and unconditional love. I will forever be indebted to them. Words alone can never fully express my gratitude.

I want to express my sincere appreciation to my brother, Musa Eugene Nkwinika. He has always been behind my success, contributed to my academic journey, and supported me in this endeavour.

I want to thank my best friend Nyiko Shandlale, who believed in me when I didn't believe in myself. He always reminded me that Rome was not built in a day. These words encouraged me not to ever give up on my dreams. I am internally grateful for his love and support.

I want to thank my special friend, Mokgadi Precious Matlakala, who knew my academic struggles but always reminded me that I could overcome them. She had so much faith in me, for she believed in me. She unconditionally supported, encouraged and showered me with all the love.

I want to thank my friend, Clarence Mangena, for his unwavering support and for providing me with guidance in my work. He was always ready to share ideas with me on issues about this work. He was always patient with me in whatever I consulted with him.

Laura Fanisa Malatjie is another friend who was always with me in whatever difficulties I encountered in the finalisation of this work. Her love and support are greatly appreciated.

Lastly, I would like to thank all the members of my extended family and friends at large for their unwavering encouragement and support.

ACRONYMS

ANC	: African National Congress
ICESCR	: International Covenant on Economic, Social and Cultural Rights
IPI	: International and Philanthropic Innovation
MDG	: Millennium Development Goals
MEC	: Member of the executive Council
NDP	: National development Plan
PIE	: Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PISA	: Prevention of Illegal Squatting Act 52 of 1951
RDP	: Reconstruction and development Policy
SCA	: Supreme Court of Appeal
SERISA	: Socio-Economic Rights Institute of South Africa
UN	: United Nations
USA	: United States of America

ABSTRACT

South Africa is a country with a past characterised by extreme racial imbalances, and that is the apartheid era. After the apartheid era was dismantled and came crumbling down, South Africa adopted what the courts later described as a 'transformative constitutionalism'. This was because the country adopted a constitution aimed at striking a balance amongst the lives of the group of citizens who were racially side-lined during the apartheid era. Similarly, the South African government derives its power from the Constitution, thereby defining its democracy through constitutionalism.

The Bill of Rights in the Constitution shows the utmost regard and respect that South Africa has for human rights. The inclusion of the right to adequate housing and its underlying provision against eviction and the property right symbolised a significant step that the country was undertaking to engage social justice for all the citizens. Furthermore, the legislature has gone further to enact legislation that gives effect to the protection and realisation of the right to adequate housing.

In an attempt to achieve social justice, the adopted Constitution provides the most fundamental socio-economic rights, including the right to housing. This right aims to elevate the most vulnerable citizens in the country who may not afford a decent house or shelter. However, it is apparent that the relief intended by the right to housing is not always readily achieved; most citizens still live in dire housing conditions. Case laws show that citizens in this situation resort to other unofficial means, such as occupying private land illegally to secure better settlement conditions.

Coupled with the right to housing is the provision that protects the citizens from being arbitrarily evicted from any shelter they consider as their home. In the backdrop of this, the courts were, however, constantly faced with multitudes of the application calling for eviction orders against people who had illegally occupied properties belonging to other people. The consequence of this situation led to the promulgation of the PIE Act, which aims to protect the rights of both the unlawful occupier and the owner of the occupied property.

No right in the Constitution may be exercised, read and interpreted to the obvious detriment of the other rights in the same Constitution. There is a conundrum that the courts and the government have to deal with; regarding the protection of the rights of property owners and unlawful occupiers.

In most instances, homeless people were once owners of specific shelters or safely put on the land. Notwithstanding that the government is responsible for providing adequate housing within its reasonable legislative and other measures, issues such as over-population are preceded by homelessness. In other words, the issue of unlawful occupation affects the lawful owners and the entire country as a whole. As a result, the government must have due regard to providing a proper and alternative shelter to unlawful occupiers and homeless citizens to do away with over-population issues and have people occupying non-residential areas. This study will show that legislation can

cure all forms of social problems the country encounters. However, that implementation as the life-blood of legislation should be affected by relevant state organs.

TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGEMENTS	iii
ACRONYMS	iv
ABSTRACT	v
1. CHAPTER ONE: INTRODUCTION TO THE STUDY	
1.1 Introduction and background.....	[1]
1.2 Problem statement.....	[3]
1.3 Research question.....	[5]
4 Aims and objectives.....	[5]
1.5 Literature review.....	[6]
1.6 Research methodology.....	[10]
1.7 Significance of the study.....	[11]
1.8 Organisation of chapters.....	[11]
2. CHAPTER TWO: LEGISLATIVE, CASE LAW AND POLICY FRAMEWORKS AND INTERNATIONAL LAW	
2.1 Introduction.....	[12]
2.2 The Constitution of the Republic of South Africa.....	[12]
2.2.1 Socio-economic rights guaranteed in the Constitution.....	[13]
2.2.2 The right to housing as a socio-economic right.....	[14]
2.2.3 Eviction in terms of Section 26.....	[14]
2.3 The Reconstruction Development Program.....	[15]
2.4 Housing Act 107 of 1997.....	[16]
2.5 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	[16]
2.5.1 Interpretation of PIE.....	[17]
2.5.2 The Courts' approach to section 26 (3).....	[18]
2.6 The National Housing Development Agency Act 23 of 2008.....	[21]
2.7 The National Development Program 2030.....	[22]
2.8 International Framework.....	[23]

3.	CHAPTER THREE: ILLEGAL OCCUPATION OF LAND, ISSUES AND CHALLENGES	
3.1	Introduction.....	[24]
3.2	Constitutional Imperatives to housing.....	[25]
	3.2.1 Right to adequate housing.....	[25]
	3.2.2 Interpretation of positive obligation.....	[26]
	3.2.2.1 Reasonable legislative and other measures.....	[26]
	3.2.2.2 Within available resources.....	[28]
	3.2.2.3 To achieve the progressive realisation of the right.....	[28]
	3.2.3 Negative obligation.....	[29]
3.3	The balance between the right to land ownership and illegal occupiers.....	[30]
3.4	Procedures for lawful eviction.....	[31]
	3.4.1 Unlawful occupier.....	[31]
	3.4.2 Consent.....	[32]
	3.4.3 Notice.....	[34]
	3.4.4 Relevant factors.....	[35]
	3.4.5 Just and equitable.....	[37]
3.5	The courts' application of PIE.....	[38]
3.6	The protection of the right to housing under International law.....	[41]
4.	CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS	
4.1	Conclusions.....	[43]
4.2	Recommendations.....	[46]
	Bibliography.....	[48]
	Books.....	[48]
	Journal Articles.....	[49]
	Legislation.....	[51]
	Reports.....	[51]
	Thesis/Dissertation.....	[52]
	Treaties.....	[52]

CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1 Introduction and Background

Everyone has a right to decent housing¹. This right is enshrined in the South African Constitution and international instruments² that safeguard and protect basic human rights. As far as the law fights for equality for everyone, such a right is limited in certain cases, especially when it comes to economic and financial equality. The history of many countries in the developing world was characterized by colonization that disadvantaged the local population. South Africa was no exception to this system since it also became the subject of colonization which resulted in a system of social classification which had the extremely rich white minority which had control of all state resources and the poor black, Indian and coloured majority, which was driven to the infertile and unproductive regions of the country in the so-called homelands.³

South Africa is not only characterized by a rapidly growing society that is turning more urbanized, and at the same time dealing with settlement patterns that are a result of apartheid legacy.⁴ The advent of democracy brought about freedom in South Africa. Such a system has made it onerous for the average black man to own a house or property. However, the minority is still in control of key sectors of the economy.

The current situation in South Africa exhibits characteristics of the old regime whereby blacks are still staying in dilapidated inhumane settlements that have no access to water or electricity. The government has adopted policies and laws to provide much-needed shelter to the destitute population. However, such policies are taking too long because of budget constraints, among other factors.⁵ The Prevention of Illegal Eviction from and Unlawful Occupation of Land

¹Section 26 of the Constitution.

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

(b) The state must take reasonable legislative and other measures within its available resources to realise this right's progressive realisation.

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

²United Nations. Istanbul Declaration on Human Settlements. Istanbul, Turkey.1996

³Nnadozie, R.M. Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis. The African Statistical Journal, Volume 16, 2013.

⁴Burgoyne, M.L. Factors Affecting Housing Delivery in South Africa: A Case Study of the Fisantekraal Housing Development Project, Western Cape. Research Dissertation: Department of Sociology and Social Anthropology Faculty of Arts and Social Sciences. Stellenbosch University. 2008.p1 ⁵Ibid.

Act¹ (PIE Act) was enacted as a counter measure to prevent the illegal settlement of people on the property and against illegal eviction and give property owners and the Municipalities the right to approach the court for eviction orders.

Most people in South Africa still reside in slummy settlements, which means that they cannot access decent houses due to poverty and the alarming unemployment rate.² This trend has resulted in people occupying property belonging to someone else searching for decent accommodation for themselves and their families. The disadvantaged groups in South Africa were pushed by the apartheid government to settle in the so-called 'homelands' where they had no access to proper shelter, clean water, electricity and the most basic service delivery.⁸

In 1994, the African National Congress (ANC) came to power. Its new constitution aimed to provide housing as a human right for all citizens. The government undertook to commit itself to address the past injustices through its housing policy. As a result, the provision of housing for the historically oppressed South Africans became a priority. The said policy documents emphasized a people-centred approach, significant community participation in housing processes and an active role for low-income groups as partners with the government and the private sector in developing housing.³

The Constitution under Chapter 2 contains the Bill of Rights, which guarantees equality⁴ and human dignity⁵, meaning that no one may be subjected to inhuman living conditions. However, most importantly, it contains provisions on the protection of socio-economic rights, including the right to access adequate housing.⁶ Section 26 of the Constitution creates a positive duty towards the government "to procure rational legislative and other measures within its power to attain the progressive recognition of the right".⁷

The PIE Act contains provisions that compel the court to consider certain circumstances in every case before granting an order evicting unlawful occupiers; amongst these is the socioeconomic welfare of the occupiers. Therefore, it imposes a condition that such people must be given

¹ Act 19 of 1998 (hereinafter called the Pie Act).

² Nevondwe, L., Odeku, K. Challenges of housing delivery in South Africa: Lessons from Jurisprudence. African Journal of Business Management.Vol.6 (45), 2012. pp. 11327-11341 ⁸See footnote 3 above.

³ Mirafatab, F. The Perils of Participatory Discourse: Housing Policy in Post-apartheid South Africa. Journal of Planning Education and Research 22:226-239 DOI: 10.1177/0739456X02250305.2003.Pp 226.

⁴ Section 9 of the Constitution.

⁵ Section 10 of the Constitution.

⁶ Section 26 of the Constitution.

⁷ Section 26(2) of the Constitution.

alternative accommodation before they are evicted. Therefore, this study analyses and critiques if the government is complying with this obligation of providing alternative accommodation to the vulnerable groups as provided by the PIE Act to ease the housing shortage in the country.

The study further analyses the effectiveness of policies currently in place to provide low-cost housing, including the Reconstruction and Development Policy (RDP). It would further analyse case law about housing in South Africa to learn how to deal with the predicament of housing. Addressing the issue of housing is paramount because such vulnerable groups are inclusive of children and the elderly hence, they need protection and to have their welfare taken care of by providing them with decent shelter, a secure and safe environment and access to basic amenities, which include access to hospitals and schools.

There are conflicting interests in the case whereby an eviction order is granted. The court is caught between protecting the interests of the land owners and safeguarding the rights of the evicted groups. Therefore, the study delves into how the court has applied the PIE Act to protect such rights and if there are cases whereby there is an injustice when it comes to discharging such court responsibilities. South Africa is a signatory to international instruments that govern human rights and liberties. The study will also consult such instruments to assess if the provisions regarding housing/ access to the shelter are being upheld.

