

The right to housing

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Evictions, engagement and alternatives:

The constitutional responsibility on local government to provide access to adequate housing,
and the obligation not to impact on this right negatively

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DECLARATION

I, Bhavna Ramji, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements for any other degree or qualification at any other university.

Signed and dated at Durban on the 30th day of October 2013.

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CHAPTER 1

Introduction

Where else could you belong, except in the place you refuse to leave?

(Amitav Ghosh)

In South Africa, there is a disjuncture between housing policy and its implementation. Whereas legislation and official government policy embraces a democratised and integrative approach to shack dwellers, the voices of government demonstrate an antagonism towards their presence in centrally-located and potentially profitable urban spaces, and ultimately indicate a tendency towards the perpetuation of spatial apartheid. For example, the eThekweni Metropolitan Municipality (hereafter referred to as eThekweni or eThekweni Municipality) is presently in dispute with displaced shack dwellers who have begun clearing land in open unused areas close to central suburbs. Their shacks were demolished to clear the land for a housing development in Cato Crest, and the response of shack dwellers was described by the chairman of eThekweni's human settlement committee as "a challenge for the city to beef up its land invasion control."¹

This dissertation focuses on the legislative and judicial approach to the urban poor – shack dwellers – who are often labelled "illegal" or "unlawful" when they settle in well-located parts of the city, and who are often removed from these areas on the basis of this so-called illegality. It considers: (i) the extent to which the courts, specifically the Constitutional Court, require urban municipalities to manage evictions and deal with any resultant homelessness, and (ii) whether the judicial interpretation of municipalities' responsibilities give rise to a "right to the city" in South African law. It deals also with whether the right to the city is worth pursuing.

This dissertation will show that judicial decisions and national legislation and policy have placed a great amount of responsibility for unlawful occupiers in the hands of

¹ L Rondganger & N Nene "Shack dwellers invade Durban" *Daily News* 14 March 2013, available at http://www.iol.co.za/news/south-africa/kwazulu-natal/shack-dwellers-invade-durban-1.1486477#.Uc05aCoh_f8 accessed on 25 July 2013.

local government. The pivotal role of local government in the “housing question” is a manifestation of the global trend of decentralisation of state power:

The sub-national aspect of rescaling [governance] involves local institutions accepting more responsibility and authority as nation-states devolve control from the national scale to the local and regional scales. This devolution means that local governing institutions are increasingly responsible for duties such as economic development, social services, the provision of infrastructure, and spatial planning (...) In this context governance institutions in cities have taken on greater authority and responsibility to make policy for urban areas.²

This paper pays particular attention to the legal duties on local government. The decision which guides housing jurisprudence is *Government of the Republic of South Africa v Grootboom* (“*Grootboom*”).³ This judgment will be explained, and its central themes extracted in order to show how the law relating to local government’s housing obligations has developed. This is a crucial point of departure as at this most basic level there is a lack of clarity on the role of local government in evictions.⁴ However, before the constitutional provisions and the prevailing housing problems are explored and understood, the historical background to land availability in South Africa is explained, together with the paradigm shift in the post-1994 approach to land access (Chapter 2). Chapter 3 considers the existing legislative framework on evictions, and chapters 4 and 5 consider the content given to the legislation by the courts. These chapters show that the law presently embraces the notion of urban inhabitants’ participation in the development of their area, and their right to be in the area.

It is therefore arguable that the original radical notion of the right to the city is at least mildly evident in policy. Chapter 6 considers the concept of “the right to the city” (originally expounded by Henri Lefebvre), which has re-emerged in political discourse as a way “to respond to neoliberal urbanism and better empower urban

² M Purcell “Excavating Lefebvre: The right to the city and its urban politics of the inhabitant” (2002) 58 *GeoJournal* 99, 100.

³ 2001 (1) SA 46 (CC).

⁴ J van Wyk “The role of local government in evictions” (2011) *PER/PELJ* 50, 75 – 76.

dwellers” through “urban democracy”. The perceived problem with neoliberal urbanism is that it transfers governing powers away from the urban inhabitants; the right to the city aims to transfer power back to city inhabitants.⁵ On the other side of Lefebvre, is the unwillingness of courts and government to embrace the right to the city consistently. Instead, the original empowering legislation has taken on more paternalistic qualities in the forms of a right to alternative accommodation and the sometimes weak interpretation of the obligation on local government to engage with inhabitants (shack dwellers included), which maintain vertical power structures. These interpretations are analysed.

This dissertation concerns only urban spaces. Its scope is limited to an attempt to elucidate the duties on local government in respect of evictions as imposed by legislation and court decisions,⁶ and a consideration of the worth of these impositions for the genuine upliftment of the urban poor. The occupation of city land is particularly important as cities are densely populated spaces, sought-after territories, and economic centres of the broader nation, and hence cities are also the centre of rivalry among city officials, ratepayers and shack dwellers. The 2011 Census shows that 62 percent of South Africans are living in urban areas, and that the populations of some municipalities grew by over 50 per cent between 2001 and 2011.⁷ There is a lack of adequate housing for people living in urban areas.

The prevailing situation of “slum dwellers”, “unlawful occupiers”, “land invaders” and “informal settlers”⁸ indicates that the question of sharing and negotiating urban

⁵ Purcell (note 2 above) 99 – 103.

⁶ For example, Professor van Wyk states that the position of municipalities in managing evictions is unclear, and proposes national or provincial intervention in the form of strict eviction guidelines for municipalities (van Wyk (note 4 above) 75 – 76).

⁷ Budget speech (2013) delivered by Minister Pravin Gordhan, accessed at <http://www.moneyweb.co.za/moneyweb-2013-budget/2013-budget-speech> on 25 August 2013.

⁸ On the use of the term “informal”: “For the government this is an informal settlement, but for the people who stay here it is formal. We take our lives and our place very seriously (...) But it is wrong to say that it is informal as if it doesn’t matter, as if we don’t care. The thing is that if you are staying in the shacks you have got the hope that things will get better” (Thandi Khambule cited in R Pithouse “Progressive policy without progressive politics: Lessons from the failure to implement ‘Breaking New Ground’” (2009) 54 *SSB/TRP/MDM* 1, 8).

space with people who cannot afford ordinary accommodation remains an issue despite the demise of marginalising legislation. A conception of urban space, based on the right to the city, which space includes the space to speak and the space to think, reveals that an interpretation of rights which insists that people need to be managed from above is problematic because it is at odds with making people rights-bearers in the first place. To the extent that the top-down approach is premised on ensuring ordered integration, it falls short for assuming that enhanced urban democracy will result in unordered or chaotic integration. By contrast, the physical and intellectual exclusion of inhabitants from local planning is counter-productive, and a new relationship with the urban poor is needed. The Constitutional Court in *Grootboom* appreciated this need for a new and respectful approach to the poor and many, though not all, later decisions built on the foundations laid by *Grootboom*. Unfortunately, an assessment of the dispute between eThekweni and the Cato Crest occupiers reveals that the principles emerging from these decisions have yet to be fully implemented.

CHAPTER 2

Pioneers and space invaders

The South African legal order has experienced a significant restructuring since 1994. Although the notion of private property remains intact under section 25 of the Constitution (and is buttressed by common-law vindicatory actions), it is counterbalanced by consideration for those who occupy space without title (section 26 of the Constitution and the legislation which stems from it). This chapter provides a brief outline of the legal property regime before 1994, and its short- and long-term impacts on black South Africans, and secondly, explains the paradigm shift in the democratic era. It will show that the present legislative concern is, as it should be, addressing the injustices of the past when dealing with black occupation of land, especially urban land. This discussion will inform the later assessment of whether the right to the city is an appropriate framework for the realisation of housing rights of poor (black) South Africans (i.e. a framework which ensures that black people in South Africa can be re-incorporated into city spaces as urban dwellers, and not as urban outcasts).

1. THE OLD LEGAL ORDER

South Africa has always been a pioneer in the field of private property. First, it blazed the racist trail of unequal land distribution, supporting this through the common law's seemingly innocuous relic of Roman antiquity: Based on the idea that an owner cannot be deprived of property against his will, the remedy of *rei vindicatio* required an owner to prove simply that he owned the *res*,⁹ that the *res* was in the possession of the defendant at the time of institution of legal proceedings, and that the *res* is still in existence and clearly identifiable.¹⁰ The South African property system was, if we stop telling the story here, distinctly uninspiring in its veneration of private ownership. However, simultaneously with industrialisation and urbanisation, South Africa's colonial authorities erected, and the post-colonial (apartheid) government cemented, a framework around the common-law protection of private property which

⁹ Usually by supplying the title deed in the case of immovable property.

¹⁰ P J Badenhorst *et al Silberberg & Schoeman's The Law of Property* 5th ed (2006) 243 – 244.

followed a system of racial segregation.¹¹ In the words of Sachs J, “[f]or all black people, and for Africans in particular, dispossession was nine-tenths of the law.”¹² In other words, whereas a marginalised underclass of workers could have been created, a black (mostly African) marginalised underclass of workers was created, and as put by Steve Biko, “[e]conomically, the blacks [were] given a raw deal.”¹³

The “antecedents of [apartheid-era] forced removal” included the colonial theft of most of the land held by African tribes and the establishment of disproportionately small and therefore overcrowded reserves intended for Africans.¹⁴ In fact, the most destructive legislation, the Natives’ Land Act 27 of 1913 (but in these times we dub it the Land Act), *preceded* the consolidation of National Party power and the implementation of apartheid. The legislation which came after the Land Act was merely ancillary legislation which served the purpose of implementing, entrenching, supporting or confirming the Land Act.¹⁵ Section 1(1)(a) of the Land Act provided that, except with the approval of the Governor-General, an African¹⁶ could only enter agreements or transactions for the purchase, hire, or other acquisition of land with other Africans. Sub-section (b) entrenched the corollary position which prohibited people who were not African from entering land agreements with Africans. The “scheduled native areas” referred to in the Land Act meant designated, desolate and far-flung reserves. The effect was firstly to render the well-located urban areas “the preserve of whites”,¹⁷ and secondly to exclude blacks from accessing in any

¹¹ A J van der Walt “Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation” (2002) *TSAR* 254, 258.

¹² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9 (“*PE Municipality*”).

¹³ S Biko *I Write What I Like* (2004) 91

¹⁴ K Henrard “The internally displaced in South Africa: The strategy of forced removals and apartheid” (1995 – 1996) *Jura Falconis* 491, 493.

¹⁵ Parliamentary Research Unit Paper *Reflections on the impact of the Natives’ Land Act, 1913 on local government in South Africa* (20 May 2013) 2; 7; Henrard (note 14 above) 493; 499 – 500.

¹⁶ The term used in the Land Act is of course “native”, which meant “any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are natives”.

