

**AN ANALYSIS OF THE ENFORCEMENT OF THE RIGHT OF  
ACCESS TO ADEQUATE HOUSING**

**By**

**SHOPKEEPER COSTARICA MNISI**

**B.Iuris; (UNIN); LLB (UL)**

**Submitted in partial fulfilment of the requirements for the degree of**

**MASTER OF LAWS**

**(IN DEVELOPMENT AND MANAGEMENT LAW)**

**in the**

**SCHOOL OF LAW**

**FACULTY OF MANAGEMENT AND LAW**

**at the**

**UNIVERSITY OF LIMPOPO**

**(TURFLOOP CAMPUS)**

**SUPERVISOR: Adv. P.P MABASO**

**July 2014**

## TABLE OF CONTENTS

	<b>Page</b>
<b>Abstract</b>	iv
<b>Declaration</b>	v
<b>Dedication</b>	vi
<b>Acknowledgements</b>	vii
<b>Table of Statutes</b>	viii
<b>Table of abbreviations</b>	ix

## CHAPTER ONE

### INTRODUCTION

<b>1.1. Introduction</b>	1
<b>1.2. The Problem Statement</b>	3
<b>1.3. Purpose of the study</b>	4
<b>1.4. Significance of the study</b>	5
<b>1.5. Literature Review</b>	5
<b>1.6. Objectives</b>	8
<b>1.7. Methodology</b>	8

## **CHAPTER TWO**

### **ENFORCEMENT OF THE RIGHT TO ACCESS ADEQUATE HOUSING.**

2.1. Introduction	9
2.2. The right to access adequate housing and the challenges to its enforcement.	
2.2.1. Availability of resources	9
2.3. Enforcement of the right to access adequate housing through the Promotion of Access to Information Act no 2 of 200	12
2.4. The role of the South African Human Rights Commission and Non-Governmental Organisation in the enforcement of the right	15
2.4.1. Non-governmental organisation	15
2.4.2. South African Human Rights Commission	16
2.5. Promotion of Administrative Justice Act and Enforcement of the right to access adequate housing	18
2.6. Enforcement of the right to access adequate housing in South Africa and International Law	21
2.7. Conclusion	24

## **CHAPTER THREE**

### **JUDICIAL ENFORCEMENT OF THE RIGHT TO ACCESS ADEQUATE HOUSING**

3.1. Introduction	25
3.2. Enforcement of children's rights by courts	25
3.3 Enforcement of the right to access adequate housing and eviction	29
3.3.1. Eviction of vulnerable groups	31
3.3.2. Eviction of people from their homes	39
3.4 Conclusion	46

## **CHAPTER FOUR**

### **AVAILABLE REMEDIES AGAINST INFRINGEMENT OF THE RIGHT**

4.1. Introduction	47
4.2. Declaration of invalidity and associated remedies	47
4.2.1 Declaration of rights and its impact	48
4.3. Constitutional remedies	50
4.4 Types of interdicts and their appropriateness in socio-economic rights litigation	51
4.4.1. Prohibitory interdict	52
4.4.2. Mandatory interdict	52
4.4.3. Interim interdict	54
4.4.4 Structural interdict	56
4.5. Reading in and reading down remedies	57
4.6. Non-compliance with court orders by the state	60
4.7. Conclusion	60

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

5.1. Conclusion	61
5.2. Recommendations	61
5.2.1. Implementation of housing and legislative policies	61
5.2.2. Monitoring court judgements	62
5.2.3. Provision of legal aid funding	62
5.2.4. The Role of government departments	62
5.2.5. Prohibition of eviction	62-63

### **REFERENCES**

6.1 Books	64
6.2 Articles	64
6.3 Table of cases	65-66

**ABSTRACT**

The Enforcement of the right to housing is one of the greatest challenges facing South African Government. The slow rate of housing delivery has forced society to suspect corruption. Communities from different provinces have demonstrated, through strikes and protest to their local municipalities, to register their discontent about the slow pace of housing delivery. The study focuses more on groups of people who are unable to address their emergency housing needs from their own resources, such as, minors heading households, children without parents, elderly, disabled and unemployed people. The study further discusses the possible remedies to these vulnerable people when their right of access to adequate housing has been infringed, especially during eviction.

**DECLARATION**

I, Shopkeeper Costarica Mnisi declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Master of Laws (LLM) in Development and Management Law, has not been previously submitted by me for a degree at this university or any other university; that it is my own work and in design and execution, all materials contain herein has been dully acknowledged.

Signed-----

Date-----

## V

### DEDICATION

To my late parents, Pauline and Ellion Mnisi for being such wonderful parents to me and for supporting me since childhood, with love and gratitude. I would like to thank my sister Lorraine for her patience during my studies, and for the encouragement she gave me when things were not good.

## ACKNOWLEDGEMENTS

First of all, I am grateful to God, the Almighty, for giving me life, protecting me and blessing me. I will like to thank him for his grace and wonderful love he gave to me in order to complete my studies.

I wish to express my gratitude to Dr M.W Mhlaba, my supervisor who kindly accepted to supervise my work despite a lot of administrative work-load, lecturing, and academic writing commitments, Dr Mhlaba found time to read and re-read drafts of this mini-dissertation, and gave me guidance to improve my work.

I also wish to acknowledge my sister Judith Mncube, who through her love and support, I managed to soldier on, to my brother Rodwell Mnisi, who stood by me through trials and tribulations, to Brown Mnisi, who through his courage made me to keep my head high, and to my sister Eunice Manzini, who supported me in trying times, and always gave me courage to be strong, lastly to Abby Mnisi, who through his contributions, made sure I completed my studies.



**TABLE OF STATUTES**

Community Re-investment Bill of 2000

Constitution of the Republic of South Africa Act (108 of 1996)

Disaster Management Act (57 of 2002)

Extension of Security of Tenure Act (62 of 1997)

Home Loan And Mortgage Disclosure Act (63 of 2000)

Housing Act (107 of 1997)

Interim Protection of Informal Land Right Act (41 of 1996)

Labour Tenants Act (3 of 1996)

Land Reform (Labour Tenants Act) (03 of 1996)

National Building Regulations and Building Standards Act (103 of 1997)

Magistrates Court Act (32 of 1944)

Native Administration Act (38 of 1927)

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

Prevention of Illegal Squatting Act (52 of 1951)

Promotion of Access to Information Act (2 of 2000)

Promotion of Administrative Justice Act (3 of 2000)

Rent Control Act (80 of 1996)

Rental Housing Act (50 of 1999)

Restitution of Land Rights Act (22 of 1994)

Social Assistance Act (59 of 1992)

State Liability Act (20 of 1957)

Supreme Court Act (59 of 1959)

The Extension of Security of Tenure Act (62 of 1997)

The Interim Protection of Informal Right Act (31 of 1996)

**viii**

## **LIST OF ABBREVIATIONS**

**DHS** - Department of Human Settlement

**ESCR** - Economic Social and Cultural Rights

**ICESCR** - International Convention on Economic, Social and Cultural Rights

**JHB** - Johannesburg

**KZN** - Kwa-Zulu Natal

**MEC** - Members of Executive Council

**NBRIS** - National Buildings Regulations and Buildings Standard

**NGO** - Non-Government Organisation

**PAIA** - Promotion of Access to Information Act

**PAJA** - Promotion of Administrative Act

**PIE** - Prevention of Illegal Eviction Act

**RCA** - Rent Control Act

**RDP** - Reconstruction and Development Programme

**RHA** - Rental Housing Act

**SAHRC** – South African Human Rights Commission South African Human Rights  
Commission

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction

The right to housing is a basic human right, in both national instruments like, South African constitution,<sup>1</sup> and Housing Act,<sup>2</sup> and international instruments like, International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR). Article 11(1) of ICESCR of 1996, provides that state parties to the present Covenant recognises the right of everyone to an adequate standard of living for himself and his family, including adequate and the continuous improvement of living conditions. The international human rights law urges all states to possess a minimum core obligation.<sup>3</sup> This is to ensure the satisfaction of at least minimum essential levels of each international right adopted. It therefore means that a minimum core requirement pertaining the right to adequate housing addresses the housing needs to its homeless people by every member state to the covenant.

During the apartheid era in South Africa, the apartheid government through its discriminatory legislation forcibly and often brutally evicted and relocated millions of black South Africans in order to secure the best land for white South Africans, which resulted in overcrowded areas with no running water, electricity, sewage services or paved roads. The rules and practices of pre-reform-era land law in South Africa reflect the fundamentally liberal, common law based view, that existing land rights should be entrenched and protected against unlawful intrusions, without first having to assert or prove their socio-political legitimacy.<sup>4</sup> In contrast, a land reform programme that intends to change current patterns of landholding is based on the fundamentally egalitarian, reformist view that the common law rules and practices of land law entrench existing patterns of social domination and marginalisation, and that they therefore need to be amended.<sup>5</sup>

Prevention of Illegal Squatting Act<sup>6</sup> (PISA), is one of apartheid government's legislation which allowed an owner of land to demolish any structure that has been erected in his or her

---

<sup>1</sup> Act 108 of 1996, Constitution of the Republic of South Africa.

<sup>2</sup> Act 107 of 1997.

<sup>3</sup> Liebenberg, S. (2010) *Socio-Economic Rights*. 1<sup>st</sup> ed. Juta & Co, Ltd. Cape Town.

<sup>4</sup> Van Der Walt AJ, *Exclusivity of Ownership, Security of Tenure and Eviction Orders; A critical Evaluation of Recent Case Law*, (2002) 18 SAJHR 373.

<sup>5</sup> Ibid.

<sup>6</sup> Act 52 of 1951.

land without court order.<sup>7</sup> PISA did not provide for fair procedures in terms of which people could be evicted and for many years, people families had been evicted with no regard for their rights as individuals. Majority of PISA provisions were in conflict with both interim and the final constitutions. For instance, in terms of section 3B of PISA, an owner of land could summarily demolish any structure that has been erected without court order. These were clearly in conflict with section 26(3) of the final constitution, which provides that no one may be evicted from their home, or have their home demolished without an order of the court. During apartheid era it was not easy to enforce the right to housing due to applicable statutes like PISA. The Prevention of Illegal Eviction from and Unlawful Occupation of Land,<sup>8</sup>(PIE), which has repealed PISA, is a direct consequence of section 26(3) of the final constitution, and seems to be the direct response to the inhumane action that was allowed by PISA.

South Africa's current housing policy is rooted in the 1994 Housing White Paper. The fundamental policy development principles introduced by the Housing white Paper remain relevant and guide all developments in respect of housing policy and implementation. The White Paper contains the fundamental principles of government's housing policy to achieve the housing vision. In May 1994, both the Department of Housing and National Housing Forum, agreed to establish Joint Technical Committees. Each committee was tasked with developing policy on a specific priority area of future housing strategy, which included, amongst others, overall Housing Strategy, Rural Housing Policy and Programmes. There are number in respect of housing, which the Department of Housing has passed since 1994, namely (a) Housing Amendment Act. (b) Housing Act, and (c) Home Loan and Mortgage Disclosure Act.<sup>9</sup>

The main objective of this Acts is to ensure that the vulnerable members of the community who lacks access to adequate housing are provided with houses. The right of access to adequate housing is a fundamental right which must be enjoyed by everyone. In terms of section 7 of the constitution of South Africa,<sup>10</sup> the state is required to respect, protect, promote and to take reasonable legislation and other measures to realise the right to adequate housing progressively as set out in sections 26(1) and 26(2).

---

<sup>7</sup> Section 3B of PISA.

<sup>8</sup> Act 19 of 1998.

<sup>9</sup> Act 63 of 2000.

<sup>10</sup> Act 108 Of 1996, Constitution of the Republic of South Africa.

According to the preamble of the constitution, the state commits itself to the establishment of a society which is based on the democratic values, social justice and fundamental human rights; it also lays a foundation for a democratic and open society. The Constitutional Court (CC) found, in the case of *Grootboom v Oosternburg Municipality*,<sup>11</sup> that the key to the justiciability of the socio-economic right in the 1996 constitution is reasonableness.<sup>12</sup> In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context, and to consider the capacity of institutions responsible for implementing the programme.<sup>13</sup> Furthermore the government has the obligation to equally protect and improve lives of all citizens. The study will concentrate much on challenges that causes slow pace on housing delivery. And its enforcement through legislations and during eviction, as well as available remedies to beneficiaries or any person who feel that their right to housing has been infringed.

This first chapter is divided into six sections: (1) Introduction; (2) statement of Research Problem; (3); Purpose of the Study (4); Significance of the Study (5) Literature Review (6) Objectives of the Study; and, (7) Research Methodology.

## **1.2. PROBLEM STATEMENT**

Notwithstanding the existing statutes that protect the right to access adequate housing, there are still millions of South Africans who are dwelling in sub-standard slum settlements. In most cases these people are residing without adequate security of tenure and therefore under permanent threat of forced eviction. The great challenge or problem in enforcing the right to access adequate housing is the slow pace of housing delivery due to corruption and lack of knowledge by government officials which have resulted in many people, especially previously disadvantaged living in informal settlements without proper shelter. This group of people can be categorised as follows, firstly, low and medium income employees who are not eligible for the subsidised Reconstruction Development Programme (RDP) houses, and therefore cannot afford to enter the lower end of the affordable housing market, secondly unemployed people are dwelling in a slum settlement due to various reasons like, orphanage, disabled and natural disaster such as floods. In the case of natural disaster there is an Emergency Housing Policy, the main objective of this policy is to provide temporary assistance to the people who lost their houses due to natural disaster. According to the

---

<sup>11</sup> 2000 (3) BCLR 227 (3) (C).

<sup>12</sup> Ibid para 20.

<sup>13</sup> Currie I and De Waal J (2005) *The Bill of Rights Handbook*, Juta, Cape Town, 557.

Department of Human Settlement (DHS), an urgent situation with regard to housing, exist when the Director-General of DHS, deems a group of people, who has become homeless due to the following disasters: floods, strong winds, severe rainstorms, hail, snow, devastating fires, earthquake or sinkholes. Therefore the assistance is required after the initial remedial measures have been taken in terms of the Disaster Management Act,<sup>14</sup> by the Municipality or Provincial Government to alleviate the immediate crisis situation. However there are victims of the above mentioned situation who did not receive such assistance from the government. The other problem with regard to enforcement of housing which this research attempt to investigate is the lack of information and knowledge by the affected communities and people without proper shelter on how to enforce this right and the procedure to be complied with.

### **1.3 THE PURPOSE OF THE STUDY**

The purpose of this study is to highlight the existing loopholes and challenges of enforcing the right to housing within the Ministry of Human Settlement. Furthermore to critically analyse the progress and shortfall of the right of access to adequate housing within section 26 of the constitution of South Africa. More attention will be given on the shortfall; specifically the group of people who have been left out of the assistance equation, as well as recommendation in a form of solution to such problems. The housing statutes have been enacted since 1994, to ensure that the right of access to adequate housing is protected and realised progressively. In enforcing this right, Prevention of Illegal Eviction Act,<sup>15</sup> (PIE) was enacted purposely to protect both constitutional and property rights as stated in the preamble of the above mentioned Act. It further stipulates that, as stated in its preamble that, no individual may be evicted from their homes without a court order. However there are number of reported and unreported cases where groups of people have been evicted by the government or owner of private land without court order, eg, Angelo informal settlement. It is a clear indication that most officials from all spheres of government are acting or taking decisions without complying with the applicable provisions of constitution.

---

<sup>14</sup> Act 57 of 2002.

<sup>15</sup> Act 19 of 1998.

## 1.4 SIGNIFICANCE OF THE STUDY

The study is significant in that it investigates and outlines the existing challenges or problems faced by the people who are homeless. It would therefore contribute to the understanding of the enforcement of the right of access to adequate housing and how these challenges can be resolved. This study would further help contribute on analysis of the constitutional basis of the legislation and also look at the prospect for successful enforcement, since the new system of local government introduced in 1995 presented the local government or municipalities with challenges to address the backlog in service delivery during apartheid era. Various debates and discussions with regard to the issue of enforceability of socio-economic rights have been held at different stages and it has become evident that these rights are enforceable.