The current reality in South Africa is that many residents are still succumbing to the challenges they faced during the apartheid regime. They had no access to shelter or land to settle. The situation has resulted in an unprecedented number of unlawful occupiers on property. This forced the legislature to promulgate the Prevention of Illegal Eviction from Land and Unlawful Occupation of Land Act⁸ to give effect to Section 26(3), which guards against the eviction of people to the effect that their homes get demolished without an order of court subject to consideration has been accorded to all relevant circumstances. Therefore, the study explores the state's duty to provide alternative accommodation to such vulnerable groups and respect the right of tenure of land owners who are having their rights infringed through illegal settlements.

1.2 Problem Statement

Housing has remained an interdependent global phenomenon that features in every aspect of humanity. Its importance is pronounced to impact man's social, physical and mental well-being,

⁸ Act 19 of 1998.

despite his socio-economic status, colour or creed.⁹ Like other countries, South Africa encounters a growing challenge in providing all citizens with access to suitable housing.¹⁰ Statistics reveal, as exhibited by South Africa's Household Survey of 2011, "12.1% (1 789 million households) of South Africa's 14.75 million households lived in informal housing in 2011 with Gauteng having 20.4% households living in informal settlements, North West 18.5% and the Western Cape 15.1%. Limpopo has the smallest percentage with 4.5% and the Eastern Cape has 6.5%".¹⁷ The statistics show that most poor South Africans still live in degrading and unhygienic informal settlements that are prone to diseases and poor sanitation. This situation has led such people to migrate and occupy private properties to better their living situations. These people are labelled as squatters, and the term 'squatter' connotes residents who have no legal right to the land on which they build their shacks or shanties.¹¹

The mandate of ensuring that evicted people are taken care of must be upheld. The government must fulfil its commitments of ensuring that such evicted people are offered an alternative and proper accommodation by considering their socio-economic status. The rights of land owners must also be protected, and the government must address the housing crisis to ensure that they have uninterrupted enjoyment of their properties. It cannot be ignored that the government has policies in place to address the housing situation, such as the Reconstruction Development Policy (RDP). However, such policies have been rigged with corruption, nepotism, and other ills, making it impossible to benefit the targeted groups.

The Constitution, the supreme law of the land, guarantees everyone "the right of access to adequate housing".¹⁹ This right, which was carefully enshrined in the Bill of Rights, creates a duty on the government to make sure that the housing crisis currently being faced in the country is addressed. The majority of black people who have no land have resorted to occupying the property, thereby infringing on the right of property owners to peaceful enjoyment of their properties. The current policies to offer low-cost housing are too slow and have resulted in people living in defiance of the law by occupying land belonging to other people. The PIE Act was promulgated for this purpose, which is to provide eviction orders and ensure that the evicted are

⁹ Ayedun, C. A. & Oluwabi, A. O. Issues and challenges militating against the sustainability of affordable housing provision in Nigeria. *Business Management Dynamics* 1(4).2011. pp. 7–10.

¹⁰ Marutlulle, N.K. (2017). Causes of informal settlements in Ekurhuleni Metropolitan Municipality: An exploration, *Africa's Public Service Delivery and Performance Review* 5(1), a131.<https://doi.org/10.4102/apsdpr.v5i1.131>

¹⁷South Africa Year Book. Human settlements, Government Printers, Pretoria, 2012.pp. 19.

¹¹ Power, A. *Hovels to high rise – State housing in Europe since 1850*. Routledge Publishers, London.1993

¹⁹Section 26(1) of the Constitution.

offered temporary and safe accommodation. Therefore, the Act must be analysed and critiqued to assess how far it has met its objectives since its inception.

In light of the above, this leaves us with the question; what can be done to avoid illegal land occupation to reach a permanent housing solution in South Africa?

1.3 Research Questions

- Is the government of South Africa honouring the mandate imposed by the Constitution under Section 26(3) and the PIE Act to prevent the eviction of people or the demolition of their homes before due regard has been given to all circumstances by taking into account the socio-economic status of such people, and also due consideration for the rights of the land owners for the final goal of searching for a permanent solution for the housing crisis in the country?
- How effective are the policies and regulatory frameworks adopted by the government so far in addressing the housing challenge?
- What are the challenges preventing the realisation of the right to housing in South Africa, considering that most people live in informal settlements and slums?
- Is the government taking any practical steps towards bringing equality with regards to the land?

1.4 Aims and Objectives

The study aims to critically analyse the PIE Act taking into account the rights of property owners and the evicted groups. It would further assess the Act's contribution towards realising the right to housing as provided by Section 26 of the Constitution. The Act provides that before an eviction order is granted, the court must first consider the welfare of the evicted groups, considering how long they had lived there if they are children and the elderly, which form part of the evicted people¹². These factors will assist if it is justifiable to issue the order and if alternative accommodation may be arranged for such people. Therefore, the study assesses whether this procedure has been followed when issuing eviction orders by reviewing the judgements in prominent cases like the *Jabulani Zulu and Others V AbahlaliBasemjondolo Movement South*

¹² Act 19 of 1998, the Preamble of the Act.

*Africa*¹³ and *Hadibeng Local Municipality v Unlawful Occupiers*,¹⁴ which the court has previously dealt with in terms of the granting eviction orders and taking into account all due consideration for the circumstances of the evicted, for instance, their socio-economic status, children and the elderly.

The study will further analyse and critique the housing policies in South Africa to evaluate their effectiveness and efficiency in providing housing to vulnerable groups with no shelter and how successful such policies have been since their inception.

1.5 Literature Review

The PIE Act was enacted to prevent the arbitrary deprivation of property as provided in Section 25 of the Constitution. The preamble of the Act provides that:

*“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”*¹⁵

As stated by “section 25(1) of the Constitution”, the provision protects property owners from taking their property away with no just cause. Section 25(2) lays the grounds on which such property may be expropriated in terms of a law of general application. The provision protects ownership of property, although there are challenges with the provision since it makes it challenging to redistribute land to those without because such redistribution is subject to compensation to the current owners.

The PIE Act also provides the legal apparatus for eviction that is fair to both the owners and unlawful occupiers of properties.¹⁶ It states that “it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances”.¹⁷ Thus, it is pertinent to investigate and assess how far this mandate has been upheld. The evicted people deserve to be provided with alternative accommodation by the state. The Act further states that “special consideration should be given to the rights of the elderly, children, disabled persons

¹³ *AbahlaliBasemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (14 October 2009)

¹⁴ *Hadibeng Local Municipality v Unlawful Occupiers of Portions 33 and 37 of the Farm 448 Bokfontein and Others* [2015] SA (15) 367 [5 JUNE].

¹⁵ Act 19 of 1998, Preamble.

¹⁶ Act 19 of 1998, Preamble.

¹⁷ Act 19 of 1998, Preamble.

and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered”.¹⁸ With that said, the state should realise the socioeconomic rights of these groups by providing decent alternative housing as provided for by Section 26 of the Constitution. Therefore, it must be stated that the PIE Act only provides the procedure for eviction but does not explicitly provide an alternative for the evicted groups.

The court has been at the forefront of protecting vulnerable groups, especially when it comes to the contentious issue of housing. In the case of *AbahlaliBasemjondolo Movement SA v Premier of KwaZulu Natal and Others*, Moseneke DCJ (as he was then) stated that,

“It is so that the scope of section 16 is limited. It applies to unlawful occupiers who were in occupation of land or a building before the Slums Act commenced. What is beyond doubt is that when the MEC in a notice requires so, the provision makes it obligatory for an owner or person in charge of land or a building to approach a court to evict unlawful occupiers. If the owner fails to do so, the obligation falls upon the municipality. The owner or municipality must do so in terms of the relevant provisions of the PIE Act. This means that courts may grant an eviction order only when it is just and equitable to do so after weighing carefully all relevant factors applicable to an eviction sought by a private owner or by a municipality or an organ of state”.¹⁹

The concern of housing in South Africa is mainly centralised on the unresolved land question. The land issue has been hotly debated by academics, political parties, and other interested groups. All solutions point to the inevitable land restitution currently envisioned by section 25(7) of the Constitution. De Villers argues that he supports that apartheid resulted in the land disparity in South Africa by stating: During 1913 the Black Land Act, most areas of South Africa were controlled by the white minority, and blacks took control of ‘traditional’ areas where they were believed to have resided historically. The 1913 Act set a precedent for 1936 as it was adopted by the Black Trust and Land Act, which allocated 13% of South Africa to black people. However, they comprised 80% of the population. It is estimated that 32% of the population currently continue to live in these areas.²⁰

¹⁸ Act 19 of 1998, Preamble.

¹⁹ *AbahlaliBasemjondolo Movement SA v Premier of KwaZulu Natal and Others*, (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (14 October 2009), Paragraph 91.

²⁰ De Villers, B. Land reform: Issues and challenges: A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia. Konrad Adenauer Foundation, Occasional Papers. Johannesburg. 2003 pp.46.

The conundrum surrounding the provision of inexpensive housing in South Africa continues to grow, with more informal settlements being established on private property. The PIE ACT was promulgated to provide lawful eviction orders and protect the owners' rights. Still, however, the evicted people do not have anywhere else to go since the policies dealing with low-cost housing are too slow in delivery. Tomlinson argues that the government has provided more than 2.5 million houses since 1994 and another 1.2 million serviced sites. Over this period, the housing backlog has increased from 1.5 million to 2.1 million units, while the number of informal settlements has gone up from 300 to 2 225, an increase of 650%. At the same time, the housing subsidy has gone up from R12 500 per household to some R160 500 today. In contrast, state spending on housing and community amenities has risen from 1% to 3.7% of GDP.²¹

The African National Congress led-government has, since 1994, addressed the issue of the housing backlog to develop it as it was one of its development agenda. The promulgation of the Housing Act 107 of 1997, South Africa's housing policy, and other related housing legislation sought to address the past's inconsistencies by providing adequate and habitable housing, specifically for disadvantaged residents.²² However, such policies still face many setbacks, chief amongst these being the issue of funding. There are dissenting views as to the cause of the housing backlog in South Africa. While some state that the current housing shortage in South Africa is a by-product of natural population growth, others attribute the critical housing shortage to migration and restrictive apartheid legislation. Some believe that all the three factors, natural population growth, migration and apartheid laws, have contributed immensely to housing.²³

The right of property owners to uninterrupted enjoyment of their properties is one of the aspects the PIE Act seeks to protect. According to the Socio-Economic Rights Institute of South Africa,²⁴ everyone has a right to adequate housing. The government has to provide such. In the case of *ModderklipBoerdery (pty) Ltd v Maddder East Squatters and Another*,³³ both the eviction order and the enforcement order was appealed to the Supreme Court of Appeal. In that Court, it was pointed out that the continued occupation by the unlawful occupiers during the persistence of an

²¹ Tomlinson, M. South Africa's Housing Conundrum. The policy bulletin of the IRR ISSN: 2311-7591 1 No 4.2015/6 October 2015/Issue 20.pp1.

²² Mohlapamaswi, M.L & Rachidi, R.M. South Africa's Challenges of realising her Socio-Economic Rights. Mediterranean Journal of Social Sciences, MCSEER Publishing, Rome-Italy.2014.Vol 5 No 27.pp901.

²³ Mashabela, H. (1990). Mekhukhu: Urban city of the future. Pretoria: South African Institute of Race Relations (accessed at <https://irr.org.za>)

²⁴ Socio-Economic Rights Institute of South Africa (SERI) 15 September, 2014. (accessed at www.seri.sa.org)

³³*ModderklipBoerdery (pty) Ltd v Maddder East Squatters and Another* 2001(4) SA 385 (W).

eviction order was an infringement of the owner's property interests. It was further considered that the eviction of the unlawful occupiers from the premises where they would be left homeless breaches their "limited" right of access to adequate housing they had realised for themselves.

Interestingly, the Court stated that the issue for determination in the case was the failure of the state to take any steps to provide alternative accommodation to the unlawful occupiers whom the Court considered to be "in desperate need". Referring to the *Government of the Republic of South Africa and Others v Grootboom and Others*²⁵, the Court stated that there was a sacred obligation on the state to ensure that, at the very least, evictions are "executed humanely".²⁶ Therefore, the court stressed the importance of protecting property rights and at the same time offering other means of shelter to the 40 000 illegal occupants.