¹⁷ Parliamentary Research Unit Paper (note 15 above) 3.

commercial¹⁸ and socially or culturally meaningful way between 87 and 93 percent of the land in South Africa.¹⁹ Put more simply:

Awakening on Friday morning, June 20, 1913, [the day after the Land Act came into operation] the South African Native found himself, not actually a slave, but a pariah in the land of his birth.²⁰

The sequel enactments included: (i) the Natives (Urban Areas) Act 21 of 1923, which empowered local authorities to establish “locations, native villages or native hostels”²¹ on the outskirts of white urban areas, and to expel “unexempted” Africans living in urban (white) areas into these African locations;²² (ii) the Native (Urban Areas) Consolidation Act 25 of 1945 (as amended by the Native Laws Amendment Act 54 of 1952) which established an administrative framework that in effect permitted the eviction and prosecution of any African unlawfully resident on white-owned land, and the removal of “idle or undesirable” Africans;²³ (iii) the Group Areas Act 41 of 1950 which allocated particular parts of South Africa to particular race groups, reserving big cities and centrally-located suburban areas for whites, and accommodating black workers in racially segregated townships on the outskirts of these;²⁴ and (iv) the Prevention of Illegal Squatting Act 52 of 1951 (“PISA”) which was used to criminalise and forcefully remove squatting communities whose presence on particular land was rendered illegal purely because it occurred on land designated as “white” in terms of the preceding acts, whether through eviction or demolition.²⁵

¹⁸ The homelands were situated neither on arable land nor close to urban industrialised areas, enhancing the “ridiculousness” of the disproportionately of the quantity of land allocated to Africans (see Biko (note 13 above) 90 – 91).

¹⁹ Land allocated to Africans originally stood at 7% of all land in South Africa (Land Act), and was later increased to 13% of South African land in terms of the Development Trust and Land Act 18 of 1936 (see Henrard (note 14 above) 500).

²⁰ S Plaatje *Native Life in South Africa* (1916).

²¹ Section 1 of the Urban Areas Act.

²² Section 5 of the Urban Areas Act.

²³ Sections 10 and 29 of the Urban Areas Consolidation Act.

²⁴ Sections 4 and 5 of the Group Areas Act.

²⁵ Sections 2 and 3 of PISA.

The concept and practice of developing self-governing territories (“homelands” or “Bantustans” or “tribal cocoons”²⁶) excluded Africans from South African citizenship, and so worked hand-in-hand with the direct laws of dispossession and segregation, turning Africans into urban space invaders.²⁷

The historical background to land access in South Africa is the natural precursor to our understanding of dispossession even in ostensibly democratic times:

Despite the assertion of the black majority to political power, however, the long standing effects of the white minority's forced removal policy remain and perpetuate the injustice of apartheid, creating an enormous obstacle to the reformation of South Africa and the economic and political empowerment of its black citizens.²⁸

This background also assists in understanding the nature and extent of the difficulty faced by government in trying to resolve or improve the status quo, and move dramatically away from spatial apartheid:

[The social architecture of apartheid and the unequal apartheid property schemes] challenge the ability of the democratic government to transform the Constitution's aspirational property and housing provisions into property ownership and “concrete” housing for landless and homeless South Africans.²⁹

In this way, the apartheid regime recognised and finely tuned for its purposes the social function of land, realising that it could go beyond merely capitalist inequality to enduring, and, as it turned out, insurmountable racial oppression.

2. THE PARADIGM SHIFT

²⁶ This last term is Steve Biko's (see Biko (note 13 above) 95).

²⁷ Bantu Authorities Act 68 of 1951; Native (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952; Bantu Homelands Citizens Act of 1970.

²⁸ Henrard (note 14 above) 491.

²⁹ B.L Jacobs “The Post-Apartheid City in the New South Africa: A Constitutional Triumph?” (2006) 18 *Pace Int'l L. Rev.* 407, 13. See also: *President of the Republic of South Africa v Modderklip Broedery (Pty) Ltd* 2005 (5) SA 3 (CC) para 36 (“Modderklip”); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 163 – 169; 191 – 197 (“Joe Slovo”).

The new South African order also recognises and upholds land as a social force, albeit in a drastically different manner. Today South Africa is pioneering a different course, necessitated by the old one and its tragic effect that “[t]he vast majority of the people of this country remain landless and development continues to be concentrated in areas where there has always been appropriate infrastructure.”³⁰ Even in urban areas, the poor, confined to informal settlements, “live at the edge of survival.”³¹

The present legal framework governing property relations represents a paradigm shift in the approach of the law to unlawful occupiers. The old paradigm was based on a Lockean consensus which glorified private property as a natural right, guaranteed the owner of property victory against an occupier with no countervailing formal legal rights, and simplified the question of land use and allocation to one of ownership. As Stuart Wilson writes, “[i]t used to be simple. A landowner was in law entitled to an eviction order if he could prove his ownership and the fact of occupation of the land by the occupier.”³²

The shift towards a new paradigm or a “new normality” is led by the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which protects people from eviction from and demolition of their homes under the broader banner of “access to housing”. Section 26 of the Constitution, provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No-one may be evicted from their home, or have their home demolished, without an order of court made after considering the relevant circumstances. No legislation may permit arbitrary evictions.

³⁰ Parliamentary Research Unit Paper (note 15 above) 8.

³¹ *Joe Slovo* (note 29 above) para 198.

³² S Wilson “Breaking the tie: Evictions from private land, homelessness and a new normality” (2009) 126(2) *SALJ* 270, 270.

In our economic environment, the poor are generally the subjects of the right and the state is generally concerned with these persons.³³ Juxtaposed to this right of the poor (firstly, to have access to adequate housing and secondly, to be protected from arbitrary evictions) is the right of property owners, as contained in the preceding section of the Constitution, not to be arbitrarily deprived of private property.³⁴ This right is not more or less significant than the suite of pro-poor rights contained in section 26.³⁵

The proximity of ideas of “property”, “land” and “housing” to one another in the Constitution implies a recognition that secure tenure, land and housing “are closely intertwined” and “overlap”.³⁶ At the same time, the urban land question cannot be reduced to a question of housing, as the latter formulation “eviscerates the profoundly political questions around how cities are governed and how land is allocated” and “re-inscribes an elitism which, while it claims to be concerned with ‘development’, is inevitably authoritarian and, in practice, deeply complicit with the logic of capital: a logic that, amongst other things, takes a profoundly exclusionary approach to the distribution of urban land.”³⁷

In its first authoritative departure from pre-Constitutional conceptions of private ownership and the rights attaching thereto,³⁸ the Constitutional Court per Yacoob J

³³ See I Currie & J De Waal *Bill of Rights Handbook* (2005) 586 – 587; *Government of the Republic of South Africa v Grootboom* (note 3 above) para 36; *PE Municipality* (note 12 above) paras 17 -18; *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) paras 39 – 40; section 2(1)(a) of the Housing Act 107 of 1997. Government assistance to the poor in terms of housing began in 1994 with a subsidy scheme for land, housing and infrastructure to those earning less than R3,500 per month. Later, loans were extended to low-income groups (Muthien *et al* (eds) *Democracy and Governance Review: Mandela’s Legacy 1994 – 1999* (2000) 59).

³⁴ Section 25(1) of the Constitution provides: “No-one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”

³⁵ *PE Municipality* (note 12 above) para 23.

³⁶ *PE Municipality* (note 12 above) para 19.

³⁷ F Hendricks & R Pithouse “Urban Land Questions in Contemporary South Africa: The Case of Cape Town” in F Hendricks *et al* (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 105 – 106.

³⁸ See Wilson (note 32 above) 272.

held that to have access to adequate housing (in terms of section 26(1) of the Constitution), “there must be land, there must be services, there must be a dwelling”³⁹. But there is more to it than this. Judicially, what is required is a refined and progressive approach to urban spaces, which ought not to allow government to divorce the relatively simplistic question of housing from the multi-faceted, emotional, controversial and, above all, political question of land rights and security of tenure. Richard Pithouse notes that in the heyday of apartheid, the state was at the international forefront of housing delivery. This underlines the futility of a two-dimensional “units built” approach to the question of where people live:

[A] properly post-apartheid approach to housing would have to consider questions such as the quality of the houses built, the location of the houses, the nature of their ownership, the degree to which they were served by affordable transport, the processes by which they were planned and built and so on.⁴⁰

This is recognised by the Housing Act 107 of 1997 which defines “housing development” to include not only the self-contained dwelling and attendant services but also security of tenure, a general environment which should “ensure viable households and communities”, and a geographical location which should allow “convenient access to economic opportunities, and to health, educational and social amenities”.⁴¹

The worth of judicial decisions for the poor is dependent on whether they follow the technocratic approach, or whether they regard the judicial question of housing as being part of an answer to the broader urban question which should be concerned with genuine development, empowerment and equality, and preventing the political hegemony annexing well-located, financially valuable property from the urban poor who reside on the land, and who contribute to the same urban region.

³⁹ *Grootboom* (note 3 above) para 35. At the outset, the services referred to have included, at least in theory, the provision of water, sanitation, waste disposal and electricity (*White Paper on Reconstruction and Development* (GN 1954 in GG 16085 of 23 November 1994).

⁴⁰ R Pithouse (note 8 above) 8.

⁴¹ Section 1 (vi) of the Housing Act.

The judicial interpretation of section 26 of the Constitution has leaned increasingly towards municipal responsibility in eviction cases, including the “negative” responsibility not to evict, and the positive responsibility to provide temporary accommodation to persons facing eviction. Local government carries the burden of fulfilling these specific responsibilities,⁴² despite the fact that housing is an area of national and provincial competence, and despite how starkly different this new function is from the role of local government under apartheid which “was never intended to be developmental”, but was geared solely towards taking white supremacy beyond the political realm and into day-to-day life, so that white lives were markedly better than black lives.⁴³

⁴² Section 9 of the Housing Act; section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”); *Grootboom* (note 3 above) para 58; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) paras 13 – 18; 38 – 41; 54. “To date, courts have deferred the responsibility to provide alternative accommodation to the City, pointing to the rights established mainly in s[ection] 26 and the statutory framework of PIE” (G Dickinson “Blue Moonlight Rising: Evictions, alternative accommodation and a comparative perspective on affordable housing solutions in Johannesburg” (2011) 27 *SAJHR* 466, 468).

⁴³ Parliamentary Research Unit Paper (note 15 above) 7.

CHAPTER 3

Evictions: Section 26(3) of the Constitution, PIE and local government

The core focus of this dissertation is the role of urban municipalities, as determined by the courts, in dealing with unlawful occupiers. With a clear illustration of the problem which South Africa is facing in relation to land, and the paradigm shift, it is now possible to proceed to this issue. This chapter analyses section 26(3) of the Constitution, which prohibits evictions without a court order, the legislation which gives effect to the constitutional provision, and shows that courts have placed the responsibility managing evictions squarely on the shoulders of local government. The specific responsibilities and the extent of these responsibilities are discussed in chapters 4 and 5.

1. THE CONSTITUTION

The Constitution generally prohibits evictions and/or the demolition of homes, with the effect that either of these acts may only occur with “an order of court made after considering the relevant circumstances.”⁴⁴ When seeking the eviction of a person from his home, the Constitution imposes firstly, a duty on the owner of property to obtain a court order and secondly, a duty on the courts to which eviction applications are made, to consider “the relevant circumstances” before granting the application. The Constitutional Court has explained section 26(3) of the Constitution in the following terms, which ought to define the judicial approach to home evictions:

Section 26(3) evinces special constitutional regard for a person’s place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.⁴⁵

⁴⁴ Section 26(3) of the Constitution.

⁴⁵ *PE Municipality* (note 12 above) para 17.