## 1.5. LITERATURE REVIEW

There are several studies on the right to housing. However very few studies have dealt with the issue of what the right to housing entails. For instance, David Potties, in his article,<sup>16</sup> undertook a discussion in the policy and institutional analysis of low cost housing development in South Africa since 1994. Potties study was based on a capital subsidy provided by the state. This policy was designed to redress the dramatic inequalities in service and infrastructure provision by offering beneficiaries access to housing on the bases of income rather than race.<sup>17</sup> While Rudolf Nengome,<sup>18</sup> echoed similar sentiments to that of David Potties in that, in his article,<sup>19</sup> he highlighted the primary responsibility of financial institutions for providing mortgage credit to previously disadvantaged people. Furthermore, his article also analyses the constitutional basis of the legislation on fair lending and also looks at the prospects for successful enforcement.<sup>20</sup> The fair lending comprises the Home Loan and Mortgage Disclosure Act,<sup>21</sup> and the Community Re-investment Bill.<sup>22</sup>

---

<sup>16</sup> Pottie D *Housing the Nation: The Politics of Low-Cost Housing in South Africa*, Politeia (2003) Volume 22 no 1 p 119-143.

<sup>17</sup> Ibid.

<sup>18</sup> Nengome R, *The Right to Access Adequate Housing, Fair Lending and The Role of Financial Institution* (2005) Codicillus Volume 46 NO 2 ISSN 00-020x © Unisa press pp 24-44.

<sup>19</sup> Ibid p1.

<sup>20</sup> Nengome R, *The right to Access Adequate Housing, Fair Lending and the Role of Financial Institution*(2005) Codicillus Volume 46 No2 ISSN 0010-020x © Unisa press pp 24-44.

<sup>21</sup> See note 8 p2.

<sup>22</sup> Bill of 2000.

Michelle Kelly –Louw,<sup>23</sup> in her article, discusses the right of access to adequate housing and execution order in the magistrate’s court, which allowed sales in execution of debtor’s homes. In the case of *Jafta v Schoeman and Others*<sup>24</sup>, the Constitutional Court set aside the sale in execution at the instance of their creditors of the immovable property of each of the two appellants, on the basis that it amounted to unjustifiable infringement of their right to have access to adequate housing protected by section 26 of the constitution.

In the case of *Standard Bank v Snyders & Others*<sup>25</sup> and *Standard Bank of South Africa v Adams*<sup>26</sup> the Cape Provincial Division refused to grant orders authorising the sale in execution of the mortgage immovable property. Section 26(3) of the South African constitution provides that every individual has the right to access adequate housing and no one may be evicted from their homes or to have their homes demolished without an order of court, made after considering all relevant circumstances. Based on the property law section, Lisa Silberman,<sup>27</sup> in her article, analyses the procedure which need to be complied with and also the implications of illegal evictions in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of land Act.<sup>28</sup> Section 1 of PIE, provides that no individual may be evicted from their homes which maybe in the form of hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter without an order of court after all relevant circumstances have been recognized.<sup>29</sup>

Stuart Wilson,<sup>30</sup> in his article argues for a theoretically informed, socially contextualised way appraising the impact of strategic litigation on the needs and interests of the poor and vulnerable. He examines the relative success of recent strategic litigation aimed at stemming the flow of forced eviction in Johannesburg’s Inner city. He present a case study of one moment in the struggle for housing rights in Johannesburg’s Inner city, it is an attempt to reflect on when and how litigation works as part of rights- based strategy for change. This case study was of a state programme of slum clearances in the inner city of Johannesburg, which until they were halted in March 2006, resulted in the eviction of around 10 000 desperately poor men, women and children by state without the provision of alternatives.

---

<sup>23</sup> The Quarterly Law Review for People in Business, Vol 15 part 1 ISSN 1021-7061.

<sup>24</sup> 2005 (2) SA 140 (CC).

<sup>25</sup> 2005 (5) SA 610 (C).

<sup>26</sup> 2007 (1) SA 598 (C).

<sup>27</sup> Silberman, L. *Illegal Evictions. Without Prejudice:Property Law* (2008) 47.

<sup>28</sup> Act 19 of 1998.

<sup>29</sup> Ibid.

<sup>30</sup> Stuart Wilson, *Litigating Housing Rights in Johannesburg’s Inncity:2004-2008* (2011) SAJHR volume 27 P 127.



This research will also dwell much on strategies and measures which must be considered by government before evicting people.

Craig Scott and Philip Alston,<sup>31</sup> discuss the first two social rights cases, *Grootboom* and *Soobramoney*, to go to the Constitutional Court under the 1996 constitution. The *Grootboom* case,<sup>32</sup> involves a claim of breaches of rights to housing or shelter brought by some 900 persons under sections 26 and 28 of the constitution. According to Scott and Alston, the judgment in the case of *Grootboom*, does not justify why the failure to meet even the core shelter needs of the applicant adults was not a violation of section 26 of the constitution.

In the case of *Carmichele v Minister of Safety and Security*,<sup>33</sup> the Constitutional Court dealt with state liability in respect of acts of violence by private sectors. In this instance, the court found that the rights to life, dignity and freedom of the person imposed a duty on the state and its organs to refrain from infringing these rights. The right of access to adequate housing is important for the enjoyment of all human rights, including right to life and human dignity. A house is fundamental for human dignity and for physical and mental health, which are crucial for socio-economic development. In certain instances, these rights involved a positive duty to provide appropriate protection to everyone through laws and other means.

McMurray and Jansen van Rensburg,<sup>34</sup> in their article outline how the High Court and Constitutional Court enforced the children's right to access adequate housing. Their article aims to examine the legislative and other measures taken by the government to realise the children's rights to shelter as provided by section 28 (1) (c) of the constitution. In the case of *Grootboom vs Oostenberg Municipality*, a group of children and adults had been rendered homeless as a result of eviction from their informal dwellings, situated on private land, earmarked for low cost housing. Based on section 26(2) and section 28(1)(c) of the constitution, they applied for an order directing the local government to provide them with temporary shelter.<sup>35</sup> The applicants succeeded in respect of section 28 not section 26. The High Court found that the right to basic shelter was an unqualified constitutional right and therefore not appropriate to consider whether the state had requisite resources. This decision

---

<sup>31</sup> Craig Scott and Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, (2000) Volume 16 SAJHR at 206.

<sup>32</sup> 2000 (3) BCLR 277 (CC).

<sup>33</sup> 2001(4) SA 938 (CC) [Carmichele].

<sup>34</sup> I Mc Murray and L Jansen van Rensburg, *Legislative and other measures taken by government to realise the rights of children to shelter* (2004) Vol 1 Potchefstroom Electronic Law Journal, at 1.

<sup>35</sup> Act 108 of 1996.

had been supported by Constitutional Court. This would seem to support the view that the courts have the willingness and capability to enforce the children's right to housing and other socio-economic rights.

## **1.6. OBJECTIVES**

The main objective of this study is to investigate the existing challenges or problems within ministry of human settlement that causes a slow pace of housing delivery. Secondly, to provide strategies of enforcement of the right to access adequate housing as a form of solution to these existing problems or challenges. Lastly, to identify the most vulnerable members of society or beneficiaries who completely do not have access to shelter and who deserve to be attended to urgently.

## **1.7. RESEARCH METHODOLOGY**

The research methodology to be adopted in this research is qualitative. This study is essentially based on library research, whereby the South African legal framework regarding the enforcement of right to access adequate housing is analysed, in the light of applicable international conventions and other applicable international instruments, South African law reports, case law, journals, text books and legislation.

## CHAPTER TWO

### ENFORCEMENT OF THE RIGHT TO ACCESS ADEQUATE HOUSING AND CHALLENGES

#### 2.1. INTRODUCTION

This chapter specifically outlines what the right of access to adequate housing entails. Amongst crucial aspects that will be discussed are, the challenges and problems that cause a slow pace of housing delivery, reasonable legislative and other measures that must be taken by the government to achieve the progressive realisation of the right to access adequate housing, within its available resources , and protection against unlawful arbitrary eviction. The role of Promotion of Administrative Justice Act,<sup>36</sup> Promotion of Access to Information Act,<sup>37</sup> and South African Human Rights Commission in enforcing the right to access adequate housing will also be discussed in this chapter.

#### 2.2. THE RIGHT OF ACCESS TO ADEQUATE HOUSING AND THE CHALLENGES TO ITS ENORCEMENT

Section 26(1) of the constitution of the Republic of South Africa makes provision for a right of access to adequate housing. This right is not an unqualified obligation on the state or a duty to provide housing on demand, meaning that the right is one of access to housing rather than a right to adequate housing.<sup>38</sup> This was illustrated in the case of *Grootboom v Oosternberg Municipality*,<sup>39</sup> where the Constitutional Court held that:

“It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggest that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must

---

<sup>36</sup> Act 3 of 2000.

<sup>37</sup> Act 2 of 2000.

<sup>38</sup> Iain Currie & Johan de Waal (2005), *Bill of Rights Hand book*, fifth Edition, p 586.

<sup>39</sup> 2000 (11) BCLR 1169 (CC).

create conditions for access to adequate housing for at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.”<sup>40</sup>

This means that the extent of the state’s obligations differs according to the economic resources available to different sectors of the population, for example, there are people who already have access to adequate housing and those who can afford to rent or purchase it. This means that the state will consider or attend those who do not have sufficient means or without access to shelter at all. Section 26(2) of the constitution provides that the state must take reasonable measures within its available resources, to achieve the progressive realisation of this right. According to this section, it means that the state shall be able to provide houses for the beneficiaries depending on the availability of the resources. In the case of *Soobramoney v Minister of Health*,<sup>41</sup> the case involved the application for an order directing the state hospital to provide the applicant with an on-going dialysis treatment and interdicting the respondent from refusing him admission to renal unit. The state raised the lack of resources as an excuse to provide an applicant with an on-going dialysis treatment and the decision of the court was that the applicant could not succeed in his claim due to the fact that the resources in the hospital were insufficient due to the fact that there were many patients suffering from chronic and renal failure than the machines to treat such patients.

Section 26(3) of the constitution protects against eviction or demolition of a person’s home unless a court orders eviction considering all the relevant circumstances, like the nature of the home, the legal basis of occupation. The effects of eviction as well as the enforcement effected during eviction will be discussed later in chapter 3.

Despite the achievements at national, provincial and local levels, challenges remain in order to speed up housing delivery. Most challenges relate to the implementation of the planned measures, these include the following:

- Some land identified for housing is under the subject land restitution claims, this has delayed housing delivery.
- Corruption.
- Capacity within Municipalities, many Municipalities does not have sufficient personnel dedicated to perform housing-related functions.

---

<sup>40</sup> Ibid para 35.

<sup>41</sup> 1997 12 BCLR 1696 (CC).

- Department of Human Settlement does not have a proper monitoring mechanism to keep record of its work or that the instituted measures during the year under review did not improve the living conditions of these vulnerable groups. The DHS does not keep the proper track of the work it does, it needs to work with the statistic South Africa to update and monitor the impact that its measures have in the improvements of the lives of the poor people.

### **2.2.1. AVAILABLE RESOURCES AND ENFORCEMENT**

ICESCR uses the phrase to the maximum of state's available resources, while South African constitution uses the phrase within its available resources. According to ICESCR the concept of "to the maximum of its available resources" means that both the resources within the state and those provided by other states or the international community must be utilised for the fulfilment of each rights, including the right to access adequate housing. The Economic, Social and Cultural Rights Committee has emphasised that even in times of severe economic contraction and the undertaking of measures of structural adjustment within a state, vulnerable members of society can and indeed must be protected by the adoption of relatively low- cost targeted programs. If a state claims that it is unable to meet even its minimum core obligation because of lack of resources, it must at least be able to demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>42</sup>

The question in this regard is whether the state truly does not have sufficient resources to ensure the progressive realisation of the right to access adequate housing. There are resources; it is evident from the RDP houses that have been constructed since 1994. More than half of those houses were occupied by people who at all do not lack shelter. In some areas even the local government officials are owners of RDP houses, while the vulnerable members of society, the real beneficiaries who deserve those houses are left out of assistance equation. The public officials, and administrators in charge of budgets have been found to illegally using the money allocated for housing delivery for their own personal matters, and they have hopelessly fail to deliver. The question of available resources is crucial in this regard due to the fact that, the right to access adequate housing can be enforced or progressively realised through the availability of resources.

---

<sup>42</sup> Liebenberg S (2010) *Socio-Economic Rights* (adjudication under a transformative constitution) ,juta and Co, Ltd p150.

Available resources are being misused and not properly utilised due to lack of accountability in the housing sector. The consequences of corruption, misuse of public funds or available resources and governments' failure to comply with its constitutional duty to ensure the progressive realisation of the right to access adequate housing have resulted in the continuation of the protests and riots due to failure to deliver housing as promised. Many countries of the world respect and praise South African constitution for containing justifiable socio-economic rights. However, the government does not do its best to realise these socio-economic rights progressively. The issue is that this right is being violated by government officials, especially when it comes to performance, implementation and delivery.

The government, through, DHS should devise means through Provincial and Local Government to identify the most vulnerable members of society who are in dire need of housing, like children without shelter, old age people, disabled and HIV people without shelter or access to housing. The DHS should also ensure that the available resources are allocated for that purpose and are properly utilised to ensure the enforcement of this right.

### **2.3. ENFORCEMENT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING THROUGH THE PROMOTION OF ACCESS TO INFORMATION ACT NO 2 OF 2000**

Lack of access to information has resulted in unethical behaviour into housing development in South Africa. At both national and provincial levels, little progress has been made to stop these irregularities. It is, however, evident that the same public has suffered tremendous loss of confidence in the DHS. An ideal housing industry will be one that is not sheltered by secrecy, corruption, and repression and human rights abuses. Housing Department must realise that secrecy and lack of accountability of financial institutions, developers and government officials have fuelled people's misgivings. A raft of corrupt practices and inhumane irregularities in housing has undermined the livelihoods of millions of poor people. This calls for the National Department of Human Settlement to find a better way of using statute that promotes access to information. The Home Loan and Mortgage Disclosure Act (HLMAMA),<sup>43</sup> seeks to promote access to information. While Promotion of Access to

---

<sup>43</sup> Act 26 of 2000.

Information Act (PAIA),<sup>44</sup> aims to create a framework to allow the public access to the records that governments holds on its behalf. PAIA, is one of the most powerful national instruments that can be used or relied on in order to enforce the right to access adequate housing by poor South Africans, who are living in intolerable or crisis situations and informal settlements. This statute, PAIA was enacted in order to give effect to the constitutional right of access to any information held by the state and by another person, and it is required for the exercise or protection of any rights.

The system of apartheid government in South Africa before the democratic elected government in 1994 had a secretive and unresponsive culture in public and private bodies, which often lead to an abuse of power and human rights violations. Section 32 (1) (a) provides that everyone has the right to any information held by the state. While section 32(1)(b) provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for exercise or protection of any rights. PAIA, was enacted in order to give effect to this right of access to information in section 32(1)(a) of the constitution, and bearing in mind that the state must respect, protect, promote and fulfil, at least, all the rights in the Bill of Rights, which is the cornerstone of democracy in South Africa. PAIA also foster a culture of transparency and accountability in public and private bodies, in order to give effect to the right of access to information. It also actively promote a society in which the people of South Africa have effective access to information, to enable them to more fully exercise and protection of all their rights, a right to access adequate housing in particular.

The question in this regard, is how do public, especially the affected communities and people without proper shelter or housing, access information in order to ensure that their right to access adequate housing is enforced. The answer to this question is provided by chapter 3 of PAIA,<sup>45</sup> which stipulates that, the human rights commission must, within 18 months after the commencement of this Act, compile in each official language a guide containing such information, in an easily comprehensive form and manner, as may reasonably be required by a person who wishes to exercise any right. If South African Human Rights Commission (SAHRC) had compile a guide which is written in all South African official languages and ensure that the guide has reached the victims of shelter or housing, then it would be easy for

---

<sup>44</sup> Act 2 of 2000.

<sup>45</sup> Section 10 of PAIA.

them to approach the relevant authority or tribunal to seek assistance in order to enforce their right to access adequate housing.

There is still much to be done by DHS to ensure that public is aware of their right to access adequate housing. The DHS must engage with residents of informal settlements and rural communities, in order to raise awareness of existing policies. It must also obtain information about the challenges faced by those residents, to enable them to develop appropriate policies. And by so doing it will be able to identify and record all the needs of the inhabitants and also inform them of their rights. Public access to information is fundamental to encouraging transparency and accountability in the way government and public authorities operate. It is also an important weapon in the fight against corruption,<sup>46</sup>

PAIA secures the right of people to receive and request information from public body. In doing so, it enhances public participation in our democracy and it is also vital in increasing transparency and reducing corruption. Public bodies have mandatory duty to provide SAHRC with information they have received and processed each year. It is a mandatory obligation applicable to all public bodies including municipalities and parastatals.<sup>47</sup>

The entrenchment of an access to information right in the constitution is directed at promoting good government. It is a duty of government to provide the public with information to enable them to exercise their rights. However, it is rare that government provide public with such information because public servants or government officials who are under constitutional obligation to protect, promote and prevent any form of violation of the rights in the Bill of Rights, the right to access adequate housing in particular, are the violators of this right. Institution for Democracy in South Africa (IDASA) has revealed very high levels of dissatisfaction, with poor municipal performance blamed on corruption, nepotism, poor management and failure to listen to residents or keep them informed.<sup>48</sup> It is evident that for poor people from rural communities, in particular, is not easy for them to exercise their rights due to government's failure to inform them on how to exercise their rights, and what they must do or which steps to follow if their right to access adequate housing is violated. PAIA is a good national instrument that can be used by vulnerable people

---

<sup>46</sup> Iain Currie and Johan de Waal (2005) *The Bill of Rights Hand Book* fifth edition, p 684.