In furthering the protection of property rights, Du Plessis supports the above assertion by stating that property laws have been established to determine whether such a law would negatively impact our property rights. Apartheid legislation also played a role in property law and land law. It dealt with expropriation in terms of Section 25 and 26 of the 1993 Constitution. Considering the above, property law shows that a property right is an absolute and complete right. That means that a land owner may exercise his right the way he wants to, and such a right may not be taken away from them. Not even land invasions and informal settlements have the power to remove the entitlement of ownership from a land owner. Also, sections 25 and 26 do not confer any right to expropriate land with an owner; the PIE Act protects such a land owner.²⁷

The importance of realising the right to housing affects the rights contained in Chapter 2 of the Constitution, which is the Bill of Rights. Suppose people continue to live in unhygienic and unsafe informal settlements. In that case, it is a violation of their right to dignity and stays in a safe environment.²⁸ De Vos argues that the right to housing promotes socio-economic rights and economic development, economic growth, health conditions, and economic upliftment.²⁹ Informal settlements lack essential services such as sewerage, refuse and toilets, which leads to an

²⁵ *Government of the Republic of South Africa and others v Grootboom and Others*[2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

²⁶ Clark, M. & Dugard, J. Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government. Socio-Economic Rights Institute of South Africa. 2013. pp10.

²⁷ Du Plessis, W. Land matters: New Developments.2006.

²⁸ Section 10 and Section 24 of the Constitution of the Republic of South Africa.

²⁹ De Vos. P. The essential components of the human right to adequate housing: Exploring the Core Content of Socio Economic Rights. Mediterranean Journal of Social Science, Vol 178. 2002.pp2

unhygienic environment. Thus, such people deserve access to decent shelter as provided by Section 26 of the Constitution.³⁰

The international community has also taken strides to address the critical issue of housing on a global level. The third United Nations (UN) Conference in Istanbul in June 1996 gave birth to the Istanbul Declaration on Human Settlements, which marked a significant turning point in the global policy discourse on the need to ensure adequate shelter for all.³¹ This policy agenda was later given fresh impetus within the UN Millennium Development Goals (MDGs) framework, which provides under Goal 7 Target 11, to significantly improve the lives of over 100 million slum dwellers by the year 2020.³²

A study conducted by the United States of America (USA) Department of Housing and Urban Development's Office of International and Philanthropic Innovation (IPI) in four countries, namely Mexico, South Africa, Brazil and the United States, concluded that in each of the four countries that are the focus of this report, we see different combinations of private and public sector participation in each stage of affordable housing development. Each country's national public policy has aimed to increase private sector participation in the affordable housing sector. However, it has not proven easy to manage increased participation of the private sector in the provision of affordable housing, and this may be the ongoing meta-challenge for each country. They further state that each of the four countries is faced with challenges of poverty, social and economic exclusion, inequality, and environmental sustainability.⁴² These challenges have made it difficult to achieve the goal of providing decent accommodation to all.

1.6 Research Methodology

The research methodology applied in this study is qualitative. In determining whether the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act affects the protection for adequate housing to combat land invasion, consideration will be given to its objectives and provisions. This research makes use of the library and relies on library resources such as

³⁰ Section 26 of the Constitution.

³¹ Ziblim, A. The Dynamics of Informal Settlements Upgrading in South Africa: Legislative and Policy Context, Problems, Tensions, and Contradictions. A Study Commissioned by Habitat for Humanity International/ EMEA Office, Bratislava, Slovakia.2013.

³² UN Habitat. Slums of the World: The face of urban poverty in the new millennium? Working Paper, United Nations Human Settlements Programme (UN-HABITAT). Available online at <https://archive.org.2003>. ⁴²Greenstein, R. Providing Housing within the Sustainable Development Framework: Lessons from Learning Exchanges with Brazil, Mexico, and South Africa. Office for International and Philanthropic Innovation. USA.2010.pp4.

textbooks, reports, legislations, regulations, case laws and articles which would be reviewed in furtherance to illuminate the rights of the evicted and the housing crisis facing South Africa and to seek for solutions to address such turmoil.

1.7 Significance of the Study

The proposed study exposes the importance of addressing the housing predicament in South Africa and giving effect to the constitutional provisions to provide equality, human dignity and access to adequate housing for all. It also further analyses the PIE Act to ensure efficient use of land and the proper land administration. Land use plays a pivotal role in the Republic, such as for agricultural purposes, natural resources, which will create development for the interests of the society. Addressing the problem regarding land invasion in our society will boost the economic status of the country and will promote good relations between land owners and occupiers. The study also encourages transparency and accountability in providing low-cost housing as provided by the RDP policy. It ensures that the poorest and vulnerable groups benefit from such policies.

1.8 Organisation of Chapters

Chapter 1

The chapter will be an introduction and a background to the study.

Chapter 2

The chapter will analyse legislative, case law and policy frameworks and international law regulating the provision of housing in South Africa.

Chapter 3

The chapter will analyse the effects and consequences of unlawful occupation of land and illegal occupation of land, issues and challenges relating to the realisation of the right to housing.

Chapter 4

The chapter will give a conclusion to the study and also make some recommendations.

CHAPTER TWO: LEGISLATIVE, CASE LAW AND POLICY FRAMEWORKS AND INTERNATIONAL LAW

2.1 Introduction

This chapter provides an analytical and in-depth assessment of the legislative, case law and policy frameworks regulating housing provision in South Africa. The concern of shelter is a vital socio-economic right guaranteed by the supreme law of South Africa, which is the Constitution. The state's denial or refusal to realise this right constitutes a severe violation of the Constitution; hence, the Constitution provides that 'everyone has a right to access adequate housing.'³³ The provision of housing is mainly dependent on the availability of resources by the state. For that reason, the state must furnish reasons for its failure to provide such accommodation. Eviction of people from properties that they would have occupied without real or personal rights in respect of such properties has been highly prevalent in South Africa. The majority of the population do not have access to land, forcing them to occupy such properties.

The court has had to deal with multitudes of applications calling for eviction orders for such vulnerable groups. The situation led to the promulgation of the PIE Act and other instruments which call for the protection of such groups and the provision of low-cost housing to cater for them. The Reconstruction and Development Policy (RDP) is one of the state's milestones to address the housing conundrum. Various Court cases have been decided in the highest Court of the land, the Constitutional Court, to give effect to the rights of the evicted groups and the evictors. Therefore, this chapter will analyse these main pieces of legislation and decide cases to deduce the extent to which they deal with the concern of shelter in South Africa and offer protection to evicted groups.

2.2 The Constitution of the Republic of South Africa Act 108 of 1996

The Constitution is the cornerstone of democracy in South Africa. Part of its mandate is to address past racial imbalances that existed during the apartheid era. It has been outlined as a transformative Constitution in academic literature and by our South African Courts because it aims to address the imbalances of the past, which promote equality, human dignity and freedom.³⁴ The Constitution seeks to dismantle systemic forms of disadvantage and subordination in our post-

³³ Section 26(1) of the Constitution.

³⁴ Klare, K. (1998). Legal culture and transformative constitutionalism, 14 South African Journal of Human Rights 146-188 at 150 (23 March 2017).

apartheid society.⁴⁵ Fraser and Honneth argue that “to achieve social justice, a society would have to address the glaring forms of status subordination based on - for instance - race, gender, and sexual orientation as well as systemic patterns of social and economic disadvantage”.⁴⁶ It is for this reason, the Constitution contains a provision that ensures that the state provides decent housing for all to ensure that there is equality and fairness amongst the races because some races had a superior and advantageous position before the attainment of a constitutional state.

2.2.1 Socio-Economic rights guaranteed in the Constitution

The Constitution of 1996 carries within it socio-economic rights which are meant to uplift the lives of all ordinary South Africans. The Constitution was adopted as the supreme law with the prerogative to heal the past divisions and establish a society based on democratic values, social justice and fundamental human rights.⁴⁷ In the adjudication of socio-economic rights, Courts are guided by the unique history of our country as well as by the constitutional objectives set out in the preamble, namely those of building a future founded on “social justice,” also to advance the “quality of life of all citizens,” and the “freeing of the potential of each person”. This means that such rights protect the most vulnerable poor South Africans who may not be in a position to afford a house.

The socio-economic rights guaranteed in the Constitution include a right to housing⁴⁸, a right to a clean environment⁴⁹, and a right to health care, food, water and social security⁵⁰. These rights impose an obligation on the state to ensure their progressive realisation taking into account the availability of resources.⁵¹ The standard of review based on the element of reasonableness was

⁴⁵Liebenberg, S. (2006) Needs, rights and transformation: Adjudicating social rights, 17 Stellenbosch Law Review 5–36.

⁴⁶Fraser, N and Honneth, A. (2003) Redistribution or Recognition: A Political-Philosophical Exchange 1-269 at 7-70.

⁴⁷Preamble of the Constitution of RSA (1996).

⁴⁸Section 26 of the Constitution.

⁴⁹Section 24 of the Constitution provides that:

Everyone has the right—

(a) to an environment that is not harmful to their health or well-being;

⁵⁰Section 27 of the Constitution provides that:

(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) Social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

⁵¹ See the decision of *Soobramoney v MEC of Health* 1998 (1) SA 765 (CC) where it was held that denying Mr Soobramoney dialysis treatment was justifiable and did not constitute an emergency which called for immediate

in essence, given an explanation and defined in clear terms in the *Grootboom* case.³⁵ The Court reasoned that “the reasonableness review model is a standard of review used to review whether the government has complied with the positive duties imposed on it by socio-economic rights”.

Therefore, the realisation of socio-economic rights may take a long time since the government has many other commitments to meet. However, the Court is always at the forefront to point out that the circumstances of every case are unique. Sometimes, there is a need for immediate intervention because such persons' dignity and life would be at risk. This is the same case with the provision of low-cost housing, which takes decades to reach specific groups that have long been living in shanty settlements. The access to resources and challenges ought not to be utilized as a justification by the government to escape its constitutional duty towards the society to fulfil and protect socio-economic rights because human dignity is inherent to all human beings.³⁶

2.2.2 The right to housing as a socio-economic right

As stated in *Grootboom*, the Court approved the *Soobramoney* case concerning the purposes and values protected by socio-economic rights under the Constitution. The Court reasoned that “the Constitution guaranteed both civil and political rights, and that the rights in the Bill of Rights are inter-related, mutually sustaining and protect certain values and purposes”.³⁷ Therefore, section 26 cannot be interpreted in isolation; the court must adopt a holistic approach encompassing the entire Bill of Rights when adjudicating such cases. This approach would ensure that other rights such as the right to dignity and equality are taken into account.³⁸ Section 26 gives a positive obligation on the government to make sure that legislative and other measures are established to ensure the progressive realisation of the right.

2.2.3 Eviction in terms of Section 26

Section 26 (3) laid the constitutional mandate which protects land owners and land occupiers.

The provision ensures that the Court plays a significant role in ensuring that evictions are fair and remedial treatment. It also further held that the right not to be refused emergency medical treatment was independent of the right to life and had to be interpreted in the context of the

³⁵ See the rationale applied in the decision of *Government of RSA and others v Grootboom and others* 2001 (1) SA 46 (CC) on the adjudication of socio-economic rights at para 43.

³⁶ Kant, I. (2010). *Fundamental Principles of the Metaphysic of Morals*, trans. by Thomas Kingsmill Abbott (Second Section: Transition from Popular Moral Philosophy to the Metaphysic of Morals)-online journal.

³⁷ *Grootboom* para 23.