In order to give effect to section 26(3) of the Constitution, Parliament has passed (i) the Land Reform (Labour Tenants) Act 3 of 1996 (“Labour Tenants Act”); (ii) the Interim Protection of Informal Land Rights Act 31 of 1996 (“Informal Land Rights Act”); (iii) the Extension of Security of Tenure Act 62 of 1997 (“ESTA”); and (iv) the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”).⁴⁶ The first three enactments apply to labour tenants (as opposed to ordinary farm workers),⁴⁷ to occupiers holding “informal” rights to the land that they occupy,⁴⁸ and to occupiers of agricultural land.⁴⁹ These three enactments therefore regulate and protect the rights of most people living in rural and peri-urban areas, and who occupy these areas with consent (either express or tacit),⁵⁰ or in terms of traditional rights.⁵¹ PIE, which applies “in respect of all land throughout the Republic”,⁵² is applicable where none of the other three enactments apply.⁵³

The effect is that PIE usually applies to the emotional subject of homes⁵⁴ which are situated in the competitive urban realm. In the same way that the Labour Tenants Act, the Informal Land Rights Act and ESTA recognise the land rights (however limited) of rural people, PIE recognises similar rights in respect of urban dwellers, who are historically and notoriously “rights-less”. Sachs J describes the process prescribed in terms of PIE as, while respecting the property rights of landowners and “the need for the *orderly* opening-up or restoration of secure property rights”

⁴⁶ See preambles to the listed acts.

⁴⁷ Labour Tenants Act.

⁴⁸ Informal Land Rights Act.

⁴⁹ Section 2(1) of ESTA.

⁵⁰ Section 1(xi) of the Labour Tenants Act; section 1(1)(i) read with section 3 of ESTA.

⁵¹ Section 1(1)(iii) of the Informal Land Rights Act.

⁵² Section 2 of PIE.

⁵³ Section 1(xi) of PIE, which limits the scope of PIE; see also *Randfontein Municipality v Grobler* [2010] 2 All SA 40 (SCA) para 4.

⁵⁴ See the preamble to PIE and the definition of “building or structure” in section 1(i) of PIE. Rare exceptions include PIE’s inapplicability to “holiday cottages erected for holiday purposes and visited occasionally over weekends and during vacations, albeit on a regular basis, by persons who have their habitual dwellings elsewhere” (*Barnett* (note 33 above) para 40).

(emphasis added), entitling once “anonymous squatters” to “dignified and individualised treatment with special consideration for the most vulnerable.”⁵⁵

2. PIE

Replicating the constitutional provision, PIE states that *any* eviction⁵⁶ of an unlawful occupier may only be ordered by a court once the court is satisfied “that it is just and equitable⁵⁷ to do so, after considering all the relevant circumstances”.⁵⁸ The prescribed “relevant circumstances” vary depending on the situation, so that the approach under PIE, the determination of rights and the remedy, is the result of a case-by-case approach.⁵⁹

2.1. Ordinary private evictions under section 4 of PIE⁶⁰

2.1.1. Where a private party seeks to evict an unlawful occupier who has occupied privately-owned land for *less* than six months at the time of the initiation of proceedings, the prescribed relevant circumstances which a court must take into account include the rights and needs of the elderly, children, disabled persons and households headed by women.⁶¹

2.1.2. Where a private party seeks to evict an unlawful occupier who has occupied privately-owned land for *more* than six months at the time of the initiation of proceedings, the prescribed relevant circumstances which a court must take into account include, in addition to the above considerations, “whether land

⁵⁵ *PE Municipality* (note 12 above) para 13 – 15. See also: paras 36 – 37.

⁵⁶ Regardless of whether it is at the instance of a private person or the state, and regardless of whether it is concerned with a long-term or a recent occupier.

⁵⁷ The decision as to whether an eviction is just and equitable must be a decision which is just and equitable to all parties (*Changing Tides* (note 42 above) para 12).

⁵⁸ Sections 4(6), 4(7) and 6(1) of PIE.

⁵⁹ *PE Municipality* (note 12 above) para 33; see also the comments of the Supreme Court of Appeal in *Changing Tides* (note 42 above) para 14.

⁶⁰ Section 5 of PIE provides for “urgent” eviction proceedings at the instance of the owner or person in charge of the land, which I do not discuss.

⁶¹ Section 4(6) of PIE.

has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier”.⁶² The significance of this consideration was made explicit by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (“*Blue Moonlight*”),⁶³ which is analysed later in this dissertation.

Other factors which have been considered relevant to private evictions are whether there is a “competing risk of homelessness on the part of the applicant”, and whether the new owner who purchases the land is aware of the presence of occupiers over a long time, in which case he will be required to be “somewhat patient”.⁶⁴ If the court is satisfied that the procedural and substantive requirements of section 4 of PIE have been met, and that the respondent has no valid defence to an eviction order the court must grant an eviction order.⁶⁵

2.2. State evictions under section 6 of PIE

A court “may” grant an eviction application made by the state if it is just and equitable to do so, after considering all the relevant circumstances, and if:

- (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
- (b) it is in the public interest to grant such an order.⁶⁶

In any⁶⁷ instance where the state seeks to evict unlawful occupiers,⁶⁸ the prescribed relevant circumstances include:

⁶² Section 4(7) of PIE. These factors are not, however, relevant where the land is sold in a sale of execution pursuant to a mortgage.

⁶³ 2012 (2) SA 104 (CC).

⁶⁴ *Blue Moonlight* (note 63 above) paras 39 – 40.

⁶⁵ Section 4(8) of PIE.

⁶⁶ Section 6(1) of PIE.

- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- (b) the period the unlawful occupier and his or her family have resided on the land in question;⁶⁹ and
- (c) the availability to the unlawful occupier of suitable alternative accommodation or land.⁷⁰

These factors are not exhaustive.⁷¹ Other considerations in section 6 eviction applications which have been judged relevant by the Constitutional Court include whether the land in question was required by either the state or the private owner for some other “productive use”, and the size of the group of occupiers (a small group would militate against a finding that it would be just and equitable to order an eviction).⁷²

2.3. Mediation

In cases where the municipality is not the owner of the disputed land, but the land falls within its jurisdiction, the municipality “*may* (...) appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to

⁶⁷ This is regardless of the length of the occupation. Section 6 evictions (those done at the instance of the state), do not distinguish explicitly between unlawful occupiers based on the duration of their occupation.

⁶⁸ This may refer to eviction from state- or privately-owned land (section 6(1) of PIE).

⁶⁹ Therefore, despite section 6(3) of PIE dealing collectively with long-term and short-term occupiers of state land, the question of time is still a relevant consideration to courts dealing with eviction applications made by the state. The eviction of established communities and individuals naturally occasions a higher degree of disruption to their once peaceful and settled condition. It is therefore appropriate that a court approach the question of eviction with more caution, and if eviction occurs, that the court be “specially astute to ensure that equitable arrangements are made to diminish its negative impact” (*PE Municipality* (note 12 above) para 27). See also para 25 where the Court explicitly includes “the duration” of the occupation as a relevant circumstance.

⁷⁰ Section 6(3) of PIE.

⁷¹ *PE Municipality* (note 12 above) paras 30 – 31.

⁷² *Ibid* para 59.

attempt to mediate and settle [the dispute]” (emphasis added).⁷³ Where the municipality is the owner of the land which is the subject of the dispute, and is therefore an interested party, the designated Member of the Executive Council (MEC) for housing in the province *may* appoint a mediator for the same purposes outlined above.⁷⁴ Given the tendency of courts to order the joinder of municipalities in most large-scale evictions, it is arguable that in these matters, the MEC for housing would appoint the mediator, notwithstanding the fact that privately-owned land is affected.⁷⁵ Lastly, a party (presumably to the dispute in terms of PIE), may request mediation.⁷⁶ The recurring use of the directory term “may” clarifies that the requirement of mediation is not a compulsory one,⁷⁷ but it is encouraged to the point where a court can refuse to order an eviction if there has been no mediation, where mediation was appropriate:

Given the special nature of the competing interests involved in eviction proceedings launched under section 6 of PIE, absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.⁷⁸

This case (*PE Municipality*) introduced mediation as a relevant circumstance in deciding whether it would be just and equitable to order an eviction, even stating that “[i]n appropriate circumstances the courts should themselves order that mediation be tried.”⁷⁹ This statement by the Constitutional Court raises, in addition to the codified option of mediation, the previously unstated idea of dialogue and discussion among the parties, which is now widely accepted and considered “equally relevant” to mediation.⁸⁰ Presently, mediation and dialogue occupy central spaces when a court

⁷³ Section 7(1) of PIE.

⁷⁴ Section 7(2) of PIE.

⁷⁵ *Lingwood v Unlawful Occupiers of ERF 9 Highlands* 2008 3 BCLR 325 (W); *Sailing Queen Investments v Occupiers of La Coleen Court* 2008 (6) BCLR 666 (W).

⁷⁶ Section 7(3) of PIE.

⁷⁷ See also: *PE Municipality* (note 12 above) para 47.

⁷⁸ *Ibid* para 43.

⁷⁹ *Ibid* para 47.

⁸⁰ *Joe Slovo* (note 29 above) para 166; *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) paras 42; 44.

is assessing whether an eviction order would be just and equitable, and often, without prior engagement between the government and the community, an eviction order will not be granted.⁸¹

3. LOCAL GOVERNMENT

The idea behind the post-apartheid restructuring of local government was for municipalities to transition in terms of a three-staged process into non-racial bodies,⁸² imbued with new importance and authority,⁸³ guided by developmental goals,⁸⁴ and to serve as cornerstones of the new democratic system because of their relative proximity to inhabitants within their respective areas of jurisdiction.

In *Grootboom*, the Constitutional Court explained that all spheres of government are responsible for the fulfilment of the state's housing obligations:

[A] co-ordinated state housing program must be a comprehensive one determined by all three spheres of government in consultation with each other . . . Each sphere of government must accept responsibility for the implementation of particular parts of the program.⁸⁵

Despite the linked obligations of all spheres of government in housing matters, the Constitutional Court in *Blue Moonlight* confirmed that, although preferable, it is not necessarily essential, to join all three spheres of government to eviction proceedings:

In view of the intertwined responsibilities of the national, provincial and local spheres of government with regard to housing, it would generally be preferable for all of them to be involved in complex legal proceedings regarding eviction and access to

⁸¹ See the discussion of engagement as an essential requirement in Chapter 5.

⁸² N Steytler & J de Visser "Local Government" in S Woolman et al (eds) *Constitutional Law of South Africa* (2008) 22-7;

⁸³ *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality* 2007 (4) SA 276 (SCA) para 33; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Municipality* 1999 (1) SA 374 (CC) para 38; Steytler & de Visser (note 82 above) 22-10.

⁸⁴ Section B of the *White Paper on Local Government* (GN 393 in GG 18739 of 9 March 1998).

⁸⁵ *Grootboom* (note 3 above) para 40.

adequate housing. Indeed, joinder might often be essential and a failure to join fatal. Whether it is necessary to join a sphere in legal proceedings will however depend on the circumstances and nature of the dispute in every specific case.⁸⁶

A joinder is only essential when the party to be joined has a direct and substantial interest in any order the court might make, when an order cannot be effected without prejudicing it,⁸⁷ or when the organ of state is responsible for the conduct that is being constitutionally challenged.⁸⁸ The effect of the rules on joinder, together with the legislative role and obligations of municipalities, is that in most eviction matters where there is a threat of homelessness (including private evictions), organs of state in the local sphere will be the parties which must be joined to proceedings.⁸⁹

Municipalities are specifically mentioned in PIE: In terms of section 4(7) of PIE, municipalities have the option of intervening by appointing a mediator in respect of a PIE dispute. Municipal functions are also relevant to section 6 evictions, even where the particular eviction application is brought by an organ of state in a different sphere of government:

In considering whether it is ‘just and equitable’ to make an eviction order in terms of section 6 of [PIE], the responsibilities that municipalities, unlike owners, bear in terms of section 26 of the Constitution are relevant (...) municipalities have a major function to perform with regard to the fulfilment of the rights of all to have access to adequate housing.⁹⁰

Elaborating on the functions of municipalities, the Constitutional Court has cited their general “duty systematically to improve access to housing for all within their area (...) on the understanding that there are complex socio-economic problems that lie at

⁸⁶ *Blue Moonlight* (note 63 above) para 45.