<sup>47</sup> Section 32 of PAIA.

<sup>48</sup> [www.idasa.org.za/Africa](http://www.idasa.org.za/Africa).



without shelter or housing, only if they are aware of its existence to enforce their right to access adequate housing.

Section 152 of the constitution provides that the local government must provide services to communities in a sustainable way. It must also promote socio-economic development and encourage communities and community organisations, to be involved in the matters of local government, one of which is to address housing. There are serious housing delivery backlogs in the municipalities and provinces caused by the government officials who violated the provisions of the constitution and also breaches the terms and conditions of the housing tenders. Lack of information to public is a violation of constitutional right by government.

## **2.4. THE ROLE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND NON-GOVERNMENTAL ORGANISATION IN THE ENFORCEMENT OF THE RIGHT.**

South African Human Rights Commission and Non-Governmental Organisation (NGO) are vital actors in the promotion and enforcement of the right to access adequate housing. In this regard more focus will be on SAHRC.<sup>49</sup>

### **2.4.1. NON-GOVERNMENTAL ORGANISATION**

Non-Governmental Organisations can carry out wide range of initiations design to promote the realisation of the right to adequate housing.<sup>50</sup> They can publicise and distribute this instrument to vulnerable and disadvantaged groups in society. Some NGO have consultative status with UN, individuals, local groups and other organisations without consultative status; they can forward their concerns through the above mentioned NGO with UN consultative status to the Committee on Economic Social and Cultural Rights and other bodies with housing rights issues.<sup>51</sup> Any group or person can send information about violations of their right to access adequate housing by any state party to the secretary of the Committee on Economic Social and Cultural Rights.<sup>52</sup> The NGO can also provide legal education, training

---

<sup>49</sup> Office of the United Nations High Commission for Human Rights, the right to adequate housing, Fact sheet no 21/ Rev.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

and advice to citizens with a view to informing people of their right to adequate housing, and how to enforce the right.

#### **2.4.2. SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

South African Human Rights Commission is the national institution established to entrench constitutional democracy.<sup>53</sup> It is committed to promote respect for observance of, and the protection of human rights for everyone without fear or favour.<sup>54</sup> The SAHRC has the responsibility to address those human rights violations that have been brought to its attention by individuals and organisations.<sup>55</sup> The SAHRC takes a dual approach to addressing human rights through, firstly, legal services department, secondly, training and education program. The training and education program takes a proactive approach by visiting rural communities and educating them on human rights guaranteed by the constitution through public programs and seminars. The educational programs target individuals in rural communities, because they are more vulnerable and encourage them to claim their rights.<sup>56</sup>

The training and education program is a mechanism that can be used by vulnerable and disadvantaged people from rural communities to ensure that their right to access adequate housing is enforced. Most people from rural communities are illiterates and they are also not aware of their existing rights and the applicable remedies if their rights are violated, especially their right to adequate housing. If people have been offered a training and education about their rights and available remedies where their rights have been violated, then it is easy for them to enforce their right to access adequate housing by lodging complaints to SAHRC.

The SAHRC training and education programme is a tool that develops awareness of human rights to vulnerable people who lacks shelter. People, who their right to adequate housing have been violated, can approach the SAHRC, and the commission will make recommendations and seek appropriate relief. The task or duties of SAHRC in accordance with the constitution are to:<sup>57</sup>

---

<sup>53</sup> The South African Human Rights Commission established under the human rights commission Act of 1994.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

- Develop awareness of human rights among the people of South Africa.
- Make recommendations to the state to improve the carrying out of human rights.
- Undertake studies and report to parliament on matters relating to human rights.
- Investigate complaints of violations of human rights and seek appropriate relief.

The second approach of SAHRC to address human rights is through its legal services department. The legal services department is an administrative agency similar to Equal Employment and Opportunity Commission (EEOC). The task of legal services department is to investigate complaints made by individuals and NGO that are brought to their attention. The legal service department's review process begins with initial screening of the complaints to see whether a violation has occurred. It then contacts the respondent to request a response to the alleged violation. If the department receives a response disputing the claim, the claimant has an opportunity to comment on the response.

The commission after receiving the complaint will propose a resolution to the problem. If the respondent does not like the decision reached by the legal service department, it can go through an appeals process, unlike EEOC, the decision of the commission are non-binding and require a non-complying respondent to be brought before a court to reach enforcement.

The legal service department is other mechanism that can be relied on by the people who their right to access adequate housing have been violated. If the complaints have been lodged or brought to the attention of the legal service department by the community or any person who claim that his or her right to access adequate housing have been violated, then the legal service department will engage both the violators for example, DHS or municipality and the claimants to investigate whether there is a violation.<sup>58</sup> If there is a violation, the department will also seek or propose a solution as a relief. The right to access adequate housing can be enforced by SAHRC through the legal services department, only if the victims or vulnerable people without proper shelter or housing at all, approach SAHRC through the legal services department. Even though the handling and management of complaints about human rights violations lies at the heart of the commission's work (SAHR). It also aims to create a national culture of human rights through its advocacy, research and legal functions. In addition the commission monitors develops standard of human rights law.

---

<sup>58</sup> Ibid.

SAHRC must compile in each official language, a guide containing such information in an easy comprehensive form and manner as may be required by a person who wishes to exercise his or her rights.<sup>59</sup> The question in this regard is whether such guide containing information about human rights has been made available to all communities and people who wish to exercise their rights to access adequate housing.<sup>60</sup> The truth is that not all the affected communities and people have such information or being offered a training about their rights to enable them to know which relevant authority they must approach in situations where they feel that their rights have been violated . The SAHRC should device means to ensure that the affected communities and those who are living in informal settlement are visited and offered a training and education about their rights in order to enable them to know the available remedies and authorities to approach, in order to enforce their right of access to adequate housing.

## **2.5. PROMOTION OF ADMINISTRATIVE JUSTICE ACT AND THE ENFORCEMENT OF THE RIGHT TO ACCESS ADEQUATE HOUSING**

Promotion of Administrative Justice Act, (PAJA) is a national statute that has been enacted by parliament as required by section 33(3) of the South African constitution, in order to promote an efficient administration, good government and to create a culture of accountability, openness and transparency in the public administration. Section 33 of the constitution of the Republic of South Africa of 1996 guarantees a lawful, reasonable and procedurally fair administrative action. Section 26(1) guarantees a right to have access to adequate housing, whereas section 33(3) provides that a national legislation must be enacted to give effect to these rights. As a result of this section, PAJA,<sup>61</sup> was enacted, in order to give effect to the provision of section 33 of the constitution.

It is vital to define administrative action before one can discuss the role of PAJA in enforcing the right to access adequate housing. Administrative action, means any decision taken, or any failure to take a decision by an organ of state, when exercising a power in terms of the constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or a natural or justice person other than an organ of state,

---

<sup>59</sup> Section 10 (1) of PAIA.

<sup>60</sup> Ibid.

<sup>61</sup> Act no 3 of 2000.

when exercising a public power or performing a public function in terms of empowering provision which adversely affects the rights of any person and which has a direct, external legal effect.<sup>62</sup>

PAJA is one of the most powerful and important national instrument to ensure the enforcement of the right to access adequate housing through efficient administrative action. Section 33 of the constitution and PAJA constitute crucial mechanisms for ensuring lawful, reasonable and procedurally fair administrative action in the context of decision-making which affects people who are victims to social benefits and services.<sup>63</sup> If successful application for the review of an administrative decision is brought in terms of PAJA, the usual remedy is the setting aside of the decision and the remittal of the matter for decision by the administrator with or without directions.<sup>64</sup>

In exceptional cases, a court on review, may substitute or vary the administrative action or correct a defect resulting from an administrative action.<sup>65</sup> The case of *Home Affairs v Watchenuka*,<sup>66</sup> is one of the socio- economic rights, though not a right to housing but, a right to education, where the court set aside an administrative decision. In this case, the Supreme Court of Appeal held that a blanket prohibition placed by the standing committee for refugee affairs on asylum seekers seeking employment and standing constituted an infringement of their rights to human dignity and education. The CC confirmed the order of the High Court setting aside the relevant regulation promulgated in terms of the References Act.<sup>67</sup> It is clear from the above mentioned case, even though it is not a housing case, that if vulnerable people feel their right to housing have been violated they can approach the court in order to enforce the right.

In the case of *Port Elizabeth Municipality v People's Dialogue on Land and shelter*,<sup>68</sup> the administrative action of the Port Elizabeth Municipality to evict unlawful occupiers, of which adversely and materially affected the rights of occupiers,<sup>69</sup> was set aside by the court. The order was not granted in favour of the applicant (Port Elizabeth Municipality) due to the fact

---

<sup>62</sup> Section 1(a) (i) (ii) (b) of PAJA.

<sup>63</sup> De Viliers N 'Social Grants and Promotion of Administrative Justice Act no 3 of 2002' (2002) 18 SAJHR P 320-349.

<sup>64</sup> Section 8(1) (c) (i) of PAJA.

<sup>65</sup> Section 8 (1) (c) (ii) (aa) of PAJA.

<sup>66</sup> 2004 (4) 326 (SCA), 2004 (2) BCLR 120 (SCA).

<sup>67</sup> Act 130 of 1998.

<sup>68</sup> 2000 (2) SA 1074 (SEC).

<sup>69</sup> Section 4 of PAJA.

that it had not provided alternative land or accommodation for the occupiers of the land which was ear marked by the Port Elizabeth Municipality for housing development.

If people who are facing eviction are aware of PAJA and make use of it, they would not be evicted and if evicted then the state would provide alternative accommodation for them, meaning that the enforcement can be easily effected through PAJA. Any person whose rights or right to access adequate housing have been materially and adversely affected by administrative action and who has not been given reasons for the action, may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.<sup>70</sup>

In the case of eviction, the victims of eviction may rely on PAJA to request reasons from the administrator of any organ of the state to provide them with reasons for eviction. The reason being that, their right in terms of section 26(1) of the constitution have been violated, and that such decision to evict them materially and adversely affects them. If the administrator fails to furnish adequate reasons for an administrative action or decision for eviction,<sup>71</sup> the affected person may institute proceedings in a court or a tribunal for the judicial review of such administrative action.<sup>72</sup> The court or tribunal in proceedings for judicial, may grant any order that is just and equitable as remedies, including the following orders:<sup>73</sup>

- Directing the administrator to give reasons or act in the manner the court or tribunal requires.
- Prohibiting the administrator from acting in a particular manner.
- Setting aside the administrative action and remitting the matters for reconsideration by the administrator with or without directions.
- Declaring the rights of the parties in respect of any matter to which the administrative action relates.
- Granting a temporary interdict, or other temporary relief.
- Directing any of the parties to do, or refrain from doing, of which the court or tribunal considers necessary to do justice between the parties.

---

<sup>70</sup> Section 5(1) of PAJA.

<sup>71</sup> Section 5(3) of PAJA.

<sup>72</sup> Section 6 (1) of PAJA.

<sup>73</sup> Section 8(1) of PAJA.

In the case of *Occupiers of 51 Olivia Road v City Council of Johannesburg*,<sup>74</sup> City Council applied to Johannesburg High Court for the eviction of the occupiers of building in the inner city on the basis that the building was unsafe and unhealthy. The High Court refused to evict the occupiers and ordered the city to remedy its housing program which was found to be inadequate.

The Supreme Court of Appeal upheld the appeal by the city and granted eviction on condition that the city would provide alternative accommodation to those who will be rendered homeless.<sup>75</sup> The occupiers appealed against the judgment of Supreme Court of Appeal to Constitutional Court. The Constitutional Court issued an interim order,<sup>76</sup> requiring the city and occupiers to engage with each other meaningfully in an effort to resolve the differences and difficulties in line with the values of the Constitution and statutory duties of the municipality and the rights and duties of the citizens. These were the efforts made by High Court, Supreme Court of appeal and Constitutional Court to enforce the right to access adequate housing by making orders that prevented eviction without an alternative accommodation. In the case of *Grootboom v Government of the Republic of South Africa*,<sup>77</sup> the Constitutional Court made three declaratory orders specifying the nature of the state's obligations in terms of Section 26 of the constitution in relation to its housing program in the area of the Cape Metropolitan Council. These declaratory orders will be discussed in chapter 4.

## **2.6. THE RIGHT TO ACCESS ADEQUATE HOUSING IN SOUTH AFRICA AND INTERNATIONAL LAW**

The right to housing has been addressed in many resolutions adopted by all types of United Nations decision-making organs. While such resolutions are not legally binding, they serve the important function of articulating international accepted standards. Most of the resolutions on housing rights have been directed at governments, with a view to encouraging them to do more to realise this right. Notwithstanding the fact that, all economic, social and cultural rights confer more complex series of obligations on states, the states must ensure that those who are truly homeless receive at least rudimentary form of shelter.

---

<sup>74</sup> 2008 (5) BCLR 475 (CC).

<sup>75</sup> Ibid para 78.

<sup>76</sup> Ibid order at para 1.

<sup>77</sup> 2000 (5) BCLR 475 (CC).

The standards set down in international instruments with regard to adequate housing and forced evictions are of cardinal importance. It is internationally recognised that forced evictions should infringe the right to housing as little as possible.<sup>78</sup>

Section 39(1) (b),<sup>79</sup> of the constitution recognises the importance of international law in the interpretation of the Bill of Rights and accordingly requires consideration of the international law. It is very important that judges follow or consider international law when interpreting the right to access adequate housing, the reason being that the post-apartheid or democratic government derived the right to housing from international conventions, such as Universal Declaration of Human Rights and International Covenant on Socio-Economic and Cultural Rights. In *S v Makwanyane*,<sup>80</sup> Chaskalson P states as follows:

[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within chapter 3 [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparative instruments, such as the United Nations Committee on Human Rights, the inter-American Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

He went on to say:<sup>81</sup>

In dealing with comparative law we must bear in mind we are required to construe the South African constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own constitution.<sup>82</sup>

The Constitutional Court provided more clarity about the use of international law in enforcing the social and economic rights provisions of the Bill of Rights in the case of *Grootboom* and *Treatment Action Campaign* judgements. In both cases of *Grootboom*,<sup>83</sup> and *TAC*,<sup>84</sup> the court emphasised that the use of international law may be directly applicable

---

<sup>78</sup> Stuurman L A (2002) *Illegal Eviction and Unlawful Occupation of Land: A Comparative Perspective*, P 6.

<sup>79</sup> Stipulates that when interpreting the Bill of Rights, a court, tribunal or forum must consider International law.

<sup>80</sup> 1995 3 SA 391 (CC) [35].

<sup>81</sup> See 415D-E of the judgment.

<sup>82</sup> See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS; first National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 786 (CC) 798E.

<sup>83</sup> 2000 11 BCLR 1169 (CC) Par [76].

<sup>84</sup> 2002 (5) SA 721 (CC).



where the particular principle or rule of international law binds South Africa directly. But where such principle does not bind South Africa directly, its relevance would be limited. In interpreting socio-economic rights in the Bill of Rights, the influence of international law not directly binding in South Africa will be limited where significant differences exist in the wording of the provisions of an international treaty and the provisions of the South African constitution.<sup>85</sup>

Various international instruments, to some of which South Africa is a party, recognise that forced evictions constitute violations of a wide range of internationally recognised human rights, including the right to housing. For instance, convention relating to the status of refugees.<sup>86</sup> The Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women.<sup>87</sup>

The most important of these are the Istanbul Declaration on Human Settlements and the Habitat Agenda.<sup>88</sup> The Habitat Agenda is the main political document that came out of the Habitat II Conference in Istanbul, Turkey 3-14 June 1996. Adopted by 171 countries, at what was called the city summit. It contains over 100 commitments and 600 recommendations on human settlement issues. The main objective or purpose was to address all the enforcement challenges or problems with regard to adequate shelter for all and sustainable human settlements especially to vulnerable groups and people with special needs. When interpreting the right of access to housing, the extent of the influence of the general comments issued by committee of Economic Social and Cultural Rights (ESCR) will also largely depend on the specific context and text of the decisions under discussion in *Grootboom*,<sup>89</sup> the court relied directly on general comments issued by the committee on ESCR,<sup>90</sup> to explain the parameters of the justifiability of Social and Economic Rights and explicitly endorsed a passage from general comment 3 regarding the meaning of the term progressive realisation in the context of the South African constitution.