³⁸ Section 9 and 10 of the Constitution of RSA.

availability of health services generally. Due regard has been given to all circumstances. It further invalidates any legislation which promotes arbitrary evictions. The provision reads as follows:

*“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”.*³⁹

The provision led to the promulgation of the PIE Act⁴⁰, which regulates the issuing of eviction orders by the court after considering all the circumstances. Muller argues as follows:

“PIE was enacted to ensure that: firstly, evictions were decriminalised; secondly, adequate procedural protections were put in place to prevent arbitrary evictions; and thirdly, substantive rights were included for courts to have regard to in considering whether it would be just and equitable in the circumstances to issue an eviction order. This coincided with a major shift in the focus of eviction legislation, from preventing illegal squatting during apartheid to preventing illegal eviction during democracy. With this shift, the term “squatter” became obsolete because it was incompatible with the foundational values of the Constitution, the right to equality and the right to human dignity”.⁴¹

2.3 The Reconstruction Development Program of 1994

In 1994 the Reconstruction and Development Programme (RDP) introduced an integrated socioeconomic policy framework⁴² to eradicate the legacies of the past through the redress of inequalities and building a vibrant and democratic South Africa. The reasons for introducing the RDP included that South Africa was identified as a country with one of the highest income distribution inequalities and consequently an extremely high incidence of poverty. Therefore, the program was introduced to solve challenges towards access to housing amongst other socio-economic concerns. To address poverty and extreme deprivation, the programme identified various aspects that needed to be addressed. These included the provision of land and housing, as well as access to safe water and sanitation.⁴³

³⁹ Section 26 (3) of the Constitution of RSA.

⁴⁰ Act 19 of 1998.

⁴¹ Muller, G. (2011). The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law. Unpublished LLD Research Thesis: Faculty of Law, Stellenbosch University.

⁴² White Paper on Reconstruction and Development in Gen N 1954 in GG 16085 of 23 November 1994.

⁴³ Ibid.

2.4 Housing Act 107 of 1997

The Housing Act was enacted to ensure sustainable housing development processes as far as housing provision in the Republic is concerned. It further states that the provision of decent housing is a basic human need that should ensure the nation's socio-economic well-being.⁴⁴

The Act further defines the responsibilities of the National, Provincial and Local spheres of government regarding housing. Section 2 of the Act states that the spheres of government must prioritise the needs of the poor regarding housing development. It further states that they should also consult with individuals and communities on how housing development has affected them, considering that many people do not have access to land. The government should also ensure that housing programmes are inclusive and that they cater for everyone meanwhile taking into account the fact that such programmes are fiscally affordable and sustainable.

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

The inclusion of section 26(3) in the final Constitution established the Constitution's commitment surrounding the predicaments faced by the homeless and the vulnerable in the context of eviction. Section 26(3) requires that "no one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances".⁴⁵ Based on this constitutionally entrenched right to non-arbitrary and a court order for evictions, PIE was promulgated to result in the realization of section 26(3) of the Constitution and set in place to control removals in the constitutional dispensation. Concerning residential property, PIE expressly replaced both pre-constitutional eviction remedies, namely the *rei vindicatio*⁴⁶ and PISA.⁴⁷

The right conferred upon the owner to evict an illegal occupier in terms of the common law is written in PIE and made subject to substantive and procedural requirements to ensure that the procedure used to evict unlawful occupiers is not arbitrary.⁶⁵ Therefore, PIE is a measure of eviction promulgated to make sure that the rights and interests of both the owner and the unlawful occupier are safeguarded in the process of evictions.⁶⁶

⁴⁴ Preamble of Act 107 of 1997.

⁴⁵ Section 26(3) of the Constitution.

⁴⁶ *Rei vindicatio* is a common law remedy to eviction which was applied during the pre-constitutional era. It is one of the remedies aimed at protecting ownership and it allows the owner to recover possession from any type of unlawful occupier.

⁴⁷ The Prevention of Illegal Squatting Act 52 of 1951 ("PISA").

2.5.1 Interpretation of PIE

In the case of *Port Elizabeth v Various Occupiers*⁶⁷, the Constitutional Court stated that PIE Act must be understood. Its governing concepts of justice and equity have to be applied within a defined and carefully calibrated constitutional matrix. PIE provides guidelines on eviction orders. Sachs J stated that,

“Its central operative provisions are section 4, which deals with evictions sought by owners or persons in charge of the property, and section 6⁶⁸, which is concerned with eviction proceedings brought by organs of state. There is a considerable difference in detail between the two provisions. They emphasise that a distinction has to be made based on whether the application for eviction is brought by the property owner or by the Municipality. This case deals with proceedings brought under section 6 by the Municipality and does not require us to consider whether it would have taken a different form if it had been brought directly by owners themselves under section 4. Despite their

⁶⁵Van der Merwe, C.G & Pope, A. (2007). Property in F du Bois (ed) Wille’s Principles of South African Law 9 ed 405729 549.

⁶⁶Cloete, C.T. (2016). A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context. Unpublished Masters Dissertation, Faculty of Law, Stellenbosch University.

⁶⁷ *Port Elizabeth v Various Occupiers* 2005 (1) SA 217 (CC) at para 14.

⁶⁸Section 6 of PIE states that:

“6. Eviction at instance of organ of state.—

(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—

(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section, “public interest” includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to— (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and their family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.”

differences both sections emphasise the central role Courts have to ensure equity after considering all relevant circumstances”.⁴⁸

The Court considered all circumstances such as “(a) the lengthy period that the occupiers occupied the land without objection; (b) the fact that neither the municipality nor the landowner was in immediate need to use the property and; (c) that they had failed to engage with the occupiers regarding the situation meaningfully; (d) the fact that the occupiers were a small group of people; and finally, that the occupiers would become homeless if evicted. After considering all these relevant factors, the Court ordered that it would not be just and equitable to evict the unlawful occupiers”.⁴⁹

*As enshrined in the Constitution, Ubuntu and our founding values should tell how Courts are aware of the relationship between sections 25(1) and 26(3) of the Constitution and how Courts apply PIE. Ubuntuism, as a philosophical doctrine, advances that the universe and everything in the galaxy is a supernatural power that works together to form a unified field of force.*⁵⁰

2.5.2 The courts approach to Section 26 (3)

South Africa has jurisprudence that has accumulated over the years over the adjudication of socio-economic rights, heard in the Constitutional Court. The cases vary, ranging from health⁵¹, housing⁵², and social security for non-residents⁵³, amongst others. The issue surrounding evictions has also been dealt with by the Court. It stressed the importance of taking into account all the relevant circumstances of such people, and if need be, arranging alternative accommodation for such people facing eviction.

One critical case relating to the right to housing and evictions is the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*.⁵⁴

⁴⁸ *Port Elizabeth v Various Occupiers* 2005 (1) SA 217 (CC) at para 24.

⁴⁹ *Port Elizabeth v Various Occupiers* 2005 (1) SA 217 (CC) at para 59.

⁵⁰ *Ibid.*

⁵¹ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) where the court held that where a breach of a right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted, see also *Soobramoney v MEC of Health* 1998 (1) SA 765 (CC).

⁵² See the case of Grootboom mentioned, the court held that the state must act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country.

⁵³ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).

⁵⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA).

Facts of the Case

Blue Moonlight Properties 39 (Pty) Ltd began eviction proceedings against the unlawful occupiers in section 4(7) of the PIE Act. The former owner and employer of most unlawful occupiers, Kernel Carpets, built a double-storey office building, two large garages and a small factory on the property. When Kernel Carpets discontinued trading in 1999, it permitted the occupiers to continue living on the property against rental payment to the caretaker. A variety of people continued receiving a rental fee from the occupiers till the end of the year 2000. After the year 2000, the buildings were no longer fit for humans to live in, nor did they have any water supply. Most of the occupiers generated little means of income from informal trading, which made them unable to find other affordable accommodation in the inner city of Johannesburg. The City of Johannesburg Metropolitan Municipality bought the building intending to develop it. It claimed they had no information regarding all the events before 2004, nor did they collect any rental payments from any occupiers. They also insisted that it would not be economically practical to re-establish commercial property to fulfil the requirements for residential use.

The High Court

The matter was brought before Spilg J in the South Gauteng High Court, Johannesburg. The court ordered that the occupiers of Saratoga Avenue in Berea in Johannesburg be evicted from the premises unlawfully occupied by them before the 31st of March 2010. Furthermore, the Court also ordered the City of Johannesburg to pay Blue Moonlight Properties 39 (Pty) Ltd (previous owner) an amount comparable to a just and rational monthly payment of the building unlawfully occupied from the 1st of July 2009 until the 31st of March 2010. The Court also stated that the application brought by the City of Johannesburg housing policy is unconstitutional and invalid. Spilg J said their housing policy constituted unfair discrimination because unlawful occupiers who were evicted from state-owned properties were granted temporary shelter; however, unlawful occupiers that private land owners evicted were deprived of such temporary shelter.

The Court instituted a structural interdict in terms of which the City of Johannesburg was ordered to find solutions to the deficiency of its housing policy and to revert to the Court with a meaningful report by no later than 12 March 2010 and to look into the facts of the case and seek advice from interested third parties what action shall be taken in the future. In addition, Spilg J ordered that the City of Johannesburg provide alternative accommodation for the occupiers of Saratoga Avenue.

The City of Johannesburg further appealed against the order made by the High Court, required to provide alternative accommodation and rental payments to each occupier until relief was sought in terms of its housing policy.

The Supreme Court of Appeal

The Supreme Court of Appeal set aside the rental payment order that was made against the City of Johannesburg and also found the ruling made by the High Court in terms of its housing policy as unconstitutional and invalid because it excludes the occupiers from being provided with alternative accommodation. The Court also held that it considered the constitutional rights of Blue Moonlight as they complied with the prerequisites of PIE and is entitled to an eviction order from its property⁵⁵ in terms of section 25 of the Constitution against the unlawful occupiers' right to access to adequate housing⁵⁶ and in terms of section 26 of the Constitution. The Court had to consider all surrounding circumstances to determine whether it is just and equitable to evict the occupiers.⁵⁷

The Supreme Court of Appeal held that the submission made by the City of Johannesburg in that they didn't have available resources to provide alternative accommodation for the occupiers was unclear.⁵⁸ The City of Johannesburg's policy that excluded alternative accommodation to occupiers evicted by private landowners constituted unfair discrimination and inequality and violated their right to dignity.⁵⁹ The Supreme Court of Appeal found that Spilg J had categorised the differentiation in treatment incorrectly and therefore held that the City's housing policy is discriminatory on an incorrect basis. However, they concluded that the City's housing policy is discriminatory and therefore unconstitutional to the extent that it excludes the occupiers of privately owned buildings that are not fit for human habitation. Currently, the City's housing policy only provides temporary emergency accommodation to those evicted from publicly-owned unsafe buildings by the City itself or at its instance in terms of the National Building Regulations and Building Standards Act 103 of 1977⁶⁰.

⁵⁵ Ibid 93-113.

⁵⁶ *Blue Moonlight Properties* para 114-127.

⁵⁷ *Blue Moonlight Properties* CC para 30.

⁵⁸ *Blue Moonlight Properties* CC para 71.

⁵⁹ *Blue Moonlight Properties* CC para 84.

⁶⁰ *Blue Moonlight Properties* SCA par 77, Order 3.

The City of Johannesburg further appealed against the order that the Supreme Court made of Appeal.

The Constitutional Court

The Court held that that Blue Moonlight complied with the requirements of PIE and is entitled to an eviction order. The Court found that relevant circumstances, including the availability of land, are to be considered to determine whether the eviction order made is just and equitable. The Court further stated that the City of Johannesburg should find available resources to provide alternative accommodation to the occupiers before an eviction date.

The Court concluded by stating that the City of Johannesburg's housing policy is considered unconstitutional and invalid to the extent that it excludes the occupiers of privately owned buildings from being provided alternative accommodation, which renders them homeless.⁶¹

Analysis of the Case

The case highlighted the plight of hundreds of thousands of South Africans living in dilapidated privately owned properties that suffer from the threat of eviction on a day to day basis. The law did not protect such people after eviction since the housing policy only catered for evictees from properties owned by the State. Therefore, the housing policy was declared unconstitutional. The evicted groups had a right in Section 26 (3) not to be arbitrarily evicted without considering all the relevant circumstances. To this end, the case highlighted the need to protect property owners and protect evicted groups with no access to decent housing, which is a guaranteed socio-economic right.

2.6 The National Housing Development Agency Act 23 of 2008⁸⁴

The Act was promulgated to regulate the establishment and to set functions for the National Housing Development Agency. The preamble of the Act states that "there are serious challenges that hinder the realisation of housing for all and that there is a need to accelerate the delivery of housing, to enhance and secure the required skills".⁶² This highlight the crisis currently being encountered in South Africa as far as housing is concerned and the need to enact similar

⁶¹ *Blue Moonlight Properties CC* par 96.