⁸⁷ *Ibid* para 44.

⁸⁸ Rule 5 of the Rules of the Constitutional Court cited in *Blue Moonlight* (note 62 above) para 44. See also rule 10 read with rule 6(14) of the Uniform Rules of Court.

⁸⁹ This was also the case in *Blue Moonlight* (*ibid*).

⁹⁰ *PE Municipality* (note 12 above) para 56.

the heart of the unlawful occupation of land in the urban areas of our country”.⁹¹

The court also cited a more intimate component of their overall duty:

They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.⁹²

The court therefore cites an objective duty on the part of the municipality as part of the broader framework to realise the housing goals of the Constitution, and a subjective duty, which is concerned with how municipalities go about playing their role in the housing rights scheme. This interpretation accords with the general legislative framework which applies to municipalities and confers on them duties and powers relating to development and delivery within a consultative, participatory and of course non-racial framework:

- i. Under section 151(3) of the Constitution, a municipality has the right to govern “the local government affairs of its community subject to national and provincial legislation”. The term “local government affairs” is informed by local government’s objectives under the Constitution, which include (in respect of local communities), (i) the development-oriented goals of promoting social and economic development, and promoting a safe and healthy environment; and (ii) the participation-oriented goals of providing democratic and accountable government, and encouraging the involvement of communities and community organisations in the matters of local government.⁹³

⁹¹ Ibid para 56. See also: *Grootboom* (note 3 above) para 39 where the Court held that local government has a duty “to ensure that services are provided in a sustainable manner to the communities they govern”.

⁹² *PE Municipality* (note 12 above) para 56.

⁹³ Section 152(1) of the Constitution. See also: Section 23 of the Municipal Systems Act 32 of 2000 (“Systems Act”) requires municipalities to undertake development-oriented planning. on development planning. These aspects of municipal goals and therefore functions are re-iterated in section 4(2) of the Systems Act (see also: Sections 11(3), (b), (e), (f), (g), (l) of the Systems Act), and are in turn reflected in the duties of municipal administrators (section 6(2) of the Systems Act).

- ii. The powers and functions assigned to municipalities also make them suitable to assist in the provision of alternative accommodation, which is central to eviction cases. These powers and functions are set out in section 156 of the Constitution and include a municipality's executive authority and right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.⁹⁴ Pursuant to section 156(1)(a) of the Constitution, a municipality has executive authority and the right to administer, amongst other things, building regulations, municipal planning, certain municipal public works. These fall under Part B of Schedule 4 to the Constitution.
- iii. The Systems Act also recognises the important role of municipality as the intermediary between people and government by requiring that it “develop a culture of municipal governance that complements formal representative government with a system of participatory governance”. The Constitutional Court has noted that local government is “the main point of contact with the community.”⁹⁵ Specifically, the importance of local government's intermediary role is enhanced in “the realm of emergency situations in which it is best situated to react to, engage with and prospectively plan around the needs of local communities.”⁹⁶ This will involve creating conditions suitable for community participation in municipal governance, which includes strategic decisions relating to the provision of municipal services in terms of chapter 8 of the Systems Act,⁹⁷ and the preparation, implementation and review of its integrated development plan in terms of chapter 5 of the Systems Act.⁹⁸ In cultivating a culture of community participation, the municipality is required to establish appropriate mechanisms, processes and procedures to enable the local community to participate in municipal affairs. These mechanisms appear to reject “top-down” processes. Instead, participatory mechanisms include extensive consultation, through written complaints,

⁹⁴ Section 156(1)(a) of the Constitution.

⁹⁵ *Blue Moonlight* (note 63 above) para 45.

⁹⁶ *Ibid* para 57.

⁹⁷ Section 16(1)(a)(i) of the Systems Act.

⁹⁸ Section 16(1)(a)(v) of the Systems Act.

public meetings and consultative sessions with locally recognised community organisations and traditional authorities.⁹⁹

The White Paper on Local Government cites two purposes¹⁰⁰ (amongst others) of the new developmental local government, namely maximising social development and economic growth, and democratising development. The first purpose is explicitly, but not exclusively linked to the provision of “basic household infrastructure”, which is distinct from housing. It requires that local government act based on pro-poor development goals, including ensuring that the overall economic and social conditions of the locality are conducive to the creation of employment opportunities.¹⁰¹ It is the second mentioned purpose of democratising development that is of particular interest:

Municipal Councils play a central role in promoting local democracy (...) Municipalities must adopt inclusive approaches to fostering community participation, including strategies aimed at removing obstacles to, and actively encouraging, the participation of marginalised groups in the local community. At the same time, the participatory processes must not become an obstacle to development, and narrow interest groups must not be allowed to “capture” the development process. It is important for municipalities to find ways of structuring participation which enhance, rather than impede, the delivery process.¹⁰²

The role of municipalities as determined by the courts is also in line with the approach of housing legislation:

- i. The Housing Act makes points of involving municipalities in housing development,¹⁰³ supporting municipalities in their functions in terms of the

⁹⁹ Section 17(2)(a – d) of the Systems Act.

¹⁰⁰ The term used in the White Paper on Local Government (note 84 above) is “characteristics”.

¹⁰¹ Ibid section B, para 1.1.

¹⁰² Ibid section B, para 1.3. See also: para 1.4, which suggests that municipalities facilitate development through “[r]esponsive problem-solving and a commitment to working in open partnerships with business, trade unions and community-based organisations.”

¹⁰³ See section 2(1) of the Housing Act which sets out the general principles applicable to all spheres of government, some of which municipalities are by their nature, best placed to manage (namely, the

Housing Act,¹⁰⁴ and creating mechanisms to ensure and regulate municipal administration of national housing programmes.¹⁰⁵

- ii. The Emergency Housing Policy contained in the National Housing Code places municipalities at the centre of the provision of emergency relief to persons who have been evicted or who are facing the threat of imminent eviction,¹⁰⁶ by tasking them with determining if an application for emergency assistance should be made; initiating, planning and formulating the application; and if the application is approved, implementing the particular emergency housing programme.¹⁰⁷ Where municipalities cannot address the situation out of their own means, they have a right to apply to the province for financial assistance.¹⁰⁸ At the same time, municipalities have a duty to fund emergency housing needs, and so must budget for such eventualities.¹⁰⁹ The duty is based on the text of the Emergency Housing Policy itself, and a contextual reading of that policy:¹¹⁰ Firstly, the Emergency Housing policy speaks of “initiating” applications for emergency housing projects,¹¹¹ “pro-active planning”,¹¹² and, after finding that an emergency situation warranting intervention exists, considering whether “the municipality can itself address the situation utilising its own means”.¹¹³ Secondly, the municipality will likely be empowered and obliged to raise its own funds if it is to “take all

consulting principles in subsections (b), (d), (ix). See also: sections 3(2)(f)(iii); 7(1) of the Housing Act.

¹⁰⁴ Sections 3(2)(e) and 7(2)(e – f) of the Housing Act.

¹⁰⁵ Section 10 of the Housing Act.

¹⁰⁶ Clause 2.3.1(e) of the Emergency Housing Policy.

¹⁰⁷ Clauses 2.3.1; 2.6.1; 2.13.1 of the Emergency Housing Policy.

¹⁰⁸ Clause 3.2 of the Emergency Housing Policy. It is emphasised that this right to funding does not preclude a municipality using its own funds (ibid 67).

¹⁰⁹ *Blue Moonlight* (note 63 above) para 67.

¹¹⁰ The citations which follow are based on the reasoning of the Constitutional Court (ibid paras 53; 66).

¹¹¹ Clause 4.1 of the Emergency Housing Policy.

¹¹² Clause 6.1(b) of the Emergency Housing Policy.

¹¹³ Clause 6.1(c) of the Emergency Housing Policy.

reasonable and necessary steps to ensure access to adequate housing”,¹¹⁴ provide services efficiently,¹¹⁵ and contribute to the progressive realisation of the right to have access to housing (amongst other rights).¹¹⁶

From a financial perspective, municipal councils have and must exercise their power to impose rates and other taxes, levies and duties, and raise loans.¹¹⁷ The role which a municipality has to play in its own financing is similarly recognised under section 4(2) of the Municipal Systems Act.

Despite the constitutional restructuring of state power, which decentralises power by enhancing the role of local government and allowing it (relative) autonomy, and the continuing increases to local government’s share of national revenue,¹¹⁸ reality paints a picture of a floundering sphere of government, struggling to deal with its financial responsibilities and suffering from a credibility crisis.¹¹⁹ The Auditor-General has announced that only nine out of 278 municipalities had clean audits in the 2011/2012 financial year.¹²⁰ These problems facing local government invariably impact on its ability to fulfil its socio-economic obligations, and so impact on litigation where litigants ultimately seek the vindication of their socio-economic rights.

However, it would be undesirable for the province to be joined as a matter of course, despite the widespread financial difficulties faced by municipalities, because this approach is at odds with the autonomy afforded to local government under the Constitution. As Jafta J has held, “[e]ach sphere is granted the autonomy to exercise

¹¹⁴ Section 9 of the Housing Act.

¹¹⁵ Section 4(2) of the Municipal Systems Act.

¹¹⁶ Section 4(2)(j) of the Municipal Systems Act.

¹¹⁷ Section 160(2)(b – d) of the Constitution. See also: Section 75A of the Municipal Systems Act.

¹¹⁸ National Treasury 2011 Local Government Budgets and Expenditure Review (“2011 Local Government Review”), accessed at

[http://www.treasury.gov.za/publications/igfr/2011/lg/02.%202011%20LGBER%20-%20Final%20-%202013%20Sept%202011%20\(renumbered\).pdf](http://www.treasury.gov.za/publications/igfr/2011/lg/02.%202011%20LGBER%20-%20Final%20-%202013%20Sept%202011%20(renumbered).pdf) on 27 August 2013, 17.

¹¹⁹ Ibid 22 – 24.

¹²⁰ Available at <http://www.bdlive.co.za/national/2013/08/14/auditor-general-warns-that-state-of-municipal-finances-is-worsening>, accessed on 25 August 2013.

its powers and perform its functions within the parameters of its defined space.”¹²¹ The Emergency Housing Policy specifically tasks municipalities with the management and implementation of emergency relief, and this allocation together with local government autonomy ought to be respected.