---

<sup>85</sup> GA Res 2200(xx);993 UNTS 3(1967);6 International Legal Materials 360.

<sup>86</sup> GA Res 429 (V) 1950; 189 UNTS 150.

<sup>87</sup> GA Res 2106 (XX) 1965; 660 UNTS 195; 5 Legal Materials 50 (1974).

<sup>88</sup> UN/CONF 165\14 (part) 7 August 1996(Adopted at the 18<sup>th</sup> plenary meeting, on 14 June 1996 of the UN conference on Human Settlement).

<sup>89</sup> 2000 11 BCLR 1169 (CC).

<sup>90</sup> UN Committee on ESCR General Comment no 3, The nature of the state parties obligations, article 2 para 1 of the convention (5<sup>th</sup> session;1990) [UN Doc E/1991/23].

## **2.7. CONCLUSION.**

South African Constitution and legislation recognises and protect the right of access to adequate housing. However, access to adequate housing is not an unqualified obligation on the state or a duty to provide housing on demand, meaning that vulnerable individuals who lack shelter cannot be quickly assisted by Government. Promotion of Access to Information Act and Promotion to Administrative Justice Act are the legislations that can be used by poor South Africans who are living in intolerable situations, informal settlements and those who completely lack shelter or access to adequate housing in order to enforce their right to access adequate housing. The challenge or the issue is that not all the affected communities and people are aware of the existence of these laws.

## **CHAPTER 3**

### **JUDICIAL ENFORCEMENT OF THE RIGHT TO ACCESS ADEQUATE HOUSING**

#### **3.1. INTRODUCTION**

Chapter 3 deals with the enforcement of children's rights to shelter, eviction of vulnerable groups from their squatter camps or communities and eviction of people from their homes. This chapter also outlines the role or duties of the local government, especially municipalities when the owners of private land brought an application to evict poor occupiers from their land. The recognition of the housing rights in section 26 of the constitution created a powerful constitutional foundation for transforming eviction laws in South Africa. One of the fundamental purposes of the right to access adequate housing is to protect people against the misery and the multitudes of negative effects on people's well-being and livelihoods, created by homelessness. The trauma and consequences of homelessness are particularly severe in circumstances where poor people are forcefully evicted from their homes. The government provides houses for the previously disadvantaged people, yet not all beneficiaries are benefiting from the Reconstruction Development Programme (RDP), they have been left out of assistance equation. Many poor South Africans had applied for low-cost RDP Housing and had been on the waiting list for many years. Until now there is no indication as to when such houses might become available. The state should ensure that the right to access adequate housing is progressively realised.

#### **3.2. ENFORCEMENT OF CHILDREN'S RIGHTS BY COURTS**

One of the socio-economic rights contained in the Constitution is the right to have access to adequate housing which is contained in section 26 which grants everyone the right to access adequate housing and section 28 which grants every child a right to basic shelter. The purpose of section 28 is to protect children in situation where they are particularly vulnerable. In South Africa there are many children who are living in unacceptable conditions which violate their right to shelter. It is the constitutional obligation of the state to ensure that vulnerable children who lack basic shelter are provided shelter. The state must also create a

legal framework in which the children's right to basic shelter can be progressively realized without undue interference from other private parties.<sup>91</sup>

The High Court in the case of *Grootboom v Oosternberg Municipality*, extensively used the structured interdict,<sup>92</sup> the court found that the conditions under which the squatters were living, were a violation of the children's right to shelter in terms of section 28(1)(c) of the constitution. According to High Court, section 38 and section 172 of the Constitution permit issuing of an order which identifies the violation of a constitutional right and then defines the reform that must be implemented while affording the responsible agency the opportunity to choose the means of compliance,<sup>93</sup> The High Court further ordered the state to provide the necessary emergency shelter to children and their accompanying parents.<sup>94</sup> On appeal the Constitutional Court held that the High Court's interpretation of the relevant constitutional provisions was incorrect. The right to housing did not give the applicants a right to claim housing immediately on demand. Therefore, the remedy for the infringement could not put the applicants in a preferential position as opposed to people in similar situations that were not party to the litigation.<sup>95</sup>

The Constitutional Court further held that due to the pragmatic nature of socio-economic rights, it was necessary and appropriate to award a declaratory order,<sup>96</sup> by virtue of section 28(1)(b).<sup>97</sup> The court ruled that the primary responsibility to provide children with the necessary adequate housing or shelter lies or vest with the prospective parents of the children, unless the parents are unable to fulfill their duty or the children are removed from their care.

According to the ruling of the CC, the primary responsibility of the parents is to provide their children with adequate housing or shelter, but this does not mean that the state or government is potentially or completely excluded from the responsibilities of providing shelter to children living with their parents. The state must still provide the framework in which parents can

---

<sup>91</sup> I McMurray and Jansen Van Rensburg, *Legislative and Other Measures Taken by Government to Realise the right of Children to Shelter*, (2004) vol 1 *Potchefstroom Electronic Law and Journal* at 10.

<sup>92</sup> Structured interdict is employed to direct a violator to take steps to rectify violation of this right under the court's supervision.

<sup>93</sup> *Grootboom High Court* para 293 H-J.

<sup>94</sup> *Ibid* para 93 I.

<sup>95</sup> *Grootboom Constitutional Court* para 79-81.

<sup>96</sup> *Ibid* para 99.

<sup>97</sup> Act 108 of 1996 ( Constitution of the Republic of South Africa ).

devise means to realize the rights of their children.<sup>98</sup> Through legislative and other measures the state can fulfill this obligation to realize everyone's right of access to adequate housing progressively, provided there are adequate resources available. Meaning that the measures that must be taken by the state to realize section 26 must also ensure the realization of children's right to basic shelter contained in section 28(1)(b).

There are various circumstances that render children unequally vulnerable, their vulnerability arises from their physical characteristics, especial emotional and developmental needs, their dependency on adult care and guidance and inability to access many government services without adult assistance.<sup>99</sup> Lack of shelter is one of the socio-economic problems that children are experiencing. In order to overcome these problems, special considerations must be paid to the nature of the needs and the manner in which these needs must be fulfilled. Other vulnerable children include children of refugees and asylum seekers.<sup>100</sup>

The children's rights to shelter entrenched in section 28(1)(c) of the Constitution are not qualified like other socio-economic rights in sections 26 and 27,<sup>101</sup> except for the right to basic social services. All the basic rights referred to in section 28(1)(c) have their counterpart in the rights protected in section 26 and 27. The entitlements in section 28(1)(c) are qualified by the adjective 'basic' which suggest that children are to be guaranteed essential levels of health care services, food and other social services necessary for their survival and proper developments.<sup>102</sup> Shelter as a basic form of housing would also be consistent with this interpretation.<sup>103</sup> In both *Grootboom*,<sup>104</sup> and *Treatment Action Campaign* cases,<sup>105</sup> the High Court and Constitutional Court were presented with arguments that, the facts of these cases

---

<sup>98</sup> 2000 11 BCLR para [78-79].

<sup>99</sup> Lieberberg S, (2010) *Socio-Economic Rights* (adjudication under transformative constitution) Juta & Co, Ltd, at 149.

<sup>100</sup> See UN Convention on the Rights of the Child article 25 and African Charter on the Rights and Welfare of the Child article 23.

<sup>101</sup> See J Sloth-Nielson *the child's right to social services, and the right to social security and primary prevention of the child abuse' some conclusion in the aftermath of Grootboom* (2001) 17 SAJHR 210-231.

<sup>102</sup> Lieberberg S, (2010) *Socio-Economic Rights* (adjudication under transformative constitution) Juta & Co, Ltd at 411.

<sup>103</sup> The New Shanter Oxford English Dictionary (1993) gives among the meaning of shelter; a structure giving protection from rain, wind, or sun; anything serving as a shield or a place of refuge from the weather. A place providing accommodation or refuge from homeless, the oppressed etc, see also the interpretation of the concept of 'shelter by the Western Cape High Court, Cape Town in *Grootboom v Oosternburg Municipality* 2000 (3) BCLR 277 (c) at 288 (B-C), however the Constitutional Court in *Grootboom* (2001) (1) SA 46 (CC) , disagreed that shelter in the context of section 28 (1) (c) implied a rudimentary form of housing.

<sup>104</sup> 2001 (1) SA 46 (CC) , 2000 (11) BCLR 1169.

<sup>105</sup> 2002 (5) SA 721(CC).

also constituted a breach of the rights of children to shelter and basic health care services respectively. The Western Cape High Court in *Grootboom* did not find a breach of section 26, Davis J held that, the respondents had produced a clear evidence that a National Housing Programme has been initiated at all levels of government to solve a pressing problems in the context of scarce financial resources. Davis J further held that, the right of children to shelter in section 28(1)(c) of the constitution has been infringed. The High Court interpreted ‘shelter’ in terms of section 28(1)(c) as a basic form of the more extensive concept of adequate housing in section 26. It further held that section 28(1)(c) imposed an obligation on the state to provide shelter if parents could not. It went on to say that the shelter to be provided according to this obligation was significantly more rudimentary form of protection from the elements than is provided by a house and falls short of adequate housing. It further held that a joint reading of section 28(1)(b),<sup>106</sup> and (c) and (2),<sup>107</sup> creates a derivative right for parents to shelter with their children. Davis J reasoned as follows:

‘As the family must be maintained as a unit parents of the children who are granted shelter should also be entitled to such shelter. The bearer of the right now becomes the family. The justification for such a conclusion is that a failure to recognise the parents would prevent the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid are unable to provide adequate shelter for their own children’.<sup>108</sup>

In order to enforce the children’s right to shelter it requires the commitment of all three spheres of government, national, provincial and local, to address this challenge through undertaking legislative and other measures. At national level, government must establish and facilitate a sustainable housing development process by adopting national statute, determining national policy, setting broad national housing delivery goals and budgeting goals. Furthermore, national government must provide assistance to the provincial and local government to ensure the affective compliance with their specific duties.<sup>109</sup>

In the provincial sphere,<sup>110</sup> each province must do everything in its power to promote and facilitate the provision of adequate housing and shelter within the framework of the national

---

<sup>106</sup> Section 28(1)(b) provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

<sup>107</sup> Section 28(2) provides that a child’s best interests are of paramount importance in every matter concerning the child.

<sup>108</sup> Note 98 above 289 C-D.

<sup>109</sup> I McMurray and L Jansen Van Rensburg, *Legislative and Other Measures Taken by Government to Realise The Right of Children to Shelter* (2004) *Potchefstroom Electronic Journal*, at 10.

<sup>110</sup> *Grootboom* para 47-55.

housing policy. Each province must determine its own policy, make laws, coordinate the housing delivery process and prepare a multi-year plan for financing purposes.<sup>111</sup>

Local government authorities, being geographically on the spot, are well placed to respond to local trends, in general poverty, and specifically to poverty caused by housing shortages that affect children. Therefore, each municipality must take necessary steps to ensure that its inhabitants have access to adequate housing and emergency shelter.<sup>112</sup> The steps must include local housing projects, housing delivery goals and local allocation of land and must generally promote effective housing development in the area.<sup>113</sup>

The socio-economic rights of children, then, are given some recognition where the children in question are outside of the care of an adult. It is to be hoped that future jurisprudence of the Constitutional Court will develop the socio-economic rights of children in a more progressive manner to extend to all children.<sup>114</sup>

### **3.3. ENFORCEMENT OF THE RIGHT TO ACCESS ADEQUATE HOUSING AND EVICTION**

To give effect to the positive constitutional obligation in section 26(1) to respect the right of access to housing,<sup>115</sup> the South African parliament has adopted a number of laws aimed at protecting the rights of those who occupied land without the authority of the owner. And also those who lawfully occupied land or premises in terms of lease agreement, for example, the Rental Housing Act,<sup>116</sup> which protects the occupation rights of lawful occupiers of rural and urban residential property. The Land Reform (Labour Tenants Act),<sup>117</sup> protects lawful occupiers of agricultural rural land. The Extension of Security of Tenure Act,<sup>118</sup> protects the occupation rights of persons who lawfully occupy rural land with consent of the land owner.

---

<sup>111</sup> I McMurray and L Jansen Van Rensburg, *Legislative and Other Measures Taken by Government to Realise The Right of Children to Shelter* (2004) *Potchefstroom Electronic Journal*, at 11.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> Mclean K, (2009) *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, PULP pdf 13 p 4.

<sup>115</sup> This section must be read with section 25(6) of the Constitution of the Republic of South Africa which deals with property and which explicitly provides that a person or community whose tenure of land is legally insecure as a result of past racial discriminatory laws or practices .

<sup>116</sup> Act 50 of 1999.

<sup>117</sup> Act 3 of 1996.

<sup>118</sup> Act 62 of 1997.

The Interim Protection of Informal Land Right Act,<sup>119</sup> protects lawful occupiers of rural and urban land in terms of informal land rights. The Restitution of Land Rights Act<sup>120</sup> protects lawful and unlawful occupiers of rural and urban who have instituted a restitution claim and the Prevention of Illegal Eviction from and Unlawful Occupation of land Act,<sup>121</sup> regulates eviction of unlawful occupiers from rural and urban land in order to give effect to the provisions of section 26(3) of the Constitution.

These Acts form a web of protection that has considerably improved the position of previously disadvantaged vulnerable groups whose legal rights to access land and housing were weak and non-existent.<sup>122</sup> One of the most important strands of this web is PIE, this Act becomes relevant in two distinct situations, first, where evictions are aimed at the unlawful orders and occupiers of land, secondly, where evictions are aimed at occupiers whose lawful occupation turned unlawful through lapse of time or cancellation.

PIE prohibits the eviction of unlawful occupiers of land unless the eviction is ordered by court of law or certain procedures have been followed.<sup>123</sup> It distinguishes between unlawful occupiers who have occupied the land for less than six months and those who have occupied the land for more than six months.<sup>124</sup> In the first case, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.<sup>125</sup> In latter case, courts are given the same power to issue an eviction order and are also required to take into account relevant circumstances, including those set out in section 6(4) of PIE. However, in the second set of circumstances, relevant circumstances are said to include the question whether land has been made available by municipality or other organ of state or another land owner for the relocation of the unlawful occupiers.

In the case of eviction of unlawful occupiers and protection of those occupiers by PIE, the question posed by land reforms in relation to evictions is whether a landowner can elect to institute evictions proceedings against unlawful occupiers in terms of common law or

---

<sup>119</sup> Act 31 1996.

<sup>120</sup> Act 22 of 1994.

<sup>121</sup> Act 19 of 1998.

<sup>122</sup> Journal of South African law page 265.

<sup>123</sup> Section 4 of PIE.

<sup>124</sup> Section 4(7) of PIE.

<sup>125</sup> Section 4(6) of PIE.



whether he or she is bound to do so in terms of one of the land reforms laws. The answer to this question is outlined by section 4(1) of PIE as opposed to the majority of land reform laws, such as Rental Housing Act (RHA),<sup>126</sup> explicitly allows common law eviction to be available with statutory procedures. The Rent Control Act (RCA),<sup>127</sup> still imposes further restrictions on landlord's right to evict. Both RHA and RCA Acts explicitly overrides common law rules, section 4(1) of PIE,<sup>128</sup> stipulates that notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to the proceedings by any owner or person in charge of land for the eviction of an unlawful occupier. PIE brought a substantive amendment of the common law with regard to eviction.

### **3.3.1 EVICTION OF VULNERABLE GROUPS**

Vulnerable groups in this case, refer to people who cannot independently satisfy their own basic housing needs. These groups comprises of unemployed, disabled, children and elderly people, most of them are illiterates and they are not aware of their rights especially their right to access adequate housing. There are many vulnerable groups of people who are still staying in squatter camps and have been left out of assistance equation by government. There are few amongst those groups who are aware or have little knowledge of their existing rights and at least a procedure to be complied with when their rights have been violated or threatened. The focus in this regard will be on the few vulnerable groups of squatters or communities who have instituted legal actions against the owners of the land, for instance, government and private land owners who brought an application before the court to evict them from their land because of unlawfully occupation.