⁸⁴Act No. 23 of 2008.

⁶² Preamble of Act 23 of 2008.

legislation to fast-track the housing processes. The Act advocates for cooperation amongst all the spheres of government to ensure that the housing objectives are achieved.

Section 7 of the Act provides for the role of the Agency; most important is the provision which states that it must develop strategic plans for the identification and acquisition of land for residential or communal purposes. Such land could be either private or publicly owned. The Agency also has the mandate of monitoring progress and ensuring that they create sustainable human settlements. This would go a long way in promoting Section 26 of the Constitution by affording everyone access to decent housing.

The Act also provides for the establishment of a Board responsible for overseeing the application of the Act in housing development.⁶³ The Board would ensure transparency and accountability in the provision of housing. The Act, therefore, provides for the much-needed machinery to ensure adequate housing in the country. The Board also identifies available land, whether private or state-owned, to establish sustainable human settlements.

2.7 The National Development Program 2030

The President of the Republic of South Africa appointed the National Planning Commission in May 2010 to draft a vision and a National Development Plan. The National Development Plan (NDP) aims to eliminate poverty and reduce inequality by 2030.⁶⁴ The plan presents ambitious goals that the country seeks to implement by the year 2030 to all sectors of the economy and socio-economic development, to alleviate poverty and destitution. The NDP intends to introduce a comprehensive plan to address the housing problem facing South Africans by the year 2030. This would reduce the illegal occupation of properties; hence they will not be needed for eviction orders. The NDP depends on the cooperation of all spheres of government to ensure that the goals are reached before the deadline lapses.

The national commitment to address the issue of housing by the year 2030 is part of the much-needed solutions to ensure that the majority of poor people living in shanty settlements have their right to access decent housing realised. Therefore, the state should operate within its available means to ensure that everyone has access to decent housing to uphold socio-economic rights in the country. The housing problem may only be addressed if the land issue is also addressed.

⁶³ Section 9 of Act 23 of 2008.

⁶⁴ National Planning Commission. *The National Development Plan 2030: Our future-make it works, Executive Summary*. Government Printers. Pretoria 2017.

Land should be re-distributed to give access to most South Africans who were disadvantaged by the apartheid regime.

2.8 International Framework

There is also a need of taking into account international law on housing, taking into account conventions, treaties and bilateral agreements on the provision of housing and assessing how far South Africa is adhering to these agreements. Section 39 of the Constitution provides that:

- (1) “When interpreting the Bill of Rights, a court, tribunal or forum—
- (2) Must consider international law....”⁶⁵

How the International standards guide us in situations involving housing and evictions is contained in article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which affords everyone the right to an adequate standard of living. Article 11(1) of the ICESCR reads as follows:

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

⁶⁵ Section 39 (1) (b) of the Constitution.

CHAPTER 3: ILLEGAL OCCUPATION OF LAND, ISSUES AND CHALLENGES

3.1 Introduction

This chapter provides an in-depth discussion of the effects and consequences of unlawful and illegal land occupation in South Africa. It highlights the constitutional imperatives regulating housing and provision of housing in South Africa. Socio-economic rights are fundamental, and if they are ignored, it impacts other rights in the Bill of Rights, for instance, the right to equality and dignity. In South African property law, “a distinction is made between real rights and other rights in land for registration purposes”.⁶⁶

The unlawful occupation or possession of land violates the rights of property owners from the undisturbed use and enjoyment of their properties; hence PIE Act allows for the issuing of eviction orders by a court of law. As entrenched by the Constitution and the PIE Act, land occupiers also have the right to consider all their circumstances when eviction orders are granted. Hence, the Court has to take an impartial and balanced assessment of both groups before an order is passed.

The chapter also analyses the role of co-operating governance as far as the realisation of the right to housing is concerned since housing is a prerogative of the national, provincial and local spheres of government. There is a need for cooperation in the spheres of government to ensure that policies, budgets and operational mechanisms are put in place so that the vulnerable social groups get fair and equal access to housing and housing incentives. In the case of *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*⁹¹, the Court explained the origins of the housing problem in South Africa by explaining that:-

“With the lifting of the racial restrictions as to where people could live and work, many of the unemployed in the former homelands migrated to the cities. They went in search of work, taking their families with them. The shortage of accommodation in the urban areas forced them to live in shack towns or squatter camps on open land. Their plight should be recognised and should be treated with awareness and understanding. Humane action is needed, not a sledgehammer⁶⁷

⁶⁶ Badenhorst, P.J, Pienaar J.M & Mostert, H. (2006). Silberberg and Schoeman’s The law of property 5 ed 208.

⁹¹*Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE).

⁶⁷ Ibid at para 20.

3.2 Constitutional Imperatives to Housing

The foundational value upon which the Constitution is built is based on the protection of individual rights. Such rights should present as a point that classifies the special relationship between landowners and unlawful occupiers. The right of access to adequate housing indicates that particular regard is necessary for a person's place of abode because, further than providing means of shelter for its inhabitants against all the surrounding factors, it is frequently the only place where individuals have access to some privacy in an otherwise cruel world.⁶⁸ The surrounding factors against evictions make it clear that judicial control and oversight are required because it is an extremely traumatic social process and is likely to lead to severe disagreements. Both sections 25 and 26 of the Constitution place an obligation on the government "to take reasonable legislative and other measures, within its available resources to, on the one hand", "foster conditions which enable citizens to gain access to land on an equitable basis",⁶⁹ and to, "achieve the progressive realisation" of the right of access to adequate housing.⁹⁵

3.2.1 Right to adequate housing

This right is guaranteed in the Constitution under Section 26 (1) and was confirmed in the landmark case of *Government of the Republic of South Africa and Others v Grootboom and Others*⁷⁰ where the court held that,

"Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights." The Courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case."⁹⁷

Therefore, the case of *Grootboom* confirmed that socio-economic rights are justifiable and will put a constructive duty on the state to guarantee their fulfilment.

⁶⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 17.

⁶⁹ Section 25(5) of the Constitution.

⁹⁵Section 26(2) of the Constitution.

⁷⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169. ⁹⁷*Ibid* at para 20.

The Court further elaborated on the justiciability of socio-economic rights by providing the elements to be considered that are contained in the Bill of Rights. The elements assist the Court in adjudicating if the right may be fulfilled and the state can ensure their realisation. The Court stated that the second subsection of section 26,

“Establishes and delimits the scope of the positive obligation imposed upon the state to promote access to adequate housing and has three key elements. The state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right. The third subsection protects against arbitrary evictions.”⁷¹

Section 26 further imposes a negative obligation as far as eviction proceedings are concerned.⁷² In the cases of *Port Elizabeth Municipality v Various Occupiers*⁷³ and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*⁷⁴ the Constitutional Court interpreted that this positive duty also included a negative duty to the effect that the government ought to be hesitant to institute eviction proceedings against unlawful occupiers of public land in circumstances in which that eviction will result to being homeless. In the case of *Grootboom*, the Constitutional Court extended the scope of Section 26 to also apply to the eviction of unlawful occupiers from private land.⁷⁵

3.2.2 Interpretation of Positive Obligation

Section 26 states that the state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right. These elements will be discussed in greater detail below:

3.2.2.1 Reasonable legislative and other measures

The insertion of this term in the Constitution was fundamentally based on defining the areas of competence for the spheres of government responsible for housing, namely the national and the

⁷¹ Ibid at para 21.

⁷² Section 26 (3) of the Constitution.

⁷³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

⁷⁴ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC).

⁷⁵ *Grootboom* 35.

provincial spheres. In the *Grootboom* case, the Court stated that what constitutes reasonable legislative and other measures must be determined because the Constitution creates different spheres of government⁷⁶. Therefore, these spheres must foster co-operation and unity to ensure that the obligations imposed by the Constitution are fulfilled.

The Court highlighted that the executive and legislature had an exclusive right to make decisions that outline measures that could be implemented to realize the rights in sections 26 and 27 of the Constitution. In terms of housing provision, this qualifying phrase would aim to assess if the government's policies and measures are reasonable in so far as ensuring that this right is realised. The Court also stressed that both the executive and legislature could implement new measures to meet this obligation.⁷⁷

The Court is also aware of the separation of powers; as a result, it gives the executive and the legislature full autonomy to decide what constitutes reasonable legislative and other measures. The Court emphasised that it could not establish whether more improved measures could have been implemented or whether public funds could have been used more efficiently. The sole enquiry must be whether the steps that have been adopted are reasonable.⁷⁸

Therefore, the Court established a standard of reasonableness in the case of *Grootboom* to assess if a governmental programme may cater effectively to the realisation of socio-economic rights. The test is as follows:

- A good programme must firstly be comprehensive and coordinated in the sense that it allocates responsibilities and tasks to all the spheres of government and ensures that appropriate financial and human resources are available.⁷⁹
- Secondly, be capable of facilitating the realisation of the right.⁸⁰
- Thirdly, be reasonable both in its conception and its implementation.⁸¹
- Fourthly, it must be balanced and flexible because it makes provision for short-, medium- and long-term needs.¹⁰⁹

⁷⁶ Ibid at para 39.

⁷⁷ Ibid at para 41.

⁷⁸ Ibid at para 41.

⁷⁹ Ibid at para 39.

⁸⁰ Ibid at para 41.

⁸¹ Ibid at para 42. ¹⁰⁹Ibid at para 43.

- Finally, must include a component that answers to the exigencies of those in desperate need.”⁸²

3.2.2.2 Within available resources

The Constitution provides a second standard test that the Court must apply towards realising socio-economic rights, checking if there are available resources to enable the state to provide such a right. The court stated that in the case of *Grootboom*,

“The other aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation concerning the rate at which it is achieved and the reasonableness of the measures employed to achieve the result is governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources”¹¹¹.

This means that the right to housing may only be realised if the state has enough resources to supply those in need. Budget constraints are the chief reason that delays the provision of low-cost housing to the poor. The state may only carry out such projects if there is enough money, therefore in most cases, the most vulnerable groups living in deplorable conditions are the first to be considered.

3.2.2.3 To achieve the progressive realisation of the right

The last criterion provided by the Constitution towards socio-economic rights was inserted after the contemplation that the request could not be realised immediately. However, measures were to be taken to ensure the eventual realisation of the right. The notion of improvement in the realisation of section 26(2) is derived from Article 2(1) of the International Covenant on Economic Social and Cultural Rights (‘ICESCR’). Article 2(1) reads:

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

⁸² Ibid at para 63. ¹¹¹Ibid at para 46.

Improvement in the realization of Section 26(2) should be interpreted with the purpose of the Covenant. It aims to create a duty on States Parties regarding the full realisation of the rights in the ICESCR.

3.2.3 Negative Obligation

Section 26(3) provides that no one may be evicted from their home without a court order. This is a negative obligation imposed on the government to ensure that evictions are taken after taking all the important facts into account. In the case of *Grootboom*, Yacoob J stated that this negative duty is further explained in section 26(3) of the Constitution. Section 26(3) of the Constitution states that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”⁸³

This provision is the core mandate of the PIE Act. It aims to protect vulnerable groups who would have stayed at a place over six months to be evicted without a court order. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*⁸⁴, the Constitutional Court established the meaning of this negative obligation to abstain from combating or impairing the right of access to adequate housing. Therefore, the state must ensure that people who have an eviction order granted against them must be given an alternative place to stay in the form of low-cost housing, which respects their right to dignity and a safe environment.

In the case of *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*,¹¹⁴ the court stated that “PIE operates as an eviction remedy. However, at the same time, it must ensure the orderly resettlement of those left homeless and displaced by the apartheid regime. These two opposing aims are based on two distinct constitutional clauses, namely the property clause in section 25(1) of the Constitution and the housing clause in section 26(3) of the Constitution”.

Horn AJ states that,

“PIE states that it protects both sections 25 and 26(3) of the Constitution by prohibiting arbitrary deprivation of property and by prohibiting evictions or demolition of homes without an order of the court. Furthermore, it requires that the rights of the

⁸³ Ibid at para 34.