As discussed, the rules of the High Court and Constitutional Court require the joinder of any party either if that party either has a direct and substantial interest in any order the court might make, or if the court’s order cannot be sustained or carried into effect without prejudicing that party. When alternative accommodation is being sought, and a municipality is precluded from evicting residents without providing alternative accommodation, the relevant province should only be joined to proceedings if a municipality has followed the correct course and applied to the province for financial assistance.¹²² If the municipality has not followed this approach, but avers that it does not have adequate resources to provide the alternative accommodation, the province should similarly be joined to proceedings. This approach accords with the obligation on provincial governments to “support and strengthen the capacity of municipalities (...) to perform their functions.”¹²³ In the *First Certification Judgment*, the Constitutional Court was of the view that the province’s power to “support” local government was aimed at ensuring that the latter performed its constitutional duties effectively, and therefore the duty of support “can be employed by provincial governments to strengthen existing local government structures, powers and functions and to prevent a decline or degeneration in such structures, powers and functions.”¹²⁴ The approach of the Constitutional Court in *Blue Moonlight* is worth referencing: While the court recognised the combined responsibility of all spheres of government in terms of section 26 of the Constitution,¹²⁵ the non-joinder of the provincial government in *Blue Moonlight* was “not fatal” given the primary role which local government is required to play (compared to the secondary role of the

¹²¹ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 43.

¹²² See the discussion under point ii above.

¹²³ Section 154(1) of the Constitution. See also: section 155(6)(a) of the Constitution.

¹²⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 371.

¹²⁵ *Blue Moonlight* (note 63 above) para 42.

provincial government) in the provision of housing.¹²⁶ This procedural question informs the substantive conclusion which the court in *Grootboom* never reached: That municipalities have an independent responsibility to provide alternative accommodation to evicted persons.

¹²⁶ Ibid paras 45 – 46.

CHAPTER 4

The *Grootboom* effect ¹²⁷

The decision of the Constitutional Court in *Grootboom* was its first interpretation of section 26 of the Constitution. This decision provides the foundation of every subsequent decision relating to section 26 of the Constitution. Accordingly, its key findings and its effect are detailed below.

1. AN ANALYSIS OF GROOTBOOM

The story has been told many times, so this dissertation provides only a brief outline of the facts: After being evicted from privately-owned land, Irene Grootboom and other unlawful occupiers of a sport field in Wallacedene sought an order from the Cape High Court directing the government, including provincial and local authorities, to provide them with either “adequate basic temporary shelter or housing”, or to provide the occupiers who were children with basic nutrition, shelter, healthcare and social services to the children. ¹²⁸ The actual eviction by the owner of the land was not challenged. ¹²⁹ Instead, the case concerned section 26(1) and (2) of the Constitution, as opposed to the anti-eviction provision (subsection (3)).

On an appeal by the government, the Constitutional Court indicated it would be difficult to give a minimum core content to the right to have *access* (as it emphasised) ¹³⁰ to adequate housing (as qualified by the duty on the state to take reasonable legislative and other measures within its available resources to achieve

¹²⁷ The purpose of this section of this dissertation is to illustrate the impact of the decision in *Grootboom* (note 3 above) on subsequent eviction cases which have come before the courts. It is not a critique of the decision.

¹²⁸ Ibid para 13.

¹²⁹ Ibid para 10.

¹³⁰ Ibid para 35. As an aside, it is always convenient to point out at a legal level that the Constitution does not guarantee people houses; instead, it grants them a “right to have access to adequate housing.” However, it peoples ideals, hopes and demands are running on the fuel of improper election promises, including the promise of houses.

progressive realisation of the right).¹³¹ Instead, a court's role is to evaluate the housing programme which the state had adopted in terms of its reasonableness.¹³² In order to be reasonable, a housing programme must, amongst other things:

- (i) clearly allocate responsibilities, tasks and resources to the different spheres of government;¹³³
- (ii) be “balanced and flexible”, amenable to continuous review, attentive to “short, medium and long term needs”;¹³⁴ and
- (iii) go beyond measures which will ensure statistical success in housing delivery, and cater *in addition* for those in desperate or emergency situations.¹³⁵

These obligations crafted by the court reflect the core themes of the judgment – that everyone, including local government has a role to play in housing delivery, that policies should be flexible, and that the policies must cater for the most vulnerable. In other words, a multi-tiered, flexible and sensitive approach is required.

The right to have access to adequate housing, read with the state's duty in terms of section 26(2) of the Constitution, meant that the national government is responsible for (i) devising a framework and “policies, programmes and strategies [which] are adequate to meet the state's section 26 obligations”, (ii) allocating national revenue to the other spheres of government on an equitable basis, and (iii) together with the provincial governments, ensuring that executive obligations imposed by the housing

¹³¹ Ibid paras 32 – 33. The idea of socio-economic rights having a minimum core content has since be explicitly rejected by the Constitutional Court (*Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) paras 34 – 39).

¹³² *Grootboom* (note 3 above) paras 41 – 43.

¹³³ Ibid para 39.

¹³⁴ Ibid para 43.

¹³⁵ Ibid paras 44; 66. Elaboration is later provided as to the people in this category. They include “people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition” (para 52).

legislation are met.¹³⁶ In this way, *Grootboom* does not preclude local government fulfilling a central role, and it must be understood that the *Grootboom* decision was merely addressing a rather empty situation where there was no “national policy to get the ball rolling [on emergency accommodation]” and to enable the local sphere “to do anything meaningful” on the subject.¹³⁷ It is arguable that in addressing one empty situation, the court created another empty situation when it failed to specifically allocate responsibility for Mrs Grootboom’s alternative accommodation to a particular sphere of government. This is no longer the situation and the present National Housing Policy envisages a vital role for local government to play in emergency housing situations.

In *Grootboom*, the state’s housing programme was generally commended for its allocation of responsibilities, and its structure, scope and objectives.¹³⁸ However, the court held that the programme could not be considered reasonable because it failed to provide interim relief for those who were facing crisis situations and were in “desperate need”, in circumstances where the permanent housing plan would be rolled out over many years as opposed to over “a reasonably short time”. Secondly, the policy’s failure to address immediate crises is counterproductive to the overall plan because the predicament of those rendered homeless and helpless “inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme.”¹³⁹

Stuart Wilson articulated the effect of *Grootboom* on eviction matters:

The consequences of this interpretation of the positive obligations of the state in giving effect to the right of access to adequate housing were to prove wide-ranging for the enforcement of the right to protection from arbitrary evictions entrenched in section 26(3) of the Constitution and the PIE Act.¹⁴⁰

¹³⁶ Ibid paras 40; 66 – 68.

¹³⁷ *Blue Moonlight* (note 63 above) para 56.

¹³⁸ Ibid para 54.

¹³⁹ Ibid para 65.

¹⁴⁰ Wilson (note 32 above) 272.

Grootboom has related the obligation to facilitate access to adequate housing to alternative or temporary accommodation pending the final fulfilment of the obligation. It created the idea of providing interim housing which informs eviction proceedings today:

[The State] owes a duty to landless people to provide them with access to adequate housing. It is this duty which prevents government from evicting landless people from its land and rendering them homeless. As long as this duty operates, the landless may not be evicted until alternative accommodation is found.¹⁴¹

The court also dabbled with the idea of engagement with unlawful occupiers, before it gained the status which it presently has in eviction matters:

The respondents began to move onto the New Rust land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would have also thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand.¹⁴²

This idea of engagement can be regarded as the fourth theme of the judgment, albeit peripheral.

Despite the subsequent jurisprudence which has built on the foundations laid by the Constitutional Court in *Grootboom* on the subjects of alternative accommodation and community engagement, the old questions asked of the seminal socio-economic rights judgment are still relevant: Did *Grootboom* go too far?¹⁴³

¹⁴¹ *Joe Slovo* (note 29 above) para 214.

¹⁴² *Ibid* para 87.

¹⁴³ The contrary question is also often posed: Did *Grootboom* not go far enough? See for example: D Bilchitz “Giving socio-economic rights teeth: The minimum core and its importance” (2002) 119 *SALJ* 484. However, these critiques of the judgment do not concern the present work.

The text of the Constitution obliges the state to “take reasonable legislative and other measures, within its available resources, to achieve the *progressive realisation* of [the right to have access to adequate housing]” (emphasis added).¹⁴⁴ The obligation on the state is so qualified that a great portion of the right to have access to adequate housing could be carved out by considerations of reasonableness, resources, and regulated delivery. Such an approach which over-emphasises the qualifications on the state’s obligation has the potential to turn the right into a mere shadow of what it could be. On the contrary, the court’s approach in *Grootboom* was faithful to the legislative theme of progressive realisation, but localised this theme purposively and contextually in light of the rights of the people. It therefore declared that section 26(2) of the Constitution requires the state develop a policy to progressively realise housing rights, and that this policy (in order to be reasonable) must provide immediate temporary relief to the homeless and most vulnerable people in the housing queue. As the Cape Metropolitan state housing programme which governed Mrs Grootboom and the other residents of Wallacedene did not cater for their desperate situation, it was unreasonable. The court did not order the state to provide temporary housing, but rather ordered it to develop a policy which would.¹⁴⁵ In other words, the housing right must be preserved, but the housing obligations must respect the capacity of the state and reject a myopic approach to the question of housing.

2. THE EFFECT OF GROOTBOOM

The decision of the Constitutional Court in *Grootboom* introduced the notion of interim relief for those living without shelter and in intolerable conditions. In this way, it breathed life into subsequent eviction applications which have come before the courts. It is now accepted that any policy which does not provide temporary shelter for “people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations” is not a reasonable measure under section 26(2) of the Constitution.¹⁴⁶ The challenge facing policy-makers in the upper

¹⁴⁴ Section 26(2) read with 26(1) of the Constitution.

¹⁴⁵ *Grootboom* (note 3 above) para 99.

¹⁴⁶ *Ibid* para 52.

echelons of government is achieving a balance between providing temporary housing on an ad hoc basis in emergency situations, and ensuring progressive realisation of the right of people to have access to adequate housing.

Following the decision of the Constitutional Court in *Grootboom*, the National Housing Code was enacted under section 4 of the Housing Act. It contains the national housing policy and sets out the principles, guidelines and standards that apply to the various programmes effected by the state in relation to housing. Chapter 12 of the Code was introduced after *Grootboom*. It is entitled “Housing assistance in emergency housing circumstances” and provides for assistance to people who find themselves in a housing emergency for reasons beyond their control.¹⁴⁷ The unenviable task of implementation falls to local government, although it should be assisted by the province where necessary, as discussed in the previous chapter.

Implementation is a question of human resources, energy and capacity. The difficulties of planning for such contingencies were raised by the City of Johannesburg in *Blue Moonlight* where the City argued that it could not “predict, plan and budget for” emergency situations due to their uncertain nature.¹⁴⁸ The court rejected this argument, concluding:

[T]he budgetary demands for a number and measure of emergency occurrences are at least to some extent foreseeable, especially with regard to evictions. Predictions can be made on the basis of available information. For example, surveys may serve to establish how many buildings in a municipality are dilapidated and might give rise to sudden eviction proceedings.¹⁴⁹

In addition to the planning difficulty, is the inescapable question of financial resources and the obvious point that, once resources are invested in the provision of temporary accommodation, they are automatically diverted away from another housing-related project. At the beginning of 2013, Finance Minister Pravin Gordhan announced that funding for improving human settlements will grow from R26.2

¹⁴⁷ *Blue Moonlight* (note 63 above) para 27.

¹⁴⁸ *Ibid* para 62.