In the case of *Port Elizabeth municipality v people's Dialogue on Land and Shelter*.<sup>129</sup> The respondents had unlawfully occupied land owned by the applicant and ear marked by it for development for housing. The respondents had refused to vacate the land so that the applicant could proceed with its development. Therefore the applicant applied for their eviction from the land.

The court held that, in dealing with matters such as the present one, one was dealing with two diametrically opposed fundamental interests. On the one hand there was the traditional real right inherent in ownership reserving exclusive use and protection of his property to the land

---

<sup>126</sup> Section 13(10) of Act 50 of 1999.

<sup>127</sup> Rent Control Act 80 of 1996.

<sup>128</sup> Section 4(1) of PIE Act 19 of 1998.

<sup>129</sup> 2000 2 SA 1074 (SEC).

owner. While on the other hand there was a genuine despair of people in dire need of adequate accommodation. It was the duty of the court to balance these opposing interests and bring out the decision which is just and equitable. The term ‘just and equitable’ as stated in section 6(1) of the PIE, means that the court has to consider public interest in determining what is just and equitable.

The public interest requires that the legislative frame work and general principle which governed the process of housing development should not be undermined and frustrated by the arbitrary and unlawful actions of a relatively small group of persons. In determining what is “just and equitable” in deciding the matter of this nature the court is obliged to break away from a purely legalistic approach and consider extraneous factors such as morality, fairness social values and its implications and circumstances which would necessitate bringing out an equitable judgment.

In this case, the Port Elizabeth Municipality did not act according to the required procedure in terms of legislation which regulates housing development when applying for an order to evict unlawful occupants of the land in question. There are several requirements set out in various Acts of parliament which bound the municipalities to provide housing within recognized parameters. The municipality’s action was inconsistent with section 26(3) of the constitution which prohibits illegal eviction or demolition of a person’s home unless a court orders such eviction after considering all the relevant circumstances.

The other requirement which was not taken into account by the Port Elizabeth municipality is the requirement in terms of section 26(2) of the constitution which requires the state, national, provincial, and local to take reasonable legislative and other measures within its available resources to achieve the progressive realization of right to access adequate housing.

It is clear from section 26(2) of the constitution that the Port Elizabeth Municipality is compelled to provide adequate housing. Instead of providing alternative accommodation or housing for respondents, it applied for an eviction order for that group to vacate the land. The court held that, an order should not be granted in favour of the applicant, but be made subject to the availability of alternative land or accommodation as contemplated in section 6(3) of PIE. When the court commenced its judgment it outlined historical and contextual analysis of

the nature and role of forced evictions during apartheid era, and the transformative purposes that section 26(3) of the constitution and PIE were intended to promote.<sup>130</sup>

During the apartheid government, through the applicable statutes, black South Africans were forcefully removed from their areas without being compensated. The main objective of PIE and constitution of the Republic of South Africa is to ensure that proper procedures and applicable requirements be complied with when people have to be evicted unlike in the past.

The *Modderklip*,<sup>131</sup> case outlines the state duties in the context of a private land owner's unsuccessful efforts to execute an eviction order granted in terms of section 4 of PIE against a community occupying his land. In *Modderklip* case, a group of people estimated at 400 had moved on private land owned by Modderklip boerdery (Pty) Ltd. On 12 April 2001 Johannesburg High Court ordered an eviction against them. The occupants did not vacate the land within two months period given by High Court. When the matter was heard in the Transvaal Provincial Division (TPD), the number of occupants had increased to an estimated 40 000.

After attempts to get various organs of state to assist in enforcing the eviction order failed, the owner applied to the high court for declaratory order obliging the state to assist in vindicating his property rights in terms of constitution.<sup>132</sup> The High Court granted an order in terms of which the state was obliged to submit a comprehensive plan to the court and the parties indicating in what manner it would fulfill its obligation to assist the land owner in enforcing the eviction order. Secondly the state was also required to report on the adoption of a scheme for the provision of accommodation alternatively, access to land qualifying occupiers in the community.

The court's reasoning was based on the duty of the state to protect the owner's constitutional property rights in terms of section 25(1) of the constitution. And in order to do so effectively, it was imperative that alternative land be made available for the settlement of occupiers once they had been removed from the Modderklip East Farm.<sup>133</sup> The state appealed the

---

<sup>130</sup> Lieberberg S, (2010) *Socio-Economic Rights* (adjudication under a transformative constitution) Juta & Co, Ltd Cape Town at 278.

<sup>131</sup> *Modderklip Boerdery (pty) Ltd v Modder East Squarters* 2001(4) SA 385 (W).

<sup>132</sup> Lieberberg S, (2010) *Socio-Economic Rights* (adjudication under transformative constitution) Juta & CO Ltd Cape Town at 282.

<sup>133</sup> *Ibid.*

enforcement order to the Supreme Court of Appeal. The Supreme Court of Appeal held that the state by failing to provide land for occupation by the community in terms of section 26(1) of the RSA constitution violated rights of the land owner as provided in section 7(2), 9(1), (2) and 25(1) of the constitution.

It is clear that should the state fail to provide alternative land or accommodation to desperate people like occupiers of Modderklip, it would be a serious breach of its duties in terms of section 26(1) of the constitution, since the occupiers are the beneficiaries of the right to access adequate housing. In this case, the state had infringed the rights of occupiers of Modderklip community by failing to provide a plan or alternative accommodation to place them.

The state appealed against the decision of Supreme Court of Appeal to Constitutional Court based on the following reasons: firstly that the Modderklip right to property and the occupiers rights to access housing had not been infringed. Secondly that Modderklip was not entitled to relief it claimed because it had neglected to apply for an urgent eviction order timeously.

The Constitutional Court did not find it necessary to resolve the case as per reason given by the state. The Constitutional Court set aside the order of the Supreme Court of Appeal and held that, the first obligation, arising from the principle of the rule of law, is that the state is obliged to provide the necessary mechanism for citizens to resolve the disputes that arise between them.<sup>134</sup> The Constitutional Court made an order declaring that Modderklip was entitled to the payment of compensation by the Department of Agriculture and Land Affairs in respect of the occupied land. It further held that, the compensation had to be calculated in terms of Expropriation Act,<sup>135</sup> and the court further ruled that the residents were entitled to occupy the land.<sup>136</sup>

The *Modderklip* case, through the judgment of High Court and the Constitutional Court, confirms that the state is obliged and may not abdicate its responsibilities in a dispute between private land owner and parties where important constitutional rights are threatened and state intervention is required for protection.<sup>137</sup> It would be unjust and unreasonable for the state to do nothing in situation where it is impossible for the owner to evict the occupiers

---

<sup>134</sup> *Modderklip*, 2005 (5) SA (CC) 2005 (8) BCLR 786 (CC).

<sup>135</sup> Act, 63 of 1975.

<sup>136</sup> *Modderklip* para 3(d).

<sup>137</sup> The Supreme Court of Appeal highlighted the state's duty in terms of section 7(2) of the Constitution to protect citizens against violation of their rights perpetrated by private parties.

due to the manner of invasion and particular circumstances of the occupiers. Both the Supreme Court of Appeal and the Constitutional Court affirmed the principle that where an eviction will place persons in a situation of desperate housing need they should generally have access to some form of accommodation pending their integration in long-term development program.

The courts have emphasized that relevant organs of state especially municipalities can no longer abdicate their responsibilities in an eviction application brought by private land owner against unlawful occupiers. There are series of High Court cases decided in terms of PIE by owners who have been joined as parties to the proceedings and the main purpose of such joinder is to place information before the court on the availability of suitable alternative accommodation and to facilitate mediation of the dispute between the parties.<sup>138</sup>

In the case of *Dada No v unlawful occupiers of portion 41 of the farm Iooikop*,<sup>139</sup> the South Gauteng High Court, found that, Ekurhuleni Metropolitan Municipality also failed to provide emergency relief in terms of alternative accommodation and basic services to a group of 76 households facing eviction from private land. The owners of the land had offered the land for sale to municipality.<sup>140</sup> The court directed the municipality to purchase the property and to make provision of essential services to the occupiers of the property.<sup>141</sup> The Supreme Court of Appeal overturned the order of High Court to purchase property and upheld the order relating to the provision and precepts of appropriate relief in the circumstances. The Supreme Court of Appeal further held that, the main application relating to the eviction of the occupiers was to be set down for hearing and dealt with by the court of first instance.

In the case of *Occupiers of 51 Olivia Road v City Council of Johannesburg*,<sup>142</sup> the City Council applied to South Gauteng High Court for the eviction of more than 400 occupiers of buildings in the inner city on the basis that the buildings were unsafe and unhealthy. The High Court refused to evict the occupiers and ordered the city to remedy its housing program which was found to be inadequate. The Supreme Court of Appeal upheld the appeal by the

---

<sup>138</sup> In terms of section 4(3) of PIE, written and effective notice of proceedings for the eviction of unlawful occupiers by the owner or person in charge of land must be served both on the unlawful occupier at least 14 days before the hearing as well as the municipality having jurisdiction.

<sup>139</sup> (2009 (2) SA 492 (W).

<sup>140</sup> Ibid Para 45-48.

<sup>141</sup> Ibid Para 50.

<sup>142</sup> (2008 (5) BCLR 475 (CC).

city and granted eviction on condition that the city would provide alternative accommodation to those who would be rendered homeless. The occupants appealed against the judgment and order of the Supreme Court of Appeal to the Constitutional Court. The appellant's contention or argument in the Constitutional Court was that the City Council of Johannesburg had failed to consult with them over its decision to evict them from bad buildings. The Constitutional Court issued an interim order requiring the city and occupiers to engage with each other meaningfully in an effort to resolve the differences and difficulties in line with the values of the constitution and statutory duties of the municipality and the rights and duties of the citizens concerned.<sup>143</sup> The engagement order was also directed at ameliorating the plight of the applicants by making the two buildings concerned safe and conducive to health.

The Constitutional Court confirmed the basic principles in situations where people face homelessness due to an eviction. Public authorities should engage seriously and in good faith with affected occupiers with a view to finding humane and pragmatic solutions to their dilemma. The Constitutional Court's judgment refers to the obligation of local authorities to provide services to communities in a sustainable manner to promote social and economic development and encourage the involvement of communities and community organization in matters of local government.<sup>144</sup> The Constitutional Court also links explicitly the objectives of meaningful engagement with the duty of municipalities to act reasonably in relation to the people's housing needs in terms of section 26(2) of the Constitution as elaborated in the *Grootboom* judgment, and the court states that:<sup>145</sup>

'Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable, it is to comply with section 26(2).'

The Constitutional Court further outlined what meaningful engagement means, the meaningful engagement in the context of eviction requires reasonable responses that are consistent with the right to access adequate housing protected in section 26(2) of the Constitution. It includes serious consideration of the alternative accommodation needs and circumstances of the particular occupier. The meaningful engagement will depend on the context of each case, for example, the number of people to be affected. It also requires

---

<sup>143</sup> Ibid Para 5.

<sup>144</sup> Ibid Para 16.

<sup>145</sup> Ibid Para 17.

honesty and good faith of the parties engaged, and it must also be characterized by transparency, as secrecy is counterproductive to the process of engagement.<sup>146</sup> It would be more convenient and quicker to provide housing if the municipality can engage in a meaningful engagement with the occupiers or people who are facing eviction rather than engaging the court of law. There are many people who do not have access to decent houses and are living in squalid settlement and without a knowledge regarding the procedure to access houses through local government. There are many people who have been evicted by municipalities from squatter camps without providing them with alternative land or temporary accommodation, and due to the lack of knowledge regarding their constitutional rights they did not approach the court or relevant authority to prevent such unlawful evictions.

One of the challenges regarding enforcement is the capacity within municipalities. Many municipalities do not have sufficient personnel dedicated to perform housing related function. It is clear from the two above mentioned cases of *Dada and Occupiers of 51 Olivia Road*, both municipalities failed to provide homeless people or people facing eviction with immediate interim relief or alternative accommodation. The reason being that most municipal officials are not aware that municipalities are under constitutional and statutory obligation homeless people with immediate interim shelter.

The judgement in the case of *Joe Slovo*,<sup>147</sup> the Constitutional Court has taken into account the implications of section 26 of the constitution, in situations where the state intend to evict and relocate a large settled community from their homes in order to facilitate a major housing development. In this case, the Western Cape Municipality brought an eviction application against 20 000 people from Joe Slovo informal settlement. The city of Cape Town owned the land where the community (Joe Slovo) settled, but the city of Cape Town did not take part in the eviction process or proceedings.<sup>148</sup> The purpose of eviction and relocation to temporary units was required to enable the upgrading and building of formal housing in terms of the N2 Gateway project. The N2 Gateway project is a key pilot project of the Breaking New Ground

---

<sup>146</sup> Ibid para 11.

<sup>147</sup> [2009] ZAAC 16,2009(9) BCLR 847 (CC).

<sup>148</sup> Ibid para 11.

Policy(BNG),<sup>149</sup> in terms of this policy, the DHS seeks to eradicate informal settlement through relocation of the relevant communities.

The residents of Joe Slovo informal settlement resisted the eviction and relocation due to the fact that an initial commitment that 70% of those relocated would be able to return to low-income housing. Secondly, that the upgraded development did not materialise in phase 1 of the project. And the trust between communities and organs of state was gradually destroyed or weakened by the fact that rentals in the development were higher than initially envisaged and greater emphasis was placed on the bonded housing. Through eroded relationship between the state and Joe Slovo informal settlement the housing opportunities became inaccessible to the vast majority of the families in the Joe Slovo informal settlement. The majority of the residents had fear that the relocation would destroy their already fragile livelihood and communal networks and that they would lack access to the schools, transport and other facilities on which they depended in the Joe Slovo settlement.

The resident of Joe Slovo resisted the eviction and relocation by appealing to the Constitutional Court and the appeal succeeded. The Constitutional Court handed down the following orders:

- (1) The Constitutional Court agreed with the High Court that an eviction order was just and equitable.
- (2) The order to vacate is conditional upon and subject to the applicants being relocated to temporary residential units in Derft or another appropriated location.
- (3) The order contains detailed specifications of the nature and quality of the alternative accommodation which must be provided.
- (4) It imposes an obligation on the respondents to ensure that 70% of the new homes to be built are allocated to those people who are currently residents in the Joe Slovo community or who were residents and voluntarily relocated to Derft.
- (5) The order requires an on-going process of meaningful engagement between the residents and respondents concerning various aspects of the eviction and relocation process.

---

<sup>149</sup> The full title is the Comprehensive Plan for the Development of Sustainable Human Settlements, which was adopted by Cabinet in September 2004.



The parties are required to report to the court if the phase of the engagement resulted in an agreement between the parties with regard to the implementation of the order and the allocation of permanent housing opportunities to those affected by the order. Meaningful engagement is an imperative tool which is most convenient and feasible to progressively realise the right to housing prior eviction by the state. It would be fair to the people who are facing eviction to be given an opportunity to participate in the process before the eviction order is granted by the court of law.

### **3.3.2 EVICTION OF PEOPLE FROM THEIR HOMES**

The right to access adequate housing can also be enforced by people who are being threatened to be evicted from their homes by the owner of a private land or the owner of the property. This normally occurs when the owner of property (Land Lord) has made an application to evict them from his land or property due to various reasons, for instance, failure to pay rent. There's no justification or reason why these people should not be protected by the constitution. If the owner of the property can be successful in evicting them from his property, they will be left vulnerable and homeless. Section 26 of the Constitution covers or protects everyone who does not have shelter, once these people are evicted from their homes by the private land owners or land lord, they may enforce this right by approaching the relevant tribunal to seek relief and to prevent the land or property owners from evicting them. There are numbers of cases that will be discussed below, where people who were threatened to be evicted and those who were served with notice of eviction from their homes approached courts for protection, some have been successful and others did not succeed.

In the case of *Groengras Eiendom (pty) Ltd v Unlawful Occupiers*,<sup>150</sup> it was held that section 26(3) of the constitution prevented the eviction of people from their homes in unfair manner and without due process of law. But it does not render eviction of an unlawful occupier impossible. The intention of PIE was to ensure that fairness and dignity prevail when an eviction is allowed, and not prevent eviction completely. This decision echoes the sentiments expressed in the case of *Port Elizabeth Municipality* case, that in terms of PIE unlawful occupiers can be evicted only with due regard for the restrictive provisions in section 26(3) of the Constitution and PIE. Both constitution and PIE, are intended to ensure that the eviction takes place fairly and with due respect for the dignity of the occupiers.

---

<sup>150</sup> 2001 (1) SA 125 (7).