⁸⁴ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC). ¹¹⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 12-13.

landowner and the unlawful occupiers, particularly children, women, disabled persons and the elderly, be considered in eviction cases. In this way, PIE regulates the eviction of unlawful occupiers fairly, while also providing the owner with a mechanism to apply for an eviction order”.⁸⁵

3.3 The balance between the right to land ownership and illegal occupiers

In South Africa, a landowner has to own title deeds that are registered in the Deeds Registry. Such a document confers a fundamental right on the owner. It entitles such an owner to uninterrupted use and enjoyment of the property. In the case of a land invasion regarding such a property, the owner has the right to approach the court to award an eviction order.

Diamond views property as a right that someone has and cannot be contested by anyone in the whole universe. With that, he states:

“Property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁸⁶

The issue of land ownership is still evidently unequal and based on racial lines. Klooper and Pienaar state that, “South African government has shown commitment to eradicate the inequalities and injustices of the past and has initiated a comprehensive land reform programme with a strong constitutional basis - a programme which has to date not been concluded - a programme consisting of three pillars namely: restitution, land redistribution and tenure security”.⁸⁷ This means that the challenges of land invasion being experienced in the country are mainly caused by the fact that the majority does not have land. The policies to achieve land reform have been in the pipeline for so long; hence an amendment to Section 25 of the Constitution must be fast-tracked to allow for land redistribution without putting severe weight on the fiscus in terms of compensation.

The challenge of housing may only be addressed if the government ensures that all the vulnerable social groups are given security of tenure in respect of the land that they possess. The current

⁸⁵ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) 1082-1083; para 33-34.

⁸⁶ Diamond, R.M. (2009). *The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty*. Georgetown Public Law Faculty Publications and other Works 423.

⁸⁷ Kloppers, H.J, & Pienaar, G.J. (2014). *The historical context of land reform in South Africa and early policies*. PER: Potchefstroomse Elektroniese Regsblad, 17(2), 01-32

reality is that most black people have Permission to Occupy permits (PTO) without an absolute right regarding such land. They are at risk of facing eviction. Thus, to protect the rights of landowners, the state must make available land for evicted groups that may allow them to settle without disturbance and have access to water, electricity, and sanitation.

3.4 Procedures for a lawful eviction

The PIE Act was promulgated due to the Constitutional mandate imposed by Section 26 (3), which stipulated that reasonable legislative and other measures must be put in place to avoid people being evicted without a court order and has not taken cognisance of all the relevant circumstances. The Act is meant to protect the rights of both unlawful land occupiers and the landowners. It further places a mandate on the government to ensure that the evicted people are given alternative accommodation since in the case of *Port Elizabeth Municipality v Various Occupiers*, the court held that in applying this legislation, the history of the country must be taken into account which reviews the inequality that existed before the constitutional dispensation. Therefore, the Act must also be interpreted from a socio-economic perspective that favours the upliftment of the right to housing⁸⁸.

The Act also provides the mechanism for a fair eviction. Van der Walt states that “since PIE applies to unlawful occupiers, who do not have any rights to occupy, the purpose is limited to stabilising existing unlawful occupation of land to guarantee that eviction only takes place when it is just and equitable and then only in a fair, equitable and controlled manner.”⁸⁹ The procedures considered for eviction orders will be discussed below.

3.4.1 Unlawful Occupier

The interpretation of the PIE Act requires one first to understand the meaning of an unlawful occupier. In the simplest form, an illegal occupier is a person who establishes their residence on someone’s land with no tacit or express approval of the owner to do so. In terms of the Act, an unlawful occupier is defined as,

“a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a

⁸⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

⁸⁹ Van der Walt, A.J. (2005) *Constitutional Property Law*. Wetton. Juta & Co Ltd.

person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996”.⁹⁰

In terms of the purpose of PIE, Moolla argues that “PIE was promulgated to provide for the prohibition of unlawful occupation and to put in place fair procedures for the eviction of unlawful occupiers who occupy land without permission of the owner or person in charge of such land”.⁹¹ In this respect, PIE applies to all land that people occupied without prior consent granted. In the case of *Ndlovu v Ngcobo*,¹²² the Supreme Court of Appeal held that,

“PIE applied to all cases where there was no consent to occupy the property when the proceedings were instituted and where the buildings or structures were used as a home or to obtain some form of shelter. As a result, PIE currently applies to all instances of unlawful occupation (land invasions, squatting, holding over and former mortgagors), in both rural and urban areas, where the property is used for residential purposes but does not apply if the property is used for business or commercial purposes”.⁹²

3.4.2 Consent

In terms of the PIE Act, consent is defined as “the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question”.⁹³ The general idea of consent was given due consideration for the first time by the Constitutional Court in the case of *Residents of Joe Slovo Community v Thubelisha Homes*⁹⁴

Facts of the case

The residents of Joe Slovo lived in informal settlements of Cape Town, which they occupied in 1990 as the land of the City of Cape Town was still under no development. The residents were evicted from the ground and demolished their homes; however, they still grew more.⁹⁵ The number of residents multiplied, and the City of Cape Town deemed it fit to improve the living

⁹⁰ Section 1(xi) of Act 19 of 1998.

⁹¹ Moolla, M. (2016). Having a slice of PIE – understanding the Act. De Rebus, available online at <http://www.derebus.org.za/slice-pie-understanding-act/> accessed on 03/12/17

¹²² *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).

⁹² Ibid at para 65.

⁹³ Section 1(ii) of Act 19 of 1998.

⁹⁴ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC).

⁹⁵ Ibid at para 19.

conditions and start supplying the residents of Joe Slovo with essential services such as water, toilets, refuse removals, roads, electricity, drainage and cleaning equipment. An argument was raised by residents of Joe Slovo that the City of Cape Town had no intentions to evict them from the land since they lived there from 1990 and that they were lawfully deemed to be occupying the place based on that the City of Cape Town had commenced rendering services on the building.⁹⁶

The conundrum that arose was the residents of Joe Slovo that no evidence found that all of them were deemed unlawful occupiers and that the City of Cape Town tacitly and expressly agreed to them occupying the Joe Slovo settlement.⁹⁷ The Court had a duty to determine whether the residents of the Joe Slovo settlement were indeed granted permission by the Local Authority to dwell in that land before eviction proceedings commenced in terms of PIE.⁹⁸ *Analysis of the Issues* In trying to determine if the residents of Joe Slovo had consent to occupy, the court defined two forms of consent that existed. Yacoob J stated that “there is a distinction between actual authority and ostensible authority. Actual authority comprises express and tacit consent, while ostensible authority is based on the doctrine of estoppel. The definition of unlawful occupier only refers to the former species of authority and therefore excludes the latter. Therefore, the residents had to prove that they acquired a defensible right of occupation in the sense that there was a bilateral, voluntary agreement between them and the City of Cape Town. In the absence of a written or verbal agreement that afforded the residents a right of occupation, the residents had to provide the Court with evidence that fell short of establishing the existence of an express agreement”.¹³⁰

In its reasoning, the court further stated that courts are imposed with a duty to clarify consent in a way that gives unlawful occupiers the broadest possible protection against evictions. Muller concluded that,

“These judgments suggest that courts cannot resort to the common law definition of consent to determine the meaning of consent for purposes of PIE because the common law definition of consent limits the definition of unlawful occupation. The existence of consent for purposes of PIE must rather be determined with reference to the facts of each case. In this regard it will be particularly important whether the landowner is a local authority because organs of state, unlike private owners, are under a constitutional and statutory obligation to provide those living in deplorable conditions with access to

⁹⁶ Ibid at para 20.

⁹⁷ Ibid at para 37.

⁹⁸ Ibid at para 72. ¹³⁰Ibid at para 48.

adequate housing and essential services. Furthermore, the fact that a local authority fulfilled its obligations cannot be construed as giving tacit consent to those occupying the land because such a construction would firstly, fail to appreciate the peremptory nature of these obligations; secondly, discourage local authorities from fulfilling their obligations; thirdly, deprive those living in intolerable conditions of essential services; and fourthly, fall foul of the general obligation to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights”.⁹⁹

3.4.3 Notice

A notice of eviction proceedings should be in writing before it may be served upon the unlawful occupiers and the local authority in which jurisdiction the land is situated by obtaining a court order not less than 14 days before the contemplated date of hearing.¹⁰⁰ The process followed and the conduct to ensure the serving and filing of the eviction proceedings notices are governed by the rules of the Magistrate Court. Should the Courts find the procedures followed as inadmissible on specific grounds, it is permitted to look for other different methods.¹⁰¹ The notice of eviction is served for various reasons, including but not limited to giving the occupiers a shield, which informs them of the risks involved to their unlawful occupation, to alert them of the stipulations of PIE and letting them know what their rights are. As a result, the illegal occupiers must receive information regarding “the nature of the proceedings; the date and time of the hearing; the grounds for the proposed eviction; their right to appear and defend the case; and that they may request legal aid”.¹³⁴

Section 4(5) of the Act sets out the structure and content of the notice of proceedings contemplated above. Therefore, the notice must:

- state that proceedings are being instituted in terms of subsection (1) of the Act;
- indicate on what date and at what time the court will hear the proceedings;
- set out the grounds for the proposed eviction; and
- state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

⁹⁹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* CCT 22/08 (2009) ZACC 16.

¹⁰⁰ Section 4(2) of PIE.

¹⁰¹ Pienaar, J.M and Muller, A. (1999). 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, 10 Stellenbosch Law Review 370-396 379. ¹³⁴Section 4(5) of PIE.

3.4.4 Relevant factors

The Constitution and the PIE Act oblige the court to consider the personal circumstances of the evictees before an eviction order is granted. This is a deviation from the common law position that applies the *rei vindication* that favours the rights of the property owners and does not consider the unlawful occupiers' circumstances. *Rei vindicatio* is concerned with the protection and restoration of ownership, but the Constitution has a different approach; hence the PIE Act is primarily concerned with the welfare of the occupiers considering the country's history, which placed some population groups into precarious conditions wherein they could not access land.

Before granting an eviction order, the court has to consider if an unlawful occupier has occupied the land in question for less than six months when the proceedings are initiated. A court may grant an order for eviction if it believes that it is equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.¹⁰² Therefore the court has to consider if the rights of those groups would not be affected; hence the court would mandate the government to provide temporary shelter for such people before they are evicted.

If the occupiers had stayed at the place for more than six months, the Act provides 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 believes 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 according to a mortgage, whether the land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”¹⁰³

There are numerous cases where the Court has dealt with wherein, they interpreted this provision about considering relevant circumstances before an order is granted. In *Ross v South Peninsula Municipality*, the Court had to consider how relevant cases should be brought before a relevant Court. Josman, AJ noted that in an adversarial system, how evidence is put before Court results in section 26(3) of the Constitution modifying the common law requiring the owner having to assert

¹⁰² Section 4(6) of the PIE Act.

¹⁰³ Section 4(7) of the PIE Act.

relevant circumstances that would aid the Court in issuing an eviction order. Other High Courts have criticised this decision and have further noted that it is next to impossible or highly unlikely for the owner to allege personal circumstances of land occupiers against his interests. Such an interpretation put an onerous burden on the owner to obtain an eviction order where the defendant failed to put his circumstances before the Court. The result of such an interpretation would be an arbitrary deprivation of the landowner's right to property as envisaged by section 25(1) of the Constitution, pending the occupier leaving the owner's land.

In the case of *Brisley v Drotsky*¹⁰⁴, the Supreme Court of Appeal had to determine the impact section 26 of the Constitution has on the pre-existing common law. The court found that eviction orders should only be granted when all the relevant circumstances have been carefully considered. The Court qualified this principle by further noting that section 26(3) of the Constitution does not grant the Court a discretion to refuse to give an order of ejection in the instance where the landowner is at liberty to such an order, thus such as an occupier's circumstances and availability of alternative accommodation do not necessarily amount to being relevant circumstances. Hence, section 26(3) of the Constitution's impact on the common law of ownership was still limited. As such, an owner could only obtain relief through *rei vindicatio* after satisfying its requirements.