¹⁴⁹ *Ibid* para 63.

billion to R30.5 billion over the next three years, including an allocation of R1.1 billion to support the informal settlement upgrading programme in mining towns. Social housing would receive an additional allocation of R685 million.¹⁵⁰

The resource question is a complicated one: There is a need to be pragmatic as “it would be quite inappropriate for a court to order an organ of state to do something that is impossible, especially in a young constitutional democracy.”¹⁵¹ There is also a need to move away from budget as that financial ball-and-chain, existing as an excuse for our refusal to shift and embrace the poor into our sphere of existence. The courts often gesture towards “budget” and “resources”, however, the question of whether there are sufficient resources is one that, in part, can only be properly answered when issues of mismanagement and corruption are resolved:

- i. As an indicator of inadequate management, the Department of Human Settlements nationally failed to spend R886 million (that is, four per cent) of its budget for the 2012/2013 financial year. This amount would consequently be surrendered to the National Treasury.¹⁵²
- ii. On the subject of corruption, the eThekweni Municipality housing department is a useful example as it experiences corruption at almost every level. The Manase Report (as one indicator) has implicated officials in the illegal rental and sale of RDP houses, and in irregular expenditure in respect of various housing projects (specifically, the Westrich, Burbreeze and Hammond Farm housing projects).¹⁵³

¹⁵⁰ Budget speech (note 7 above).

¹⁵¹ *Blue Moonlight* (note 63 above) para 69.

¹⁵² C Dodd “MPs upset at housing underspend.” *Daily News* 14 March 2013, accessed at <http://www.iol.co.za/dailynews/news/mps-upset-at-housing-underspend-1.1486106> on 17 March 2013.

¹⁵³ Statement by Co-operative Governance and Traditional Affairs MEC Nomusa Dube on progress in respect of the implementation process of the recommendations of the Manase Report and announcement of the release of the full report on 4 June 2012, accessed at http://www.durban.gov.za/Resource_Centre/Press_Releases/Pages/Manase-Report-Available-To-Public.aspx on 25 August 2013.

Corruption and mismanagement threaten to undo the relative good of the more than two million houses built by the state since 1994. Although housing departments would need to be cleansed in these respects before the question of resources can be fully addressed, the interlinked rights of the population and obligations of government demand that tangible relief be provided in spite of irregular spending and mismanagement. The Constitutional Court in *Blue Moonlight* followed this reasoning:

This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.¹⁵⁴

Similarly, a municipality logically and morally cannot be entitled to argue that because of the illegitimate (and criminal) use of public funds, it does not have sufficient resources to meet the legitimate needs of its constituents. Additionally, a provincial government, which bears a duty of financial support as outlined, cannot decide to withhold funding to a municipality on the basis of corruption. Speaking in the context of the Eastern Cape health department, Mark Heywood (of SECTION27) rejected the excuse of "corruption and looting on the ground", pointing out that government "is clearly responsible for putting systems in place to prevent corruption and to report it. If those systems aren't working or not in place, [it is] failing in [its] job."¹⁵⁵ The issue of corruption will need to be addressed simultaneously with but separately from the immediate needs of the poor population. In short, where resources are available to meet people's most desperate needs, these must be used and excuses based on mistake and misuse are inadequate.

Despite the enormous impact of *Grootboom* on housing jurisprudence, the decision failed to allocate appropriate responsibilities to particular spheres of government. The wisdom of this choice is not the concern of the present dissertation as *Grootboom*

¹⁵⁴ *Blue Moonlight* (note 63 above) para 74.

¹⁵⁵ M Malan "Medics 'sabotaged' E Cape health" *Mail & Guardian* (October 25 to 31 2013) 13.

nevertheless laid a foundation upon which obligations could be specifically allocated to spheres of government. At present, the major obligations in evictions lie with municipalities who must engage with inhabitants facing evictions and who must, where necessary, provide them with alternative accommodation. It is clear that the imposition of these obligations at local government level requires significant budgetary and planning commitments by individual municipalities. Such obligations should not, however, be regarded as unduly onerous in a system of multi-level government where municipalities are the closest sphere to people and therefore most structurally suitable for dealing with specific residential needs of their respective constituents.

CHAPTER 5

***Grootboom*'s multi-tiered, flexible and sensitive approach and the emergence of specific responsibilities for local government**

Grootboom articulated a multi-tiered, flexible and sensitive approach to housing which required the involvement of all spheres of government, the constant review and built-in flexibility of its housing policy in order to keep up with changing needs, and responsiveness to the homeless and most vulnerable members of the society. From this framework created by the court, alternative accommodation and community engagement have emerged as the pillars of section 26, and as the responsibilities of local government.

1. ALTERNATIVE ACCOMMODATION

1.1. Is the provision of alternative accommodation in emergency situations an absolute duty on government?

The Constitutional Court in *PE Municipality* tentatively held that the question of alternative accommodation is a factor in the determination of what is just and equitable, but is not determinative of the question of justice and equity.¹⁵⁶ By the time of its decision in *Joe Slovo* the court appeared to be moving towards the idea that “government may not evict landless people from its land and render them homeless”, based on its duty in terms of section 26(2) of the Constitution.¹⁵⁷ From this, the view arose that the provision of alternative accommodation is “vital to the justice and equity evaluation and a crucial factor in the enquiry.”¹⁵⁸

¹⁵⁶ *PE Municipality* (note 12 above) para 58; see also para 28: “[A court]should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.”.

¹⁵⁷ *Joe Slovo* (note 29 above) para 214.

¹⁵⁸ *Changing Tides* (note 42 above) para 15.

Despite these comments, the present position of courts shies away from anything unequivocally in favour of the state being required to provide alternative accommodation in the case of every eviction resulting in homelessness:

[I]n the present situation in South Africa, where housing needs are so great and resources so limited, there cannot be an absolute right to be given accommodation. Specifically in regard to s[ection] 6(3)(c) of PIE, which requires the court to have regard to the availability of alternative accommodation or land, it has said that there is no unqualified constitutional duty on local authorities to ensure that there cannot be an eviction unless alternative accommodation has been made available.¹⁵⁹

The reluctance of courts to create a hard-and-fast rule on the provision of alternative accommodation is understandable: A property owner cannot, as a rule, be expected to be deprived of his rights while the provision of alternative accommodation is being addressed,¹⁶⁰ and the provision cannot be interpreted to allow long-term permanent housing measures to be undermined.

Despite its theoretical cautions, in practice, the courts have tended to treat alternative accommodation as a prerequisite to ordering evictions:

Contentions that [municipalities] were not obliged to provide emergency housing (*Grootboom*); alternative land on a secure basis (*Port Elizabeth Municipality*); use their own funds to provide emergency accommodation (*Rand Properties*); and provide emergency accommodation to persons evicted at the instance of private property owners (*Blue Moonlight*) have all been advanced and rejected by [the Supreme Court of Appeal] and the Constitutional Court.¹⁶¹

The duty to provide alternative accommodation has even been enforced in the context of the National Building Regulations and Building Standards Act 103 of 1977,

¹⁵⁹ Ibid.

¹⁶⁰ Ibid para 16.

¹⁶¹ Ibid para 39. See also: *Lingwood* (note 75 above) para 32; *Sailing Queen Investments* (note 75 above) paras 17 – 19; *Ark City of Refuge v Bailing* [2011] 2 All SA 195 (WCC) para 21; *Pedro v Transitional Council of the Greater George* [2001] 1 All SA 334 (C) para 14; *City of Johannesburg v Rand Properties (Pty) Ltd* [2007] 2 All SA 459 (SCA) para 76.

apartheid-era legislation which ostensibly permitted evictions by a municipality at the peril of occupiers of buildings deemed to be dangerous. Section 12(4)(b) of the Act provides:

If the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered (...) order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice.

Although the sub-section makes no specific reference to alternative accommodation being provided to those evicted in terms of this provision and on the grounds of health and safety, the Constitutional Court has held that there is link between the right of a municipality to evict persons on the grounds of health and safety, and the duty under section 26(2) of the Constitution, as interpreted in *Grootboom*, to provide alternative accommodation to those rendered homeless by the eviction:

Municipal officials do not act appropriately if they take insulated decisions in respect of different duties that they are obliged to perform. In this case the City had a duty to ensure safe and healthy buildings on the one hand and to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses on the other. It cannot be that the City is entitled to make decisions on each of these two aspects separately, one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided. The housing provision and the health and safety provision must be read together. There is a single City. That City must take a holistic decision in relation to eviction after appropriate engagement taking into account the possible homelessness of the people concerned and the capacity of the City to do something about it.¹⁶²

The duty to provide alternative accommodation cannot be avoided on the basis that it is not the concern of a specific unit within the municipality. A co-ordinated approach is required and compartmentalising municipal functions is an unacceptable avoidance of local government's mandate to provide alternative accommodation.

¹⁶² *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC) para 45 (“*Occupiers of 51 Olivia Road*”).

1.2. Does the duty to provide alternative accommodation depend on whether it is a private or a state eviction?

We have already seen that, in theory, people left homeless following an eviction do not have an unqualified right to temporary accommodation provided by the state. The Supreme Court of Appeal has, however, distinguished between private and state evictions in this regard, noting that where an organ of state seeks the eviction, it is “relatively straightforward” to link the eviction order with the availability of alternative accommodation or land, because the state (as a composite) is responsible for the provision of housing.¹⁶³

Certainly, in cases involving masses of people, state intervention is required to alleviate, amongst other things, the position of the overwhelmed private owner. When 50 hectares¹⁶⁴ of land owned by Modderklip Broedery (Pty) Ltd became occupied by approximately 40,000 people, the company was at a loss even after it successfully obtained an eviction order. The company’s eviction attempts in respect of such a mass of people brought to light the state’s obligations to both land owners¹⁶⁵ and unlawful occupiers who live with the precarious and constant status of being potentially homeless (until their fears are laid to rest by actually becoming homeless). Firstly, the Constitutional Court per Langa ADCJ held that the state is “obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders”.¹⁶⁶ In other words, the state potentially has a role to play in every large-scale eviction. Private owners cannot be expected to manage, in accordance with PIE, mass evictions,¹⁶⁷ which do not impact simply private property rights but also “stability and peace” generally.¹⁶⁸

¹⁶³ *Changing Tides* (note 42 above) para 17.

¹⁶⁴ *Modderklip* (note 29 above) para 8.

¹⁶⁵ The state in this case was also ordered to pay compensation to Modderklip Broedery (ibid para 51).

¹⁶⁶ Ibid para 43.

¹⁶⁷ Ibid para 44.

¹⁶⁸ Ibid paras 45 – 47.

The role of the state in comparatively minuscule private evictions was recently considered, and a similar approach was adopted: In *Blue Moonlight*, 86 unlawful occupiers of a building in Johannesburg would face homelessness if an eviction order was granted in favour of a (private) owner who wanted to develop the property. The City of Johannesburg argued firstly that it was not obliged to provide temporary housing to the subjects of private evictions.¹⁶⁹ This is in effect an argument that it would be just and equitable to order a *private* eviction which would result in homelessness.¹⁷⁰ Developing the *Grootboom* principle that “a reasonable housing programme cannot disregard those who are most in need”,¹⁷¹ the court held that there is no *prima facie* difference in need between those facing homelessness as a result of a private eviction, and those facing homelessness as a result of a state eviction.¹⁷² Therefore, a policy which provides temporary accommodation to victims of state evictions while excluding victims of private evictions, without even considering their personal circumstances, is unreasonable.¹⁷³

The court therefore declared the City of Johannesburg’s housing policy unconstitutional to the extent that it excluded the occupiers and other victims of private evictions from being considered for temporary accommodation in emergency situations. It went a step further and also ordered the City to provide the occupiers who had not already voluntarily vacated the property with temporary accommodation within four months of the judgment being handed down.¹⁷⁴

The following rule emerges from the court’s approach to the competing rights of owners and unlawful occupiers: An owner of property is entitled to an eviction order against unlawful occupiers, and has no obligation to provide “free housing” to people.¹⁷⁵ However, certain considerations may require that the owner’s right to an eviction order be held in abeyance, as a court will only order an eviction on a date

¹⁶⁹ *Blue Moonlight* (note 63 above) paras 79 – 80.