In the case of eviction of unlawful occupiers through lapse of time or cancellation of lease agreement, the crucial question in this situation is whether the lawful occupiers of land whose lawful occupation became unlawful through lapse of time or cancellation can be protected by PIE? A lawful tenant can become unlawful occupier when holding over upon termination of the lease and the lawfulness occupation can be an essential aspect of a dispute about the status of an occupier who claims to be a labour tenant or an occupier with consent. The question to be asked is, can these occupiers claim the protection under the Act (PIE)? The second question is whether the land owner who wants to evict them be bound by the controls and requirements embodied in the Act, or can the landowner proceed on the basis of common law? The answer is that the proceedings on the basis of common law can sometimes benefit the occupiers. In the case of *Conradie v Hanekom*,<sup>151</sup> the Land Claims Court applied the normal contractual rules of rent agreements in a way that arguably benefited the occupier of the house.

In the case of *ABSA Bank Ltd v Amod*,<sup>152</sup> the respondent occupied the house in question pursuant to an agreement with the owner, a company of which the respondent was a shareholder. It was a common cause that the agreement in terms of which the respondent occupied the house has terminated. The respondent alleged that there was an oral lease in terms of which he occupied the property free of charge until the house was sold, after which the applicant could terminate the lease with three months' notice. The applicant denied the existence of the oral lease agreement. The matter was referred for the hearing of oral evidence. Before the trial, the parties had come to an agreement, *inter alia* that the respondent would vacate the property on or before the 31 march 1999. Hence the question was whether PIE applies to situation where the occupation becomes unlawful at a later stage as opposed to situation where the land was occupied by way of unlawful invasion. They asked the presiding judge to make this agreement an order of the court.

The court held that, PIE cannot be interpreted as turning or changing common law of landlord and tenant or common-law right of an owner of immovable property who has, in terms of contract has given another the right to occupy his or her immovable property to recover them.<sup>153</sup> The court further held that PIE applies, in any event, to persons moving on to vacant land who then erect dwellings that accord with the definition of the buildings or

---

<sup>151</sup> [1999] (4) SA 491 (LCC).

<sup>152</sup> [1999] 2 All SA 423 (W).

<sup>153</sup> *Ibid* para 27.

structures mentioned in section 1 of PIE and which may be demolished in terms of section 4 (10) of PIE. The court further held that PIE does not apply to occupation of formal structures occupied in terms of rent or lease agreement, which were said to be governed by the normal rules of common law. The *Absa Bank* case's decision until recently is regarded as the authoritative decision on this matter. The *Absa* case decision was confirmed in the case of *Ellis v Viljoen*,<sup>154</sup> and *Nelson Mandela Metropolitan Municipality v Various Occupiers of stands in Mnyanda Street, Qaqawuli Phase 2, New Brighton*.<sup>155</sup>

In the case of *South African National Parks v Ras*,<sup>156</sup> the defendant has occupied the premises, and his right to occupy the premises was terminated. The defendant did not have the requisite permission in terms of section 21(1)(a) of the Act,<sup>157</sup> to reside on premises. This section provides for criminal sanction for anyone who enters or resides in a park without the required permission. It was decided that illegal residents can be evicted on the basis of common law and the applicability of PIE was not considered, the defendant in this case originally occupied the land under a lease, which was subsequently cancelled.

The Transvaal High Court decided that the prohibition against summary eviction in terms of PIE is restricted to persons who invaded land and who occupied structures in informal settlements. The Act (PIE) does not apply to occupation of formal structures occupied in terms of rent agreements, which were said to be governed by the normal rules of common law.

In the case of *Bekker v Jika*,<sup>158</sup> the Southeast Cape High Court did not follow the decision in the case of *Amod* where the respondent in the case of *Bekker v Jika*, refused to vacate property previously owned by him and subsequently sold in execution by public auction. The court in this case decided that the decision in the case of *Amod*, restricted the ambit of the Act (PIE), unduly and so fails to give effect to section 26(3) of the constitution. The *Jika* case was distinguished on the basis of a lack of contractual nexus between the respondent and the applicant. It was held that the respondent was indeed an unlawful occupier for the purpose of the Act. Surprisingly this decision was upheld by a narrow majority in the Supreme Court of Appeal, where it was argued that parliament intended PIE to cover all cases of unlawful occupation, including cases of holding over as indicated by the ordinary meaning of the

---

<sup>154</sup> 2001 (5) BCLR 487 (CC).

<sup>155</sup> [2001] 4 All SA 490 (SEC).

<sup>156</sup> 2002 (2) SA 537 (C).

<sup>157</sup> National Parks Act 57 of 1976.

<sup>158</sup> [2001] 4 All SA 573 (SEC).

terminology used in the Act. In effect this decision overturns the earlier decision in the case of *Amod*.

There is uncertainty about the impact of the constitutional eviction principle on common law evictions in so called 'normal landlord and tenant evictions' where the land reform laws have been said not to apply. In the case of *Ross v South Peninsula Municipality*,<sup>159</sup> the Cape High Court held previously that before the enactment of PIE, common law position was that an owner could claim his/her property wherever he or she found it from whoever was holding it. Therefore the owner had to allege and prove that he or she was the owner of that property and that the defendant was holding the property before the onus would shift to the defendant to establish any common law rights to continue holding the property.<sup>160</sup> The owner of the property under PIE unlike previously under common law, has no absolute right to evict unlawful occupier, the court has wide discretion to decide whether an eviction order would be just and equitable.

In the cases of *Ndlovu v Ngcobo*, *Bekker* and *another v Jika*,<sup>161</sup> the question that arose in both appeals was whether unlawful occupants were only those who had unlawfully taken position of land e.g. squatters or whether the term included persons who at one stage had had lawful position, but whose position had subsequently become unlawful. In the case of *Ndlovu v Ngcobo*,<sup>162</sup> the issue was that the tenant's lease had been terminated lawfully but he had refused to vacate the property. The magistrate held that the Act did not apply to the circumstances of the case.

An appeal in the High Court upheld this decision while the Supreme Court of Appeal found that the PIE indeed applied not only to the cases where land or housing was unlawfully occupied, but also where the occupation of land and housing became unlawful after a previous period of lawful occupation. Hence in the case of *Bekker v Jika*,<sup>163</sup> a mortgaged had been called up, the property sold in execution and transformed to the present appellants but the erstwhile owner had refused to vacate. In the application for eviction in the High Court the court had raised the question of non-compliance with PIE and had subsequently dismissed

---

<sup>159</sup> (2000) 117 SALJ 26-31.

<sup>160</sup> Section of PIE states that: Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

<sup>161</sup> 2003 1 SA 113 (SCA).

<sup>162</sup> *Ibid*.

<sup>163</sup> [2001] 4 All SA 573 (SEC).

the application. Harm JA and Mthiyane J.A, concurring held that by the very nature of things a mortgagor being an owner, could not be an unlawful occupier, only once the property had been sold in execution and transferred to a purchaser then, the possession of the erstwhile mortgagor or owner become unlawful. It was also held that to call mortgagor or owner an unlawful occupant was not only incongruous but absurd.

It is quite clear from the judgment of the above cases of *Ndlovu v Nqcobo* and *Bekker and another v Jika*, that right to access housing can be enforced through PIE by any person whose right to housing has been infringed or violated. PIE applies to the eviction of unlawful occupants in respect of all land in South Africa<sup>164</sup>.

Where the occupier has occupied the land in question for more than six month, PIE specifies additionally that, the court must consider whether land has been made available by a municipality or other organ of state or other land owners for the relocation of the unlawful occupier.<sup>165</sup> The discretion of a court to grant such evictions is also subject to the overriding consideration of justice and equity, which includes substantive considerations pertaining to the circumstances of the occupation, the period of residence on the land, and the availability to the unlawful occupier of suitable alternative accommodation or land.<sup>166</sup>

The state, especially local authorities or municipalities, when the owner of a private land brought an application to evict poor occupiers from his land, is obliged to put in place and implement a reasonable programme which provides immediate relief for those who have no access to land, no roof over their heads, and who are having unfavourable conditions or crisis situation. This principle was laid down in the case of *Grootboom*.<sup>167</sup> This constitutional duty must be fulfilled by state through local government.

The case of *Lingwood v The Unlawful Occupiers of R/E of q High Lands*,<sup>168</sup> is one of the recent cases where the owner of the land applied for eviction order for occupiers of his residential property. Prior to the sale of the property the impoverished occupiers had been paying rental in respect of the property to a person whose identity and relationship to the property was unclear.<sup>169</sup> The occupiers of the property as respondents sought the joinder of

---

<sup>164</sup> Section 2 of PIE read with ss 5,6&7.

<sup>165</sup> Ibid section 4(7).

<sup>166</sup> Ibid section 6(3).

<sup>167</sup> 2001 (1) SA (CC), 2000 (11) BCLR 1169 (CC).

<sup>168</sup> 2008 (3) BCLR 325 (W).

<sup>169</sup> Ibid para 3-5.

the City of Johannesburg Metropolitan Municipality on the basis of the city's constitutional and statutory obligations to make provisions for temporary emergency shelter for persons such as respondents who upon eviction would have no suitable alternative accommodation available to them.<sup>170</sup> But the city of Johannesburg was not a party to the proceedings due to the fact that the application was not properly served on the city of Johannesburg. The court held that the joinder of the city was essential. The court emphasized that the availability of suitable alternative accommodation of land to unlawful occupiers was one of the imperative factors for a court to have regard to in determining whether it is just and equitable to issue an eviction order.<sup>171</sup> The court also emphasized the importance of mediation in attempting to arrive at equitable and pragmatic solution to the clash between property and housing rights in eviction situations.

It further directed the parties to engage in mediation in an endeavor to exploring all reasonable possibilities of securing suitable alternative accommodation or land for achieving solutions mutually acceptable to the parties.<sup>172</sup> The most convenient and quickest manner of enforcing the right to access housing in cases of eviction is the joinder of municipality having jurisdiction where such eviction occurs. The joinder of the city of Johannesburg was for the purpose of furnishing the envisaged comprehensive program for the realization of the right of access to adequate housing and provision of temporary emergency housing as an interim measure.<sup>173</sup>

In the case of *Sailing Queen Investment v The Occupants of La Colleen Court*,<sup>174</sup> Justice Jabhay stayed an application for eviction brought in terms of section 4 of PIE, and directed that the City of Johannesburg Metropolitan be joined to the proceedings. There are various decisions or judgments which have confirmed the importance of local authorities placing substantive information before a court to enable the presiding officer or judge to exercise a proper discretion in eviction application brought by private land owners. One of those judgments is found in the case of *Absa bank v Murray*,<sup>175</sup> in this case, the court emphasized the obligation of municipality to report to the court on any factors that will affect land and

---

<sup>170</sup> Ibid para 12.

<sup>171</sup> Ibid para 18.

<sup>172</sup> Ibid para 30.

<sup>173</sup> Ibid para 32. The court held that PIE did not impose an obligation on private landowner to provide alternative accommodation to unlawful occupiers facing eviction. This obligation rested on the state, it is its responsibility.

<sup>174</sup> 2008 (6) BCLR 666 (W).

<sup>175</sup> (2004 (2) SA 15 (c) 2004 (r) BCLR 10.

availability of accommodation and the basic health and amenities consequences of an eviction on the most vulnerable such as children, disabled and the elderly.<sup>176</sup> The court further held that the failure to provide such report by local authority would frustrate objectives of PIE.

In the case of *Ritama Investment v The Unlawful Occupiers of Erf 62 Pynberg*.<sup>177</sup> The court also confirmed that the report containing meaningful information regarding available housing for homeless is critical in order to determine whether an eviction order should be made and if it is so on what terms and conditions, justice and equity would be served.<sup>178</sup> Judge Masipa, in the case of *Blue Moonlight Properties 39 (pty) limited v The Occupiers of Saratoga Avenue*,<sup>179</sup> outlined a detail and sophisticated elaboration of the duty of municipalities to provide meaningful information to courts in eviction applications, she rejected the inference in the city's papers that it is not under obligation to assist persons facing homelessness pursuant to their eviction from private land.<sup>180</sup> She further held that such instance was inconsistent with section 26 of the constitution as interpreted in the case of *Grootboom* judgment.<sup>181</sup>

The Housing Act,<sup>182</sup> and the program for housing assistance in emergency circumstances adopted in terms of the housing Act,<sup>183</sup> the city of Johannesburg is obliged to assist people facing homelessness as a results of eviction. If the Local Government, J.H.B Metropolitan Municipality declares that it is not under obligation to assist persons facing homeless due to eviction, then it is clear that some government officials do not know the duties that they should execute as members of government. This is one of the shortfalls which require imminent attention of the ministry of human settlement. Those officials who are not capable, should be replaced by competent candidates or some workshops be arranged where they will be taught about their duties and how to apply those duties. In the case of *Grobler v Malinga*,<sup>184</sup> the Randfontein Local Municipality also failed to provide detailed information on the provision of alternative accommodation to the occupiers facing eviction from the private

---

<sup>176</sup> Ibid Para 41.

<sup>177</sup> 30782/05 ZAGPHC (unreported judgment of 27 January 2006).

<sup>178</sup> Ibid para 9-10.

<sup>179</sup> 2009 (1) SA 470 (W).

<sup>180</sup> Para 37.

<sup>181</sup> (2001 (1) SA 46.

<sup>182</sup> Act 107 of 1997.

<sup>183</sup> Ibid.

<sup>184</sup> 2008 3 All SA 549 (W).

land in question.<sup>185</sup> The municipality's contention was that no land was available to accommodate the community and had also failed to appreciate its constitutional and statutory duties to provide emergency accommodation in the case of an eviction order.<sup>186</sup>

The municipality was ordered to offer and provide to those respondents who are evicted and are desperately in need of housing assistance with relocation to a temporary settlement area, within its municipal area. And the temporary accommodation is to consist of a structure that is waterproof, and with access to basic sanitation,<sup>187</sup> water and refuse services. The municipality was also required to take all steps necessary to obtain land for purposes of the relocation of the respondents and all other unlawful occupiers of the property

### **3.4. CONCLUSION**

The state must be more responsive to the needs of the poor, by directing resources to those living below the minimum core standard. This can be achieved if the government authorizes co-ordination among all government departments in charge of service delivery, such as electricity, water, sanitation and institutions in charge of implementing housing policies.

## **CHAPTER 4**

---

<sup>185</sup> Ibid para 216-217.

<sup>186</sup> Ibid Para 235.

<sup>187</sup> Ibid Para 254.



## **AVAILABLE REMEDIES AGAINST INFRINGEMENT OF THE RIGHT**

### **4.1. INTRODUCTION**

This chapter discusses the remedies available to people listed in section 38 of the constitution of the Republic of South Africa who alleges that their fundamental right in the Bill of Rights has been infringed. The focus will be on socio-economic rights particularly the right to access adequate housing and the constitutional remedies as well as interdicts available to people who lack shelter and feels that their right to access adequate housing has been infringed or threatened. There are many South Africans who are currently in need of shelter and do not have any means or source of income to meet their socio-economic needs.

The interdict is an order of the court requiring the person to whom it is directed to do or to refrain from doing a particular thing.<sup>188</sup> The interdict can be used both as a relief for those whose rights have been violated and as a remedy to deter violations of a similar nature in future. Historically, the interdict has been used as a remedy of last resort. It is used only where other remedies are considered inadequate. In procedural terms, this means that the applicant would be granted an interdict only if there is no other common law remedy capable of adequately repairing the injury.<sup>189</sup>

### **4.2. DECLARATION OF INVALIDITY AND ASSOCIATED REMEDIES.**

In terms of Section 172 (1),<sup>190</sup> of the Constitution of South Africa, a court is obliged to declare any law or conduct which is found to be inconsistent with the Constitution invalid to the extent of its inconsistency. In the case of *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs, Thomas v Minister of Home Affairs*,<sup>191</sup> it was held that, when law or conduct is declared invalid, the courts have wide power to control the consequences of the declaration of invalidity through granting “just and equitable” remedies. These may include the following, firstly, limiting the retrospective effect of a declaration of invalidity, suspending the declaration for a period, subject to any conditions,<sup>192</sup> severing constitutionally defective provisions of legislation, and reading particular provisions into the legislation. The abilities of the courts to control the consequences of a declaration of invalidity through the mechanisms, is particularly important in the context of statute and programs which give

---

<sup>188</sup> Mbazira C, (2009) *Litigating Socio Economic Rights in South Africa*, PULP at 166.

<sup>189</sup> *Ibid.*

<sup>190</sup> Act 108 of 1996 .

<sup>191</sup> 2000 (3) SA 936 (CC) , 2000 (8) BCLR 837 (CC) para 17 & 59.