In *Ndlovu v Ngcobo, Bekker and Another v Jika*¹⁰⁵, the Supreme Court of Appeal had to again deal with the effect of PIE on the common law. The Court's approach was different from the case of *Brisley*, where it found that PIE overrode the common law and further that the occupier's circumstances amounted to relevant circumstances. Nonetheless, the Court echoed from previous judgements that the onus remained on the owner to prove ownership of the land and that the occupier had unlawfully occupied his land. The effect was that the onus then shifted to the occupier. As such, an occupier had to put before Court particular circumstances that justified his land occupation.

Such a decision has the effect of seeming as an amendment of *rei vindicatio*'s prerequisites as the owner bears the onus to prove that he has occupied the land lawfully so and furnish reasonable grounds for his occupation to be deemed as lawful. Van der Walt argues that the Courts have managed to portray *Ndlovu* regardless of the fact that PIE supersedes our common

¹⁰⁴ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

¹⁰⁵ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).

law in a way that it has left the onus to prove the same way by compelling the Courts to award an eviction order when it is reasonable and rational to do so after all relevant factors have been considered carefully¹⁰⁶. The owner had to additionally prove her onus in that she had to declare that the process of Pie, to protect her rights, has been followed accordingly in extension to the prerequisites of *rei vindicatio*. Furthermore, the onus to prove also places a duty on the owner in terms of section 26(3) and PIE to confirm that the eviction is reasonable and rational in all relevant factors.¹⁰⁷

3.4.5 Just and equitable

In terms of PIE, the act explicitly provides that:

*“...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....”*¹⁰⁸

The provision means that before an order is granted, the court is required to consider “(a) the circumstances under which the unlawful occupier occupied the land and erected the buildings/structures; (b) the period the unlawful occupiers resided on the property; and (c) the availability of suitable alternative accommodation or land in determining whether it would be just and equitable to evict the unlawful occupiers”.¹⁰⁹

The court must be convinced that all the relevant factors have been taken into account to grant an eviction order because it is “just and equitable” to do so.

In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*,¹⁴⁴ the Horn AJ noted that the expression “just and equitable” intertwined the “property interests” concerning the owner of the land as well as the “housing interests” about the unlawful occupiers. He also emphasised that the Courts have a duty to parting away from the lawful path used for eviction and take into account additional surrounding circumstances such as morality, fairness, social values

¹⁰⁶ Van der Walt, A.J (2007). *Constitutional Property Law* (4).

¹⁰⁷ Van der Walt, A.J (2007). *Constitutional Property Law* (4).

¹⁰⁸ Section 4 (7) of the PIE Act.

¹⁰⁹ Section 6(3) of the PIE Act.

¹⁴⁴2000 (2) SA 1074 (SE).

and the implications and circumstances which would necessitate bringing out an equitably moral judgment.¹¹⁰

3.5 The court's application of PIE

The application of the PIE Act has resulted in various ground-breaking judgements in the Constitutional Court. The Court's decisions flow from Section 26 (3) of the Constitution, prohibiting arbitrary evictions without a court order. The Court has been at the forefront of ensuring that homeless people get access to housing in this post-constitutional era, which is their constitutional right. The following landmark case demonstrates the position of the Court as far as unlawful evictions are concerned. In the case of *Port Elizabeth Municipality v Various Occupiers*¹¹¹, the court explained that the objective of the PIE Act, which repealed the previous Acts according to Sachs J was:

“PIE not only repealed PISA but, in a sense, inverted it: squatting was decriminalised, and the eviction process was made subject to several requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the statute's name, character, tone, and context being turned around. Thus, the first part of the title of the new law emphasised a shift in thrust from the prevention of illegal squatting to the prevention of illegal eviction. The former objective of reinforcing common law remedies while reducing common law protections was reversed to temper common law remedies with strong procedural and substantive protections. The overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledging the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, homeless people had to be treated with dignity and respect. Thus, the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters

¹¹⁰ Ibid at para 36.

¹¹¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

now became entitled to dignified and individualised treatment with special consideration for the most vulnerable.”¹¹²

Facts of the case

The applicant in this matter was the Port Elizabeth Municipality (the Municipality). The respondents were 68 people, including 23 children, who occupied twenty-nine shacks that they had erected on privately owned land within the Municipality¹¹³. The Municipality sought an eviction order against the occupiers in the High Court's South Eastern Cape Local Division. When the proceedings were instituted, the occupiers had lived on the property for a period ranging from two to eight years. The occupiers indicated they were willing to leave the property if they were given reasonable notice and provided with suitable alternative land to which they could move. However, they were informed they could move to a place referred to as Walmer Township, which was crime-ridden and overcrowded. They also feared further eviction if they moved there because they would not have the security of occupation.¹¹⁴

In the court *a quo*, it was decided that the occupiers were unlawfully occupying the property. It was in the public interest that their unlawful occupation is terminated. The Court said that in taking all the relevant statutory considerations into account, it could not conclude that the relief sought should not be granted. The Court accordingly ordered the occupiers to vacate the land and authorised the Sheriff to demolish the structures.¹¹⁵

The Municipality submitted that it was aware of its obligation to provide housing and had, for that reason, embarked on a comprehensive housing development programme. It contended that if alternative land were made available to the occupiers, they would effectively be ‘queue-jumping; by occupying private land and, when asked to vacate it, demanding that they be provided with alternative accommodation, they would be disrupting the housing programme and forcing the Municipality to grant them preferential treatment.¹¹⁶

¹¹² Ibid at para 12.

¹¹³ Ibid at para 1.

¹¹⁴ Ibid at para 2.

¹¹⁵ Ibid at para 3.

¹¹⁶ Ibid at para 3.

The occupiers took the matter on appeal to the Supreme Court of Appeal (SCA). The SCA held that the occupiers were not seeking preferential treatment because they were asking for housing to be made available to them in preference to people in the housing queue. The SCA held further that the critical consideration in the present case was the availability of suitable alternative land. They were merely requesting that land be identified where they could put up their shacks and where they would have some measure of security of tenure. This was so because of the length of time that the occupiers had occupied the land. More importantly, the eviction order was not sought by the property owners but by an organ of state on the owners' behalf. The SCA held that, given that it was unclear whether Walmer was land owned by the Municipality or privately owned on the papers, the High Court should not have granted the order sought without assurance that the occupiers would have some measure of security of tenure at Walmer. It accordingly upheld the appeal and set aside the eviction order.

The Municipality applied to this Constitutional Court for leave to appeal against the decision of the SCA and to have the eviction order restored. In opposing the application, the occupiers contended that in essence it was based on a challenge to findings of fact made by the SCA and did not raise any constitutional matters and as such the argument was supposed to be rejected. It further indicated that it is particularly concerned to get a ruling from this Court that it is not constitutionally bound to provide alternative accommodation or land when it seeks eviction of unlawful occupiers. The whole case turned on the interpretation to be given to various provisions in the Constitution. The statute was adopted to give effect to a provision of the Constitution.¹¹⁷

The Constitutional court held that it considered surrounding circumstances which were not rational to grant eviction, such as the time the unlawful occupiers resided on the land, that it was not vital for the land to be used productively, the failure of the Municipality to use its resources to find alternative means of accommodation for these occupiers since they would be homeless. The Court established that the state has to find legislative measures to protect the rights of people in terms of property rights¹¹⁸ and housing rights¹¹⁹ as enshrined in the Constitution, taking into consideration all relevant circumstances.¹⁵⁶

¹¹⁷ Ibid at para 7.

¹¹⁸ Section 25 of the Constitution.

¹¹⁹ Section 26 of the Constitution.

¹⁵⁶ Ibid at para 59.

3.6 The protection of the right to housing under International Law

The right to access housing as a socio-economic right is enshrined in international law since it may also be considered a human right. The Constitution itself derives certain norms and standards from international law since it states in Section 39(1) (b) that courts consider international law when interpreting the Bill of Rights. The United Nations Declaration of Human Rights states that “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and under the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.¹²⁰ This is part of the UN’s commitment to ensure that social development in every member state is people-centred and ensures that they are uplifted economically, including the provision of housing.

The primary source of international law relevant to this issue is the International Covenant on Economic, Social and Cultural Rights, which the United Nations members of states entered into to ensure that circumstances are established so that everyone may enjoy his economic, social and cultural rights, inclusive of his civil and political rights to recognise the importance of human rights.¹²¹ These rights include the upliftment of rights to human dignity through decent shelter, clean water, and health services, amongst others. Article 2 of the covenant states that: -

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”¹²²

The Covenant further obliges nations to take measures to ensure that they put programs in place to create sustainable housing programs for their citizens. Access to housing is considered a fundamental human right. The right must not be denied to those in vulnerable positions who cannot afford to buy properties. The covenant explicitly states that,

¹²⁰ Article 21 of the United Nations Declaration of Human Rights of 1948 which was adopted by the General Assembly and South Africa is a signatory to the convention.

¹²¹ The covenant was adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

¹²² Article 2 of the International Covenant on Economic, Social and Cultural Rights.

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”¹²³

Therefore, South Africa must take progressive measures to ensure that adequate housing is afforded to all irrespective of class, race, ethnicity, or gender.

¹²³ Article 11 of *ibid.*

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

It has been established that the Republic of South Africa is a constitutional state with an elected government, and as such, the Executive is bound to abide by the dictates of Section 26(3) of the Constitution that states that “no one may be evicted from their home or have their home demolished without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.”

This has been complied with by enacting PIE which has been followed to the latter through various case laws. PIE has been passed to combat the eviction of unlawful occupiers without following eviction proceedings. Furthermore, due regard is to be given to all relevant circumstances. However, the courts were constantly faced with multitudes of applications calling for eviction orders against people who had illegally occupied properties belonging to individuals, group of people, or companies. The consequence of this situation led to the promulgation of the PIE Act, which is aimed at protecting the rights of both the unlawful occupier and the owner of the occupied property or properties.

The unlawful occupation of private land is a clear violation of the owner’s property rights. As much as the illegal occupier will need the state to protect his right to housing, the property owner will, likewise, seek the protection of his right to property from the state. The analysis in Chapter three shows that PIE was promulgated to remedy such kind of a situation. From this Chapter, it is apparent that PIE provides for procedures that an aggrieved land or property owner should follow to evict the unlawful occupier without violating their constitutional right to adequate housing together with their protection against arbitrary eviction.

The protection of the rights of the unlawful occupier by PIE does not leave the government exonerated from its mandate or responsibility to provide adequate housing for its citizens, particularly the vulnerable that may be facing eviction from their current settlement. PIE, policy considerations and case law have shown that while in an attempt to strike a balance between the rights of the landowners and the unlawful occupiers, the government is mandated to provide adequate alternative shelter for those on the verge of eviction. In all processes, the government ought to show utmost regard for the human rights of all parties involved. The officers concerned take into account the socio-economic status of people to be evicted, but that does not mean that they do not consider the right of landowners in terms of section 4(2) of PIE. For instance, if need

be, it is the powers' responsibility to seek alternative accommodation for affected individuals. This is done to find a permanent solution to the problem.

Furthermore, the government considers the purpose of PIE which is to provide for the prohibition of unlawful eviction and procedures for the eviction of unlawful occupiers.

It is the responsibility of the Department of Human Settlements in collaboration with provinces and municipalities to facilitate a sustainable national housing development process, and this has to be done by determining national norms and standards for housing. It is also the responsibility of the department to build capacity for provinces and municipalities. It is also the wish of the department to transform human settlements into equitable spaces with the people concerned living close to work with access to essential infrastructure. It has, however, been established that the regulatory frameworks adopted by the government to address the housing issues in the country are facing severe challenges. For instance, to this day, close to 15% of households are still living in informal dwellings. This could be attributed to the rapid household growth and population relocation that make it very difficult to address the existing backlogs.

It has also been established that the government finds it very difficult to provide housing to homeless people who qualify for such because of the severe backlog of people in need of houses. The primary cause was the unfair apartheid policies that discriminated against certain sections of the population, particularly African people. This has been the case both in rural and urban areas.

It has also been established that incompetency in various provinces and municipalities is also a contributory factor. In short, most provinces and municipalities cannot implement the stipulated laws and policies. However, the blame should not be laid squarely on the hands of the two government arms, for it is the responsibility of the central government to train and build capacity for the officials in these arms.