¹⁷⁰ *Ibid* para 32.

¹⁷¹ *Ibid* para 90.

¹⁷² *Ibid* para 95.

¹⁷³ *Ibid* para 92.

¹⁷⁴ *Ibid* para 104.

¹⁷⁵ *Ibid* paras 31; 40; 97.

which is just and equitable based on relevant circumstances, which include the availability of alternative housing for the occupiers. In this case, the relevant circumstances included the facts that the occupiers had been in occupation for more than six months, some of them had occupied the property for several years and their occupation was once lawful, the property owner was aware of the occupiers' presence when it bought the property, and the eviction of the occupiers would result in their homelessness whereas there was no competing risk of homelessness on the part of the owner (a juristic person which sought to use the property for commercial purposes).¹⁷⁶

1.3. What constitutes alternative accommodation?

In a decision confirmed by the Constitutional Court (*Blue Moonlight*), the Supreme Court of Appeal rejected a High Court order requiring the City of Johannesburg to pay a landowner an amount equivalent to fair and reasonable monthly rental until the eviction of the unlawful occupiers, and then to provide the occupiers with temporary accommodation, or to pay R850 per month to each occupier or household head.¹⁷⁷ Therefore the term “alternative accommodation” in the context of PIE, and evictions resulting in homelessness, would refer to actual accommodation.

The decision of the Constitutional Court in *Joe Slovo*, is instructive on the nature and quality of the accommodation: It prescribed the size (24m² in extent),¹⁷⁸ structures (walls constructed with a substance called Nutec, galvanised iron roofs, individual numbering), services (electricity through a pre-paid meter, toilet facilities with water-borne sewerage, a fresh water supply)¹⁷⁹ and surroundings (tarred roads, situated

¹⁷⁶ Ibid para 39.

¹⁷⁷ *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* (SGHC) unreported case no 11442/2006 of 4 February 2010, unreported, cited in *Blue Moonlight* (note 63 above) para 12. This outright refusal of the concept of financial assistance proposed by the lower court has been criticised for excluding a potentially innovative remedy (see Dickinson (note 42 above) 477).

¹⁷⁸ This aligns with the minimum size of a shelter prescribed in the Emergency Housing Policy, para 2.5(C).

¹⁷⁹ These along with access roads form part of the “basic municipal engineering services” provided in terms of the programme for temporary settlements under the Emergency Housing Policy, para 2.5(A).

within reasonable proximity of a communal ablution facility) of temporary residential units provided to relocated residents in the course of slum upgrading.¹⁸⁰ The court acknowledged that “much of this temporary accommodation will be at least in physical terms better than that at [the original settlement]. It is certainly more hygienic and less dangerous.”¹⁸¹

1.4. The question of resources (revisited)

In respect of providing alternative accommodation, the municipal budget is a consideration,¹⁸² but (according to the Constitutional Court in *Blue Moonlight*) “it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.”¹⁸³ In fact, the processes in terms of which a municipal budget is passed envision community involvement (though these were not mentioned by the court deciding *Blue Moonlight*): (i) section 16(1)(a)(iv) of the Systems Act extends the obligation on the municipalities to cultivate a culture of participation in its affairs to include “the preparation of its budget; and on a lesser note (ii) section 20(2)(b) of the Systems Act prohibits the exclusion of the public and media from the part of a municipal council meeting in which a budget is being tabled.

In *Blue Moonlight*, it was relatively easy for the Constitutional Court to reject the City’s argument that it had not budgeted for the provision of temporary accommodation to the homeless victims of private evictions and therefore could not provide these particular people with temporary accommodation. This is because the City’s housing budget was based on an erroneous understanding of its duties. The court was not faced with the more difficult question of determining the City’s obligation to provide temporary accommodation based on its actual financial resources as the City did not provide the court with information relating to its general

¹⁸⁰ *Joe Slovo* (note 29 above) para 7.10.

¹⁸¹ *Ibid* para 105.

¹⁸² *Occupiers of 51 Olivia Road* (note 162 above) para 18; *Blue Moonlight* (note 63 above) paras 86; 88; *Changing Tides* (note 42 above) para 15.

¹⁸³ *Blue Moonlight* (note 63 above) para 74.

budget and “overall financial position”.¹⁸⁴ This was also the case for the Supreme Court of Appeal hearing the same matter where it noted, amongst other things, that the City spoke only vaguely about the affordability of meeting demands for housing, it had been operating in a financial surplus for the past year, and it did not attempt to show or even allege that its general budget could not meet the temporary housing needs of the occupiers in this case.¹⁸⁵ (The finding of the Supreme Court of Appeal is relevant as the Constitutional Court fell back on this finding in the course of its judgment stating that it was not persuaded that the findings of the Supreme Court of Appeal were wrong in any way.¹⁸⁶)

As discussed earlier, the argument of financial resources can only be fully addressed when personnel issues relating to management and corruption are resolved. However, when a claim for temporary relief in the form of the provision of accommodation comes before a court, the court seized of the matter cannot practicably go as far as straightening matters of mismanagement and corruption out. In these cases, it will have to be accepted that the genuine lack of resources in a particular municipality presents an absolute limitation on the realisation of the right to temporary accommodation first articulated in *Grootboom*. Without delving into great detail, a court and unlawful occupiers faced with this dilemma of municipal-level budgetary constraints, could consider the possibility of joining the national sphere of government to the litigation based on the dependence of local government on the national sphere for an equitable share of national revenue. In fact national government is obliged to allocate an equitable share of national revenue to local government.¹⁸⁷

1.5. Moving away from “concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances”

The current jurisprudence relating to unlawful occupiers marks a stark departure from the pre-*Grootboom* jurisprudence of courts, which sought to categorise unlawful

¹⁸⁴ *Blue Moonlight* (note 63 above) para 49.

¹⁸⁵ *Ibid* para 46.

¹⁸⁶ *Ibid* para 50.

¹⁸⁷ Section 214(1) of the Constitution read with schedule 3 to the Division of Revenue Act 2 of 2013.

occupiers as “queue-jumpers”, and social deviants who stood to be evicted regardless of the circumstances of their occupation and the consequences of their eviction.¹⁸⁸

In the *PE Municipality case*, 68 people (almost one-third being children) erected and inhabited 29 shacks, unlawfully built on privately-owned, but undeveloped land zoned for residential use.¹⁸⁹ Many of the families resided on the land for eight years.¹⁹⁰ They had never applied to the municipality for housing.¹⁹¹ 1,600 of their “neighbours” signed a petition with a view to evicting them, despite the fact that the owners of the land (also signatories to the petition) gave no indication that they required it for use at that stage. Responding to the petition, the municipality applied for an eviction order against the occupiers, in terms of section 6 of PIE.¹⁹² The municipality told the community that they could move to Walmer Township, a proposal which they rejected on the basis that Walmer Township was “crime-ridden and unsavoury, as well as over-crowded” and that in any event they would, without secure tenure, remain vulnerable to eviction despite the change in location.¹⁹³ In these circumstances, the municipality argued that “if alternative land was made available to the occupiers, they would effectively be ‘queue-jumping’ (...) disrupting the housing programme and forcing the [m]unicipality to grant them preferential treatment.”¹⁹⁴

The perfunctory categorisation of all unlawful occupiers as subversive and criminal elements hell-bent on disrupting the smooth functioning of government was rejected by the court in favour of a factual analysis. In this case, the occupiers were described as “a community who are homeless, who have been evicted once, and who found land to occupy with what they considered to be the permission of the owner where they

¹⁸⁸ See for example: *Uitenhage Local Transitional Council v Zenza* [1997] 3 All SA 193 (SE) 198, where a group of residents were evicted from vacant municipal land, on which they had sought refuge after a flood had hit their homes.

¹⁸⁹ *PE Municipality* (note 12 above) para 2.

¹⁹⁰ *Ibid* para 49.

¹⁹¹ *Ibid* para 3.

¹⁹² *Ibid* para 1.

¹⁹³ *Ibid* para 3.

¹⁹⁴ *Ibid* para 3.

have been residing for eight years.”¹⁹⁵ The judgment is flanked by similar approaches: Years earlier, in a different matter, the Supreme Court of Appeal held that there was no indication that several thousand occupiers moved onto land in Benoni on Gauteng’s East Rand, with the intention of jumping the queue. Rather, they were on the land because they had nowhere else to go and believed the empty land belonged to the municipality.¹⁹⁶ Similarly, a few years after *PE Municipality*, in *Blue Moonlight*, different occupiers in Johannesburg’s inner city were found not to be queue-jumpers simply because they occupied a privately-owned building. Putting the matter simply, the court held that the occupiers did “not claim permanent housing, ahead of anyone else in a queue. They have to wait in the queue or join it.”¹⁹⁷

In *Changing Tides*, the Supreme Court of Appeal confirmed that the urgent situation of those facing homelessness would take precedence over the housing allocation policy of the municipality (i.e. the housing queue), which generally requires people to apply for housing using the mechanisms set up by the municipality. In emergency situations, a process of this nature in these circumstances “sets in train a bureaucratic process that will inevitably involve delay and probably spawn further disputes and litigation” (for example, disputes as to whether or not the City has an obligation to provide temporary emergency housing to foreign citizens – i.e. most of the unlawful occupiers in this particular matter).¹⁹⁸ Therefore, while “the City is entitled to review the claim of any person seeking temporary emergency accommodation as a result of an eviction,” in emergency circumstances (where health and life are at stake), “the review process should defer to the need for eviction and accordingly take place after the City has provided the evictees with temporary emergency accommodation” regardless of the housing queue.¹⁹⁹ The court, in weighing up evils, held:

¹⁹⁵ Ibid para 55. (The question of time is referred to again in para 57.)

¹⁹⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) para 25.

¹⁹⁷ *Blue Moonlight* (note 63 above) para 93.

¹⁹⁸ *Changing Tides* (note 42 above) para 50.

¹⁹⁹ Ibid para 53.

[The possibility] that some people not entitled thereto may obtain temporary access to temporary emergency accommodation, until their disqualification is discovered was preferable to a large number of people who undoubtedly are entitled to such accommodation being kept out of it and forced to live in unhealthy and potentially life threatening surroundings for longer than necessary, while the City weeds out the few who are not entitled to this benefit. That is especially so as it seems probable that any adverse decision by the City on an individual's right to temporary emergency accommodation may be subject to legal challenge.²⁰⁰

The approach of the courts reflects in some ways the reality that “that there is no single queue.” As Kate Tissington explains, to speak of housing entitlements and delivery in these terms is misleading because the overall housing policy of government is a multi-faceted one which extends beyond the simple question of standing in a line, and sometimes has nothing to do with being registered on a consolidated national housing database. It would be a positive development if courts rejected the language of queues altogether when dealing with these submissions made by any level of government, pointing out that its policies are more complex.²⁰¹

1.6. At the border between charity and justice: The risk of the alternative accommodation requirement

Government, in pursuit of the fulfilment of its duty to provide access to adequate housing has: (i) built houses or provided housing subsidies or assisted with home loans, and (ii) formulated and begun implementing programmes to upgrade informal settlements.²⁰²

In September 2004, the national government adopted a new housing policy entitled “Breaking New Ground: A Comprehensive Plan for the Sustainable Development of Human Settlements” (“BNG”), which is intended to represent the second generation

²⁰⁰ Ibid para 53.