<sup>192</sup> These two options are specifically referred to in section 172 (1) (b) (i) and (ii) of the Constitution.

effect to various socio-economic rights. If these laws and programs were simply declared invalid,<sup>193</sup> the consequences would be that large numbers of current beneficiaries would be deprived of access to much needed social benefits. Such a result would be incompatible. Furthermore, seeking to remedy constitutional defects without invalidating statute which enacts important social programs and competences of the legislative and executive branches of government. These branches of government have the primary mandate under the constitution to give effect to socio-economic rights through comprehensive social legislation and programs.<sup>194</sup>

#### **4.2.1. DECLARATION OF RIGHTS AND ITS IMPACT**

Section 38 of the constitution specifically provides that a declaration of rights is one of the forms of appropriate relief that a court may consider when it is approached by anyone alleging that their rights in the bill of rights are infringed or threatened. The Constitutional Court has the power to make declaratory orders even where it has not found conduct to be in conflict with the constitution.<sup>195</sup>

A declaration of rights is an optional remedy which may constitute appropriate relief in the circumstances of a particular case. In considering when declaratory orders should be made, the court has held that the principle developed at common law and under section 19(i)(a)(iii) of the Supreme Court Act, which provided that a High Court has the power in respect of persons or cases falling within its jurisdiction, in its discretion and at the instance of any interested person, to enquire into and to determine any existing future or any contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.<sup>196</sup>

Declaratory order is defined as an order by which a dispute over the existence of some legal right or obligation is resolved. However the particular content of constitutional matters may introduce different or additional considerations.

---

<sup>193</sup> For instance, on the basis of an unconstitutional exclusion of certain group.

<sup>194</sup> *Grootboom* paras 39-40; in its recent judgment in the *HOD Mpumalanga Department of Education v Hoerskool Ermelo* [2009] ZACC 32 (judgment unreported at the date of writing) the Constitutional Court emphasised that the broad remedial powers in section 172 (1) (b) are not limited to circumstances where a court makes an order of constitutional invalidity in respect of law or conduct under section 172 (1) (a).

<sup>195</sup> *Metrorail*, 2005 (2) 359 (CC) para 10, where law or conduct is found to be inconsistent with the Constitution, an invalidity order in terms of section 172 is obligatory.

<sup>196</sup> Act 59 of 1959.

In the case of *Grootboom*,<sup>197</sup> the Constitutional Court made three declaratory orders specifying the nature of the state's obligations in terms of s 26 of the constitution in relation to its housing programme in the area of the Cape Metropolitan Council. Firstly, it declared that section 26(2) of the constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme to realize the right of access to adequate housing.<sup>198</sup> Secondly, it held that this programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme.<sup>199</sup> Thirdly, it held that at the date of the launch of the application, the state housing programme in the Cape Metropolitan Council fell short of compliance with these requirements in that it failed to make reasonable provisions within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions on crisis situations.

After such declaratory orders made by the Constitutional Court, there were arguments that the Grootboom community did not receive adequate relief, and four months after that argument before the judgement was handed down, an urgent application was made to court on behalf of the Grootboom community in which it was revealed that the government had failed to comply with agreement. The court after communication with the parties made an order to Municipality to provide certain rudimentary services,<sup>200</sup> which required the municipality to provide basic sanitation services, water and R 200 000 for purposes of waterproofing the applicants' existing accommodation. The order also specified the nature and number of toilets and taps to be made available to the Grootboom community as well as the requirement that their shelters be adequately waterproofed. Furthermore the order also made a provision for the provincial and local government to report back to the court on the implementation of the order and for a response by the Grootboom community.

In circumstances where there is a delay by municipality in complying with the declaratory orders made by court, the SAHRC must intervene to ensure that the court orders are implemented by state through local government. SAHRC is one of the most vital

---

<sup>197</sup> 2001 (1) SA (CC).

<sup>198</sup> Ibid para 99.

<sup>199</sup> This programme has been designed by the Cape Metro Politan Council to assist in meeting urgent short-term housing needs, while the medium and long-term objectives of the nation-wide housing programme were being fulfilled. However, at the time when litigation in Grootboom case commenced, the programme had not been implemented.

<sup>200</sup> 2000 11 BCLR 1169(CC) Para 5.

organisations as observed above, that can be relied on by vulnerable group without shelter or accommodation or when they are facing eviction.

### 4.3. CONSTITUTIONAL REMEDIES

The courts have wide remedial powers to grant effective remedies in litigation under the Bill of Rights.<sup>201</sup> Any person who alleges that his or her right to access adequate housing has been infringed can approach a relevant court to seek a constitutional remedy. Section 38 of the Constitution provides that anyone with standing in terms of this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The provision of section 38 has to be read in conjunction with section 172 of the Constitution which stipulates that, a court in deciding a constitutional matter, within its powers must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

The court may make any order that is “just and equitable” including an order limiting the retrospective effect of the declaration of invalidity, and making an order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.<sup>202</sup> In the case of *Fose v Minister of Safety and Security*,<sup>203</sup> the court held that the appropriateness of the remedy was determined by its efficacy for without effective remedies for breach, the values underlying and the rights entrenched in the constitution cannot be properly upheld or enhanced. The court has to consider the nature of the constitutional infringement in the particular case and the probable impact of a specific remedy.

The main objective of the remedy is to provide suitable relief to the victims of a violation of constitutionally protected right and to deter future violations of these rights.<sup>204</sup> The courts may be confronted with a number of interrelated challenges in achieving this synchronization. These may include designing a remedy in circumstances when the violation of a constitutional right requires extensive positive measures and has substantial resources implications.<sup>205</sup> In these situations there are usually a range of possible policy solutions to

---

<sup>201</sup> Lieberberg S, (2010) *Socio-Economic Rights* Juta & Co,Ltd at 380.

<sup>202</sup> Section 172(1)(b)(i) and (ii).

<sup>203</sup> 1996 (2) BCLR232 (W).

<sup>204</sup> Ibid para 96 and 97.

<sup>205</sup> See note 148 above at 381.

remedy the violation, and the court may not know in advance what would be the optimal solution.<sup>206</sup> Secondly, they may face the challenge of ensuring speedy and effective relief in circumstances where a violation of rights may have serious and irreparable consequences for the applicant group. Thirdly the courts must consider the implications of relief they give not to the successful litigant, but also to other groups that may be similarly situated to the applicants or who may be adversely affected by the order.<sup>207</sup> The courts must also consider whether another branch of government may be best suited to remedy the particular constitutional violation.

#### **4.4. TYPES OF INTERDICTS AND THEIR APPROPRIATENESS IN SOCIO-ECONOMIC RIGHTS LITIGATION**

The historical foundations of the modern South African law of interdicts have been investigated from the early days of the Roman law to the decisions of South African courts decided up to the year 1914.<sup>208</sup> In this year (1914) the important decision of the Appellate Division in the case of *Setlogelo v Setlogelo*,<sup>209</sup> was handed down, the judgment of Innes JA was the first which distinguished clearly between the final interdict and the requirements thereof, and the interlocutory interdict and the requirements of such relief. Innes JA, further accepted that the requisites for the right to claim an interdict were, first, a clear right; secondly, an injury actual committed or reasonably apprehended; and, thirdly, the absence of similar protection by any ordinary remedy. In his judgment, Innes JA concluded that in an application for a temporary interdict in cases where irretrievable loss is concerned, the applicant is entitled to relief where the right asserted by him, though *prima facie* established, is open to some doubt.

The following interdicts: prohibitory, mandatory, interim, and structural, will be discussed below. These are the available remedies for people who allege that their socio-economic rights especially their right to access adequate housing has been violated or threatened. They can make use of these remedies in situations where they are facing eviction. There are two broad types of interdicts, prohibitory and mandatory interdicts, sometimes called reparative interdicts. Both prohibitory and mandatory interdicts can be issued either as perpetual or as

---

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Prest CB (1993). *The Law and Practice of Interdicts*, Juta Publishers at 33.

<sup>209</sup> 1914 AD 221.

interim interdict.<sup>210</sup> The perpetual interdict is the final order of the court, and is deemed to signal the final determination of the issues of the case. In contrast, the interim interdict is issued to protect the interests of the applicant by maintaining *status quo* pending the final determination of the case.

#### **4.4.1. PROBITORY INTERDICT**

Prohibitory interdict is negative in form; it prohibits the person to whom it is directed from doing something proclaimed as a violation.<sup>211</sup> Its role is therefore to proscribe what may be considered unlawful conduct. In socio-economic rights cases, the prohibitory interdict is most appropriate as a remedy for infringements of the negative obligations that these rights give rise to.<sup>212</sup> It can be obtained to prevent either government or any other person from taking away the existing socio-economic rights vested in the applicant. The prohibitory interdict is also very effective in preventing future infringements where the applicant shows likelihood of violating protected rights. In this case, it becomes a preventive interdict. For this type of interdict to be granted, the plaintiff must show reasonable apprehension of injury, however, the apprehension must be induced by some action of the respondent or authorized to be performed by his or her agent or servant.<sup>213</sup>

#### **4.4.2. MANDATORY INTERDICT**

Mandatory interdict is expressed in positive terms and it requires the person to whom it is directed to undertake positive steps to remedy a wrongful state of affairs for which he or she is responsible.<sup>214</sup> It also requires such person to do something which he or she ought to do if the complainant is to enjoy his or her rights.<sup>215</sup> The mandatory interdict is appropriate as a means of enforcing both the positive and the negative obligations engendered by socio-economic rights. Mandatory interdict has potential to enforce positive obligations, this is because in the majority of socio-economic rights cases the emphasis is always more on enforcing compliance with the obligations, in the future than on repairing past wrongs, and in

---

<sup>210</sup> See *Jordan v Penmill Investments* CC 1991 2 SA 430 (E) 436 D.

<sup>211</sup> The prohibitory interdict has been granted in a variety of contexts and for a variety of reasons to prohibit the commission of a delict, to restrain interference with a property owner's right of enjoyment, to restrain a breach of a statutory provision to restrain the infringement of a copy of right, to restrain the passing on of a trade secrets and to restrain acts of family violence amongst others. See *Jones and Buckle*.

<sup>212</sup> Mbazira S, (2009) *LITIGATING SOCIO ECONOMIC RIGHTS IN SOUTH AFRICA PULP* at 170.

<sup>213</sup> Liebenberg S (2010) *Socio-Economic Rights* (Adjudication Under a Transformation Constitution) Juta Publishers, at 410.

<sup>214</sup> See note 161 at 170.

<sup>215</sup> *Skuza v Minister of Water Affairs and Agriculture and another* [2001] JOL 8486 (TK) 2.

such cases the remedies that have affirmative element can be used to demand positive provision of socio-economic goods and services. The mandatory interdict can also pass a corrective remedy when it is aimed at correcting past wrongs, thereby becoming a reparative interdict which compels the defendant to repair a wrong. Such compulsion is also a deterrent as it becomes clear to the defendant that he or she engages in wrongful conduct in the future, he or she will be compelled to undo the wrong. So are other potential defendants who, though not party to the suit, will be deterred once they become aware of the courts' powers of compulsion.<sup>216</sup>

It would not be appropriate to award a mandatory interdict where there is evidence that the state will respond positively, in good faith, to the orders of the court. In such cases, declaratory judgment would suffice.<sup>217</sup> But where there is evidence of likely non-compliance, it would be appropriate for the court to make a mandatory interdict. This could be in the case where a government official, for instance, states on public television that the government is not prepared to abide by any order against it in a pending case compelling the government to provide, Nevirapine/houses.

The *TAC*,<sup>218</sup> case is one of the socio-economic rights cases where Constitutional Court has asserted its powers to grant mandatory interdicts as part of appropriate, just and adequate relief. The Constitutional Court has rejected submissions that the only order it can make against the government in constitutional litigation is a declaratory order.<sup>219</sup> It has been submitted that the court was prevented by the doctrine of separation of powers from granting mandatory interdict as it would amount to requiring the executive to pursue a particular policy.<sup>220</sup> According to Constitutional Court in *TAC* case there is no distinction between mandatory order and declaratory order because both affect state policy and may have budgetary implications. This is because the government is constitutionally bound to give effect to both Mandatory and declaratory orders.<sup>221</sup>

The government is bound constitutionally to carry out mandatory as well as declaratory orders. The interdict can be followed by contempt of court proceedings to secure compliance

---

<sup>216</sup> Liebenberg S (2010) *Socio-Economic Rights (Adjudication Under a Transformation Constitution)*. Juta Publishers.

<sup>217</sup> This is because the mandatory interdict is said to be more intrusive as it compels the state to act and involves displacement of the state's judgment for that of the court.

<sup>218</sup> *TAC* case paras 97-98.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *TAC* case para 99.

from the state. This explains why it was easy for those dissatisfied with the implementation of the TAC case in some provinces to secure compliance.<sup>222</sup> It therefore remains that the power of mandatory order cannot be compared to that of the declaratory order. Mandatory relief was given by both High Court and Supreme Court of Appeal in the case of *Mazibuko*.<sup>223</sup> The South Gauteng High Court ordered the City to provide each applicant and other similarly placed residents of the Phiri Township with a free basic water supply of 50 litres per person per day.

#### 4.4.3. INTERIM INTERDICTS

Due to the impossibilities of using the traditional public law remedies as means of interim relief, the interim interdict has gained more prominence as an interim remedy. It can be given at any time of the proceedings if the circumstances warrants and it can also be granted without notice to the defendant.<sup>224</sup> The interdict, just as other interlocutory remedies, provides one possible way to combine individual and distributive or systematic relief.<sup>225</sup> The interim interdict can be used to accord individual protection to litigants in the case while seeking remedy that may have a distributive effect as the final order of the case. However this can only be done with respect to protection against negative and not positive violations.

It is easily available in those cases where the applicants, for instance, require that the government be restrained from taking away an existing right until a final decision is made. An example is an order sought in an eviction case to maintain the *status quo* and prevent irreparable harm that would result in eviction. In the case of *Occupiers of 51 Olivia Road v Inner City of Johannesburg*,<sup>226</sup> the Constitutional Court issued an interim order requiring the City of Johannesburg and the applicants to engage with each other meaningfully in an effort to resolve the disputes between them in the light of the values of the constitution, the statutory duties of the Municipality and the rights and duties of the citizens concerned.

A litigant must prove the following requirements for interim interdict;

- (1) That the right which is the subject matter of the main action and which he or she seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to doubt,

---

<sup>222</sup> Ibid.

<sup>223</sup> 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 SCA.

<sup>224</sup> See note 161 at 173.

<sup>225</sup> Ibid.

<sup>226</sup> 2008(5) BCLR 475 (CC).



- (2) That if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he/she ultimately succeed in establishing his/her rights.
- (3) That the balance of convenience favours the granting of interim relief
- (4) That the applicant has no other satisfactory remedy.<sup>227</sup>

The right that the applicant for an interdict seeks to enforce need not be shown on balance of probabilities.<sup>228</sup> All that court has to do is to consider the facts as set out by the applicant together with any facts set out by the respondent. If, with regard to the inherent probabilities, the applicant would obtain final relief, then a *prima facie* would have been proved.<sup>229</sup>

The court must weigh the prejudice that the applicant will suffer if the interim interdict is not granted. If there is greater possibility of prejudice to the respondent, the interdict will be refused.<sup>230</sup> However one of the factors to consider in the balancing process is the prospects of success in the main action. The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant, the weaker the prospects of success, the greater the balance of convenience to favour him/her.<sup>231</sup>

As with irreparable harm, third party interests too will have to be weighed in the balance of convenience. The court should focus beyond the interests of the parties in order to be able to consider not only the polycentric case, but also the interests that society as a whole may have in the case.

Traditionally irreparable harm has been considered as harm that cannot be repaired with an award of damages;<sup>232</sup> however, the inherent nature of human rights and the intrinsic values they protect cannot be compensated for with damages. If the applicant can establish a clear right, there is no need to prove that the irreparable harm would result if the interim interdict is not granted.<sup>233</sup> It is only when the right is open to some doubt that the irreparable harm would have to be proved. In the case of *Occupiers of 51 Olivia Road and others v City of*

---

<sup>227</sup> See *LF Boshoff Investments (pty) Ltd v Cape Town Municipality* 1969 2 SA 256 (C) 267A-F. See also *The National Gambling Board v Premier of Kwazulu-Natal and others* 2002 2 SA 715(CC).

<sup>228</sup> Prest B (1996) *The law and Practice of interdicts* at 72. See also *Struben and others v Cape Town District Waterworks Co (1892)* 9 SC 68, as discussed by prest.

<sup>229</sup> Note 161 above at 174.

<sup>230</sup> See also *Eriksen Motors (welkom) Ltd v Pretea motors and another* 1973 3 SA 685 (A).