It should be noted that it is the policy of the government to provide integrated human settlements. In this regard, the government has failed dismally. For instance, a large number of black people live in severe poverty. As such, there is no way they can afford to live in affluent areas occupied by the previously advantaged South African population.

The rapid population growth due to low-income family planning and uncontrolled border posts, where people come into the country in great numbers and obtain South African citizenship fraudulently, has become a severe challenge to the government. It is not a secret that the governing party has many people who lived in exile during the liberation struggle; as such, they

are sympathetic to people who come from outside the country without proper documentation. This has proved to be a severe drawback to the government's providing adequate housing to all.

The high unemployment rate poses a severe problem for the government because a sizable number of people are unemployed; as such, they cannot afford proper houses. Although it is the government's policy and duty to provide for such, it does not have enough funds to do so.

The government has also failed to deliver title deeds to all the people paying rentals to houses since the time of apartheid, particularly in the urban areas. For the few who received such, it was done for political expediency. In other words, that was done only towards national and provincial elections to convince the electorate that the government cared about their welfare.

Another challenge is the lack of resources by the government to build houses for the poor multitudes; this emanates partly from the corrupt practices that are taking place, particularly in the municipalities. In some instances, people who have money but do not qualify for the allocation are given first preferences to receive RDP houses. Because they do not need such accommodation, they sell the houses for a profit.

The delays in building houses also pose a serious challenge because other people in need of such accommodation resort to invasion of land and occupy incomplete houses without the consent of the prospective owners. The government appears to have severe difficulties in dealing with such anomalies.

It has also been established that at times the government build houses far away from established residential areas and places of employment; as such, some houses remain vacant for long periods and ultimately end up being vandalized by thieves and hooligans. Some end up being occupied by village idiots and relatives of corrupt officials.

With the above evidence, it is pretty clear that the government has to a large degree, failed to provide or facilitate a sustainable national housing development process.

The government is trying to take steps to bring equality to the land. This is, however, happening at a plodding pace. There are various reasons for this; first and foremost, it has been established that some landowners tend to sell their land at exorbitant prices, making it difficult for the government to buy such property.

The steps that have been put in place to establish land claims are too cumbersome to follow, making it difficult because there is much paperwork involved, and the outcomes usually take a very long time to reach the claimants.

The proposed legal changes to land claims processes are fraught with serious obstacles and challenges that pose significant threats to the country's economy.

Agri South Africa, which is the voice of organised agriculture, makes it difficult for the government to implement its policies on bringing equality concerning land. For instance, Agri SA does not find it difficult to take the government to court if they are not satisfied with certain steps that affect their members negatively. In some cases, the courts instruct Parliament to adopt replacement legislation. This takes much time, and as such, the government fails to meet its deadlines.

It has also been established that many successful claimants prefer to take cash rather than have their land returned. As a result, the government appears not to be doing enough in the eyes of the aggrieved to bring about equality to landownership.

The land restitution process appears to be based on the belief that giving land back to the original owners was enough to allow the aggrieved to earn an income from farming. The government has realised this fallacy very late but has not yet come up with another intervention strategy.

It is a fact that the government is not doing enough to bring about land reform in the country, mainly because of the controversial land claims process and controversial legislation.

4.2 Recommendations

In light of the discussion above, this paper recommends that the government take up the following in its endeavour to provide adequate shelter to the citizens of the country:

Firstly, the government must establish accurate statistics of the people who lack adequate shelter in the country. The exercise of providing shelter or the land on which people can build their houses may be described as a “numbers exercise”. Statistics that are appropriately constituted will help the government timeously identify the citizens who need suitable shelter. It would be a futile exercise for the government to develop the land and build houses for an unknown number of people as such, this would either result in under-provision or over-provision of houses, which will, either way, affect the financial standing of the government and thereby, impeding the government's ability to serve its citizens.

Secondly, the lack of land for the citizens to develop and build their desired shelter has proved to be one of the leading causes of people's illegal occupation of private land and property. In this context, the government should identify and demarcate land on which people can temporarily erect houses and shelters until the government establishes permanent shelters for such people. This will curb and encourage people to refrain from practising in land grabs or illegal occupation

of private land, thereby striking a balance between the property rights of private land and property owners and the citizens' right to shelter.

Thirdly, the government is responsible for providing adequate and proper housing for the citizens in its country. However, there is a heavy burden that comes with this responsibility. To alleviate this burden, the government must establish long-term and sustainable employment for its citizens. The more people are employed and can provide for themselves, the more people will build shelters for themselves. In turn, this will reduce the prominence of illegal occupation of land and the warranted dependence on the government to provide shelters in large numbers.

Fourthly, the government must regularly conduct community awareness outreaches to constantly educate the community on the issues surrounding provision of houses, ownership of land, what constitutes illegal occupation, and the consequences of such illegal occupation. While people's occupation of private land converges with their dire need for shelter, most community members lack the basic comprehension of land grab and illegal occupation of personal property. The government must teach the public about property rights and how exactly they operate in our constitutional democracy. Furthermore, it is not that there is not enough land for everyone in South Africa; most citizens are landless and homeless because our laws regarding the acquisition of land are onerous or somewhat burdensome. Provisions for the implementation of the laws that provide for the acquisition of land should be adhered to.

BIBLIOGRAPHY

BOOKS

Badenhorst P.J, Pienaar, J.M & Mostert, H. (2006) Silberberg and Schoeman's The Law of Property.5th edition.

Du Plesis, W. (2006) Land matters: New Developments.1st edition.

Power, A. (1993) Hovels to high rise – State housing in Europe since 1850.1st edition.

Fraser, N and Honneth, A. (2003) Redistribution or Recognition: A Political-Philosophical Exchange.1st edition.

Van der Merwe, C.G & Pope, A. (2007) Property in F du Bois (Ed) Wille's Principles of South African Law.9th edition.

Roederer, C and Moellendorf, D (2004) (Eds) Jurisprudence. Lansdowne.1st edition.

Van der Walt, A.J. (2005) *Constitutional Property Law*.2nd edition.

CASE LAW

AbahlaliBasemnjondolo Movement SA v Premier of KwaZulu Natal and Others, (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC).

Brisley v Drotsky 2002 (4) SA 1 (SCA).

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

Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA).

Government of the Republic of South Africa and others v Grootboom and Others. 2001 (1) SA 26 (CC).

Government of the Republic of South Africa and others v Grootboom and Others 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

Hadibeng local municipality v Unlawful Occupiers of Portion 33 and 37 of the farm 448 Bokfontein and Others [2015] SA (15) 367.

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC).

Khosa and Others v Minister of Social Development and Others, Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC).

Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC).

ModderklipBoerdery (pty) Ltd v Maddder East Squatters and Another 2001(4) SA 385 (W).

Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA).

Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2000 (2) SA 1074 (SE).

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

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC); 2009 (9) BCLR 847.

Ross v South Peninsula Municipality 2000 (1) SA 589 (C) at 595I.

The President of the Republic of South Africa v ModderklipBoerdery and Others 2005(8) BCLR 786 (CC).

Soobramoney v MEC of Health 1998 (1) SA 765 (CC).

JOURNAL ARTICLES

Ayedun, C. A. & Oluwabi, A. O. (2008) Issues and challenges militating against the sustainability of affordable housing provision in Nigeria. *Business Management Dynamics* 1(4), 2014.pp07–10.

Clark, M. & Dugard, J. (2013) Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government. *Socio-Economic Rights Institute of South Africa*.p10.

De Villers, B. (2003) Land reform: Issues and challenges: A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia. *Konrad Adenauer Foundation, Occasional Papers*. Johannesburg.p46.

De Vos, P. (2002) The essential components of the human right to adequate housing: Exploring the Core Content of Socio-Economic Rights. *Mediterranean Journal of Social Science*, Vol 178. p02.

Diamond, R.M. (2009) The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty. Georgetown Public Law Faculty Publications and other Works 423.p85.

Greenstein, R. (2010) Providing Housing within the Sustainable Development Framework: Lessons from Learning Exchanges with Brazil, Mexico, and South Africa. Office for International and Philanthropic Innovation. USA.p04.

Klare, K. (1998) Legal culture and transformative constitutionalism, 14 South African Journal of Human Rights.pp146-188.

Kloppers, H.J, & Pienaar, G.J. (2014) The historical context of land reform in South Africa and early policies. PER: Potchefstrooms Electronic Law Journal, 17(2).pp01-32.

Liebenberg, S. (2006) Needs, rights and transformation: Adjudicating social rights, 17 Stellenbosch Law Review.pp05–36.

Marutlulle, N.K. (2017) Causes of informal settlements in Ekurhuleni Metropolitan Municipality: An exploration, Africa's Public Service Delivery and Performance Review 5(1), a131.<https://doi.org/10.4102/apdpr.v5i1.p131>.

Miraftab, F. (2003) The Perils of Participatory Discourse: Housing Policy in Post-apartheid South Africa. Journal of Planning Education and Research 22:226-239 DOI: 10.1177/0739456X02250305.p226.

Mohlapamaswi, M.L & Rachidi, R.M. (2014) South Africa's challenges of realising her SocioEconomic Rights. Mediterranean Journal of Social Sciences. Vol 5 No 27. p901.

Moolla, M. (2016) Having a slice of PIE – understanding the Act. De Rebus, available online at <http://www.derebus.org.za/slice-pie-understanding-act/> accessed on 03/12/17.p01.

Nevondwe, L, Odeku, K. (2012) Challenges of housing delivery in South Africa: Lessons from Jurisprudence. African Journal of Business Management. Vol.6 (45). pp11327-11341.

Nnadozie, R.M. (2013) Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis. The African Statistical Journal, Volume 16.p82.

Pienaar, J.M and Muller, A. (1999) 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, 10 Stellenbosch Law Review.pp370-396.

Tomlinson, M. (2015) South Africa's Housing Conundrum. The policy bulletin of the IRR ISSN: 2311-7591. No 4.2015/6 October 2015/Issue.p01.

LEGISLATION

Constitution of the Republic of South Africa Act 108 of 1996.

Extension of Security of Tenure Act, 62 of 1997.

Group Areas Act, 68 of 1950.

Housing Act, 107 of 1997.

National Housing Development Agency Act, 23 of 2008.

Natives Land Act of 1913.

Natives Trust and Land Act of 1936.

Prevention of Illegal Squatting Act, 52 of 1951.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 Of 1989.

REPORTS

Mashabela, H. (1990) Mekhukhu: Urban city of the future. South African Institute of Race Relations. Pretoria.

National Planning Commission. The National Development Plan 2030: *Our future-make it work, Executive Summary*. Government Printers. Pretoria 2017.

Socio-Economic Rights Institute of South Africa (SERI) 15 September, 2014. (Accessed at www.seri.sa.org).

South Africa Year Book. (2012).

UN Habitat. Slums of the World: The face of urban poverty in the new millennium? Working Paper, United Nations Human Settlements Programme (UN-HABITAT). <http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=1124.2003>.

White Paper on Reconstruction and Development in Gen N 1954 in GG 16085 of 23 November 1994.

Ziblim, A. The Dynamics of Informal Settlements Upgrading in South Africa: Legislative and Policy Context, Problems, Tensions, and Contradictions. A Study Commissioned by Habitat for Humanity. International/ EMEA Office, Bratislava, Slovakia.2013.

THESIS / DISSERTATION

Burgoyne, M.L. (2008) Factors Affecting Housing Delivery in South Africa: A Case Study of the Fisantekraal Housing Development Project, Western Cape. Research Dissertation: Department of Sociology and Social Anthropology Faculty of Arts and Social Sciences. Stellenbosch University.

Cloete, C.T. (2016) A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context. Unpublished Masters Dissertation, Faculty of Law, Stellenbosch University.

Muller, G. (2011) The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law. Unpublished LLD Research Thesis: Faculty of Law, Stellenbosch University.

TREATIES

International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27. Ratified in 18 January 2015.

United Nations Declaration of Human Rights of 1948 which was adopted by the General Assembly and South Africa is a signatory to the convention.

United Nations. Istanbul Declaration on Human Settlements. Istanbul, Turkey.1996.