<sup>231</sup> Ibid 176 above.

<sup>232</sup> See *Dikoko v Mokhatla* 2007 1BCLR 1 (CC) (*Mokhatla* case) para 109.

<sup>233</sup> 1914 AD 221 (*Setlogelo* case).

*Johannesburg and others*,<sup>234</sup> interim interdicts could play a very important role in providing interim relief resulting in a final remedy. This case was instituted by occupants of two bad “buildings” in the inner city of Johannesburg, to resist a pursuant eviction order issued under the National Building Regulations and Building Standard Act (NBRSA).<sup>235</sup> The basis for the eviction, according to the city, was that the buildings were in a sorry state, and were considered to be a fire hazard. This is in addition to a lack of proper hygiene, which posed a health hazard to the occupants and the neighborhood. The occupants resisted the eviction on the grounds that no satisfactory alternative accommodation had been offered before the eviction. This is in addition to the failure of the city to consult with them.

The applicants, at the hearing also argued that the city was partly responsible for the sorry state of the buildings. The city had disconnected the water supply and had not yet done anything to make the buildings less hazardous in terms of hygiene and fire. The applicants sought an interim order to compel the city to restore the water supply and make the buildings less hazardous. In response the Constitutional Court ordered that the parties engage each other meaningfully in an effort to resolve the differences and difficulties aired in the application, which could be described as an interim structural order. The court issued a report back to court order requiring the city to file affidavits on a stipulated date reporting on the results of the engagement with the applicants.<sup>236</sup> The court order was heeded by the parties, who engaged each other and such engagement resulted in an agreement on interim measures. By this agreement, the city undertook to render the buildings safer and more habitable, and the agreement resulted in intangible positive results for the applicants.

#### **4.4.4. STRUCTURAL INTERDICT**

The structural interdict is a complicated form of interdict. It involves continued participation of the court in the implementation of its orders. Its functions are various and determined by the circumstances and demands of each case, unlike other forms of interdicts or remedies such as damages. The purpose of structural interdicts is not deterrence or compensation as such. In broad terms, its purpose is the elimination of systematic violations of existing rights

---

<sup>234</sup> 2008 5 BCLR 475 (CC). For summary of the history of this case, see also L Chenwi & S Liebenberg ‘*The Constitutional Protection of those facing Eviction from Bad buildings*’ (2008) 9(1) ESR Review 12.

<sup>235</sup> Act 103 of 1997.

<sup>236</sup> *Olivia* case, para 5.

especially in institutional or organizational settings.<sup>237</sup> Rather than compensate for past wrongs, it seeks to adjust future behavior and is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered.<sup>238</sup> In the *Modderklip* case,<sup>239</sup> a large group of people illegally occupied a portion of a farm. By the time the land owner was granted an eviction order, the number of occupiers had grown to 36 000, and the sheriff insisted on payment of R1,8 million to execute the eviction because it required the assistance of private contractors. The state refused to contribute to the costs of eviction. The High Court granted a structural interdict, ordering the government to produce a plan to end the unlawful occupation and find alternative accommodation for the squatters.

#### 4.5. READING IN AND READING DOWN REMEDIES:

When a legislative omission gives rise to the infringement of a constitutional right, a possible remedy is the 'reading in' of particular words in a statute. This situation usually arises when a statute is under-inclusive in the sense that it unconstitutionally excludes certain groups from the ambit of the protection it provides or the benefits it confers.<sup>240</sup> However, the remedy is not confined to under-inclusive statutes, and can, to a limited extent, be used to redraft legislative provisions to render them constitutionally consistent.<sup>241</sup>

The Constitutional Court has used the 'reading in' remedy in three major socio-economic rights cases to date, in the case of *Khosa v Minister of Social Development*;<sup>242</sup> *Mahlaule v Minister of Social Development*,<sup>243</sup> the court read the excluded group of permanent residents into relevant provisions of the Social Assistance Act,<sup>244</sup> and Welfare laws Amendment Act,<sup>245</sup> It held that, their exclusion from the social grants scheme established by this legislation violated both the right against unfair discrimination section 9(3),<sup>246</sup> of the constitution and the right of access to social security, including social assistance section 27(1)(c) read with (2).<sup>247</sup> The court confirmed that in considering the 'reading in' remedy, remedial precision was an

---

<sup>237</sup> See note 161 above at 176 and Liebenberg S 'The value of human dignity in interpreting socio-economic rights' ( 2005) 21 *South African Journal on Human Rights* 1 30.

<sup>238</sup> Mubangizi JC (2004). *The protection of human rights in South Africa*, ISBN 0702167304.

<sup>239</sup> *Modderklip boerdery (Edms) Bpk v President of the RSA* 2003 (6) BCLR 638 (T).

<sup>240</sup> Liebenberg S ( 2010 ) Socio- Economic Rights, P383.

<sup>241</sup> *S v Manamela, Director-General of Justice interviewing*, 2000 (3) SA (CC), 2000 (5) BCLR 491 (CC) para 56.

<sup>242</sup> 2004 (6) SA 505 (CC).

<sup>243</sup> 2004 (6) SA 569 BCLR (CC).

<sup>244</sup> Act 59 of 1992.

<sup>245</sup> Act 106 of 1997.

<sup>246</sup> Act 108 of 1996 Constitution of South Africa.

<sup>247</sup> *Ibid* Section 27.

important consideration related directly to respect for the role of statute. ‘reading in’ was considered a more appropriate remedy than granting an immediate or suspended declaration of invalidity.

The socio-economic rights cases in which the Constitutional Court granted the ‘reading in’ remedy was the case of *Japhta v Schoeman*,<sup>248</sup> *Van Rooyen v Stoltz*,<sup>249</sup> the court held that Section 66(1)(a) of the Magistrates Court Act,<sup>250</sup> was unconstitutional to the extent that it allowed for sale-in-execution against immovable property without appropriate judicial oversight. The remedy for the over-breadth of the scheme was to read in a provision requiring that such Sale-in execution against immovable property could be authorized by a court after consideration of all relevant circumstances. The court rejected the argument of the Minister of Justice and Constitutional Development that the most appropriate remedy would be to strike down the impugned section and to suspend the declaration of invalidity for a period in order to allow legislature to correct the defect on the ground that it would not be in the interests of justice and good governance.

A central consideration in favour of a remedy of reading words into section 66 of the Magistrates Court Act was the limited range of legislative options for curing the constitutional defect. The court held that, it was not appropriate to specify a comprehensive list of factors that would be relevant to the exercise of the judicial discretion in these circumstances, given the range of different circumstances in which execution against the homes of debtors could be sought to satisfy a debt. However, it held that some guidelines should nonetheless be provided to ensure proper consideration of the constitutionally protected housing rights of debtors. In this respect, the court endorsed proportionality inquiry in which the creditor’s interest in obtaining payment of a debt were weighed against the interests of the judgment debtor in securing a tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless. A central element in the proportionality inquiry is whether there are alternative mechanisms for the creditor to secure payment of the debt without resorting to drastic steps of execution against a person’s home.

---

<sup>248</sup> 2005 (2) SA 140 (CC).

<sup>249</sup> 2005 (1) BCLR 78 (CC).

<sup>250</sup> Act 32 of 1944.

In the case of *Occupiers 51 Olivia Road*,<sup>251</sup> section 12(6) of the NBRSA was found to be inconsistent with section 26(3) of the constitution in that it compelled people to leave their homes on a criminal sanction in the absence of a court order. However the court held that it was not just and equitable to set the provisions of section 12(b) aside as it was appropriate to encourage people to leave unsafe or unhealthy buildings in compliance with a court order. A criminal sanction had this effect and reduced the need for a forced eviction at the instance of the state.<sup>252</sup>

The 'reading in' remedy was deemed appropriate as there was not a wide scope for legislative choice in remedying the unconstitutionality of the relevant provision. The court also underscored that, before making an order for NBRSA, a court is obliged to take into account all relevant circumstance as well as affording the occupier a reasonable time within which to vacate the property. In other words, section 12 of the NBRSA had to be read so as to be consistent with section 26 of the Constitution,<sup>253</sup> without striking down the legislative provisions giving local authorities the power to seek the eviction of people from unsafe buildings. The court sought to bring them into conformity with housing rights and their underlying values. It did so through employing a combination of a 'reading in' remedy and reminding courts to read statutory provisions in conformity with constitutional rights. Of particular importance in this context was the reminder to courts that the availability of alternative accommodation for those facing homelessness pursuant to an eviction was a relevant consideration in the exercise of their discretion. Indirect application to legislation i.e 'reading down' is a remedy which is also applicable when the right to access adequate housing is infringed. Indirect application means that the constitution and the bill of rights does not directly bind actors.<sup>254</sup> The Bill of rights binds all the original and delegated law making actors and always apply directly to legislation. But before a court may resort to direct application, it must first consider indirectly applying the Bill of Rights to the statutory provision by interpreting it in such a way as to conform to the Bill of Rights.<sup>255</sup> Section 39(2) of the constitution places a general duty on every court, tribunal or any forum, to promote the

---

<sup>251</sup> 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).

<sup>252</sup> The Court noted that the constitutionality of the use of criminal law to compel evictions of the poor was not raised and expressly declined to express any opinion on it, save to note that section 12 (6) of the NBRSA did not for imprisonment.

<sup>253</sup> Earlier in its judgment, the court observed that the supreme court of appeal had failed to appreciate that the statutory provisions providing for eviction in these circumstances had to be read consistently with the constitutional guaranteed housing rights in section 26.

<sup>254</sup> Iain Currie and Johan de Waal. *The Bill of Rights Fifth Edition* p 64.

<sup>255</sup> *Ibid* p 69.

spirit, purport and object of the Bill for rights when interpreting any legislation. Any statutory interpretation must positively promote the Bill of Rights and other provision of the constitution.

#### **4.6. NON COMPLIANCE WITH COURT ORDERS BY THE STATE**

What are the mechanisms available to courts to ensure that the state complies with their orders? State's failure to urgently comply with court order is a major challenge that needs to be attended to, to ensure that the people without shelter or facing eviction got quick relief as court ordered. Section 165(5) of the constitution stipulates that an order or decision issued by a court binds all persons and the organs of state to which it applies, while section 3 of State Liability,<sup>256</sup> precludes execution or attachment against the asset or property of the state, without providing an alternative procedure of satisfying the judgement. In the case of *Grootboom*,<sup>257</sup> the government failed to comply with declaratory orders made by the Constitutional Court. Constitution is the Supreme law of the country that must be respected and its provisions must be complied with by everyone including institutions, private or public and organs of state.

#### **4.7. CONCLUSION**

The availability of remedies to affected individuals who lacks or experiencing the problem of shelter is an appropriate measure which shows that the constitution really protects the individual whose rights to shelter have been violated or threatened. However, many affected individuals are not aware of those available remedies due to many reasons such as illiteracy and lack of information. The government must consider the issue of consultation and participation in order to reach those affected individuals by visiting affected communities especially rural areas.

---

<sup>256</sup> Act 20 of 1957.

<sup>257</sup> 2000 11 BCLR 1169(CC).

## **CHAPTER 5**

### **5.1 COCLUSION**

The introduction of R.D.P policy by the Democratic government under Mandelas' administration, installed confidence that the lives of the people (vulnerable group without proper shelter) will change, with the hope that houses will be provided. It is a good policy aimed at addressing various socio-economic rights. However the lives of those whose needs are most urgent have not been attended to till today, and their lives have not been improved. There are various protests from one province to another against poor service delivery, where protesters raised or expressed their dissatisfaction about poor services by government.

Despite the fact that the slow pace of housing delivery is caused by the lack of adequate resources available to the state, one can argue that the right to access adequate housing is not necessarily the resources constraints, is a denial by state to vulnerable individuals because they are not able to access existing legal, political and social remedies that may allow them to gain access to some form of housing. Most individuals who are vulnerable and whose housing needs are most urgent are from rural areas, the reason being that most of them are illiterate and it is not easy for them to exercise their rights. It is the duty of the state to ensure that vulnerable groups in society are provided with houses, failure to do so or to take special steps or measures to protect those vulnerable individuals, disadvantaged and marginalised by apartheid government it would result in a constitutional infringement of a right to access adequate housing. The right of access to adequate housing must benefit all groups who are unable to address their emergency housing needs from their own resources and may also be extended to a number of groups not catered for in the housing programme, for example, persons without dependents, minors heading households and unlawful residents.

### **5.2. RECOMENDATIONS**

### **5.2.1 IMPLEMENTATION OF HOUSING AND LEGISLATIVE POLICIES**

The Ministry of Human Settlement must revisit all the housing statutes and policies through amendments which will include provisions which are aimed at dealing or disciplining corrupt government officials and dodgy contractors who do not complete their work while they have been paid. Secondly the introduction of a forum or special court to deal with corruption cases and to ensure that the funds reserved for service delivery are properly used as well as whistle blowers protection.

### **5.2.2 MONITORING COURT JUDGEMENTS**

It is necessary that the state through Ministry of Human Settlement set a commission or mandate Human Rights institution like South African Human Rights Commission to monitor the implementation of court judgments that protect human rights. Such commission should be provided with adequate resources to monitor the implementation of court judgements related to the realisation of economic, social and cultural rights, particularly a right to access adequate housing. If the implementation of court judgements can be successful, the progress in the fulfilment of a right to access adequate housing would be accelerated. The mandated commission must accelerate its monitoring and investigative work on the realisation and violations of the right to access adequate housing.

### **5.2.3 PROVISION OF LEGAL AID FUNDING**

Realising that most affected people regarding lack of shelter are unemployed and therefore do not have enough funds or nothing at all to institute legal proceedings when their right to adequate housing have been violated, this paper further recommends that adequate legal aid funding for civil and administrative law proceedings be provided by the state in order ensure that the affected people whose socio-economic rights, a right to access adequate housing in this case, have been breached/infringed be able to have access to affordable and quality legal representation to enforce this right.

### **5.2.4 ROLE OF GOVERNMENT DEPARTMENTS**

In order to accelerate the progress in housing delivery, the coordination of other government departments will be paramount. The role or involvement of other government departments in charge of service delivery like water, sanitation and electricity would ensure an integrated approach to housing that recognises the individuality of human rights.



### 5.2.5 PROHIBITION OF EVICTION

Section 26(3) of the South African Constitution protects against eviction or demolition of a person's home unless a court orders eviction after considering all the relevant circumstances. The state should by all possible means ensure that there is no introduction of Bills aimed to authorising evictions and the eradication or demolition of slums until all national, provincial and local policies, legislation and administrative actions have been brought into line with the constitutional provision.

### BOOKS

1. Liebenberg S ( 2010 ) *Socio-Economic Rights*. 1<sup>st</sup> ed . Juta & Co, Ltd. Cape Town
2. Currie I and de Waal J ( 2005 ) *The Bill of Rights Handbook*., 5<sup>th</sup> ed Butterworths Durban
3. Danie B and Christof H ( 2005 ) *Socio-Economic Rights in South Africa*, Pretoria University Law Press
4. Kirsty M ( 2009 ) *Constitutional Diference, Courts and Socio- Economic Rights in South Africa* Pretoria University Law Press
5. Danie B and Russell S ( 2002 ) *Exploring the core content Socio-Economic Rights* 1<sup>st</sup> ed : South African and International Perspectives: Protea Book House Pretoria
6. Prof Mubangizi C J ( 2004 ) *The Protection of Human Rights in South Africa*
7. Mbazira C ( 2009 ) *Litigating Socio-Economic Rights in South Arica A Choice Between Corrective and Distributive Justice* Pretoria University Law Press

## Articles

- 1.Codicillus Volume 46 no 2 2005 ISSN 0010-020x c Unisa Press pp.24-44.
- 2.David Pottie, Housing The Nation; The Politics of Low-Cost Housing in SA, Politeia volume 22 2003 pp 119-143.
- 3.Rudolph Nengome, The Right To Access Adequate Housing, fair lending and the role of financial institution, codicillus vol 46 no 2 2005 ISSN 0010-020x c Unisa press pp.24-44.
- 4.The quarterly Law Review for people in Business, vol 15 part 1 ISSN 1021-7061.
- 5.Silberman. L. Illegal Evictions, without prejudice; property law. October 2008.
- 6.Stuart Wilson, Litigating housing rights in JHB innercity; 2004-2008,SAJHR volume 27 (2011).
- 7.Craig Scott and Pilip Aston,adjudicating constitutional priorities in a transitional context; A comment on Soobramoney's legacy and Grootboom's promise, 2000 vol 16 SAJHR.
- 8.I Mc Murray and L Jansen van Rensburg, legislative and other measures taken by Government to realise the rights of children to shelter.