²⁰¹ K Tissington “Jumping the queue – Waiting lists and other myths” *Amandla!* August 2013 (Issue 31) 11 – 13.

²⁰² Available at: <http://www.dhs.gov.za/Content/Housing%20Programmes/Programmes.htm> , accessed on 18 March 2013.

of housing policy.²⁰³ Its overarching objective is sustainable housing development, and one of the focus areas is informal settlements. BNG aims, through a “more responsive state-assisted housing policy” to decrease the formation of informal settlements over time, while acknowledging the existence of informal settlements, and acting respectfully by “shift[ing] the official policy response to informal settlements from one of conflict or neglect, to one of integration and co-operation, leading to the stabilisation and integration of these areas into the broader urban fabric.”²⁰⁴ Between the discourses of sustainable development, slowing the proliferation of informal settlements in urban areas, and integration and co-operation, is the goal of what is popularly referred to as “slum eradication”:

Informal settlements must urgently be integrated into the broader urban fabric to overcome spatial, social and economic exclusion. The Department will accordingly introduce a new informal settlement upgrading instrument to support the focused eradication of informal settlements. The new human settlements plan adopts a phased in-situ upgrading approach to informal settlements, in line with international best practice. Thus, the plan supports the eradication of informal settlements through in-situ upgrading in desired locations, coupled to the relocation of households where development is not possible or desirable.²⁰⁵

BNG provided further that “upgrading” projects would commence with nine pilot projects in each province “building up to full programme implementation status by 2007/8.”²⁰⁶ The first of these is the N2 Gateway Project, which sought to upgrade all informal settlements along the N2 highway in the Western Cape, and whose implementation came before the Cape High Court and shortly thereafter, the Constitutional Court. The project involved over 15,000 households, including the 4,500 households in the Joe Slovo Informal Settlement (“Joe Slovo”).²⁰⁷ It began with the residents of Joe Slovo, who were required to move to Delft, much further

²⁰³ Available at: http://www.thehda.co.za/uploads/images/BREAKING_NEW_GROUND_DOC_copy-2_1.pdf, accessed on 24 July 2013.

²⁰⁴ Ibid para 4.1.

²⁰⁵ Ibid para 3.1.

²⁰⁶ Ibid para 3.1.

²⁰⁷ *Joe Slovo* (note 29 above) para 206.

away from the city centre, so that the better-located Joe Slovo area could be upgraded.

The proposed “relocation” of thousands of (unlawful) occupiers of Joe Slovo was considered by the Constitutional Court to be different from standard eviction cases because “the [state] respondents in effect offer relocation. The people ejected will not be out in the cold.”²⁰⁸ Instead, the people were ejected out into Delft, situated 15 kilometres from their original homes,²⁰⁹ and against their will (which demanded in situ shack upgrades). Commenting on the N2 Gateway Project, Hendricks and Pithouse write:

The project became a simple case of the state seeking a mass forced removal that would leave the poor in ‘temporary relocation areas’ (government-built and -managed shacks) and tiny and badly constructed houses in Delft, out on the far edge of the urban periphery. This in turn would open up well-located land to ‘bankable’ customers. Delivery was segregation.²¹⁰

Ngcobo CJ and O’Regan J both noted that many residents from Joe Slovo had already complied and relocated to Delft, and that this fact strengthened the case against the remaining residents who were seen as holding up progress, prejudicing themselves and those who had already relocated.²¹¹ This account paints a somewhat misleading picture of the residents who had relocated as being willing participants:

The first evictions from Joe Slovo were achieved after a fire when 4,500 people were moved to a “temporary relocation area” in Delft with the promise that they would return to formal housing in the new development – a promise that was later withdrawn. The site, described by Uma Dhupelia-Mesthrie as having “all the hallmarks of an apartheid-era relocation camp”, was named “tsunami” by the new residents” (references omitted).²¹²

²⁰⁸ Ibid para 106.

²⁰⁹ For a full discussion of the justifiability of the relocation to Delft, see the judgment of Ngcobo CJ, *ibid* paras 254 – 257.

²¹⁰ Hendricks & Pithouse (note 37 above) 119.

²¹¹ *Joe Slovo* (note 29 above) paras 259 and 303 respectively.

²¹² Hendricks & Pithouse (note 37 above) 119.

The court apparently ensured the justness and equitability of forced removal based on a part of the order “in terms of which 70% of the houses yet to be constructed at Joe Slovo will be allocated to Joe Slovo residents.”²¹³ Lastly, because the accommodation was on the peripheries of the city centre,²¹⁴ transport to work, school, administrative and health facilities would need to be provided.²¹⁵

In ruling in favour of the state, on the basis of the alternative accommodation being offered to the residents (and on the promise of future consultation, discussed later), with only minimal interrogation of the prescripts of the state’s own housing policy (which requires in situ upgrading unless this is “not possible or desirable”)²¹⁶ and regardless of the road blockades and public protest, an uncomfortable question arises: Is the court allowing alternative accommodation to be used to justify the expulsion of shack dwellers from well-located urban spaces under the guise of development and upgrading?

Certain statements of the court would point to this:

[T]here are circumstances in which this Court and all involved have no choice but to face the fact that hardship can only be mitigated but can never be avoided altogether. The human price to be paid for this relocation and reconstruction is immeasurable. Nonetheless it is not possible to say that the conclusion of the City of Cape Town, to the effect that infrastructural development is essential in the area and that the relocation of people is necessary, is unreasonable. There are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later.²¹⁷

14 months later (in August 2009), following a report submitted by the Western Cape MEC for Housing, expressing, amongst other things, “grave concerns” that the

²¹³ *Joe Slovo* (note 29 above) para 110.

²¹⁴ See L Chenwi & K Tissington “Sacrificial lambs in the quest to eradicate informal settlements: The plight of Joe Slovo residents” (2009) 10(3) *ESR Review* 18, 22.

²¹⁵ *Joe Slovo* (note 29 above) para 11.6; see also paras 107; 255.

²¹⁶ See for example the dismissal of the possibility of in situ upgrades by Moseneke DCJ, *ibid* para 174.

²¹⁷ *Ibid* para 107.

court's relocation order would be more costly than in situ upgrading of Joe Slovo, the Constitutional Court discreetly suspended its order until further notice, putting on hold its sanctioning of the largest post-apartheid eviction programme,²¹⁸ and “[i]n the end there was something of a stalemate and the mass evictions didn't happen.”²¹⁹

1.7. Conclusions on alternative accommodation

The duty to provide temporary accommodation has now also been directly linked to the right not to be evicted in section 26(3) of the Constitution.²²⁰ The emphasis on alternative accommodation directly involves government, specifically at the local level, even in private evictions. In respect of evictions at the instance of the state, it enhances the role to be played by government.

The requirement of providing alternative accommodation to evicted persons, or as a prerequisite to ordering an eviction is not unique to PIE: For example, in terms of ESTA, an occupier who was occupying land before ESTA came into operation (before 4 February 1997) may only be evicted in specific and limited instances.²²¹ However, in a significant departure from these listed instances, a court may still order an eviction of a “pre-ESTA” occupier if suitable alternative accommodation is available to the occupier.²²² In respect of more recent occupiers (occupiers who started occupying the land in question after 4 February 1997), an eviction may only be ordered if it would be just and equitable to do so.²²³ In determining whether an eviction under ESTA would be just and equitable, the court is required to consider, amongst other things, whether suitable alternative accommodation is available to the occupier.²²⁴

²¹⁸ A Majavu “Evictions suspended – Shackdwellers reprieved” *The Sowetan* 24 September 2009, available at <http://abahlali.shackdwellers.org/node/5665>, accessed on 24 July 2013.

²¹⁹ Hendricks & Pithouse (note 37 above) 120.

²²⁰ *Blue Moonlight* (note 63 above) paras 84 – 97.

²²¹ See section 10(1) of ESTA.

²²² Section 10(2) of ESTA. (Section 10(3) of ESTA, however, allows a court, in certain circumstances, to order an eviction even where no suitable alternative accommodation has been provided or is available).

²²³ Sections 11(1) and (2) of ESTA.

²²⁴ Section 11(3)(c) of ESTA.

However, in the context of urban (re)settlement, providing alternative accommodation is not an easy task. Although the minimum quality standard of the accommodation has been determined, the difficulties of insufficient resources, backlogs and inefficient management and corruption remains. There are simply too many people facing eviction in South African cities. Compounding this situation is the present policy of slum upgrading, which while necessary, involves the displacement of slum dwellers. It is in the light of such complexities that the courts have encouraged engagement or dialogue – horizontal discussions as opposed to vertical decision-making processes – at all stages.

2. ENGAGEMENT

2.1. The establishment of the duty of municipalities to engage

Mediation is the final stage in pre-litigation engagement between parties. It should generally be preceded by the least formal and least adversarial form of dispute resolution on the spectrum: discussion. Mediation has translated into a duty on municipalities to engage. The constitutional values of human dignity, equality and freedom mean that “it would not be enough for the municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost effective way.”²²⁵ The demand of dignity, and justice and equity is that parties to a land dispute adopt “pro-active and honest” measures, and “respectful face-to-face engagement”, or at least mediation, which may be able to find solutions and settlement.²²⁶ This is also the demand of justice and equity, which is a requirement under PIE, and the very basis of modern constitutional thought which treats people as rights-bearers,²²⁷ who need to be engaged with.²²⁸ This would also require the occupiers to co-operate.²²⁹

²²⁵ *PE Municipality* (note 12 above) para 29.

²²⁶ *Ibid* paras 41; 44.

²²⁷ *Ibid* para 43.

²²⁸ The Court held that in this particular case, mediation would no longer be appropriate because they parties had already been through the rigmarole and expenses of court, and carried with them the resultant bitterness (*ibid* para 49). Despite this finding and the consequent court order, the court held

When a private owner is also involved, the municipality's duty to engage requires it to consult both sides on an objective basis:

It must show that it is equally accountable to the occupiers and to the landowners. Its function is to hold the ring and to use what resources it has in an even-handed way to find the best possible solutions. If it cannot itself directly secure a settlement it should promote a solution through the appointment of a skilled negotiator acceptable to all sides, with the understanding that the mediation proceedings would be privileged from disclosure.²³⁰

Therefore, the Port Elizabeth Municipality, in the matter discussed under paragraph 1.5 above, failed in a key component of its housing obligations when it did not even attempt to open a dialogue with a relatively small group of 45 adult unlawful occupiers,²³¹ and instead asserted that “having established a four peg housing programme, it need do no more to accommodate individually homeless families such as the occupiers than offer them registration in that housing programme which, it admits, may not provide housing for the occupiers for some years.”²³²

2.2. Granting procedural rights in substantive matters

The idea of engagement stems from the notions of multi-tiered participation in our democracy, and has been recognised as being increasingly necessary in present times:

In South Africa, participation has been looked at as a tool to respond to the democracy deficit by creating what has been described as new democratic spaces.²³³

that its decision “in no way precludes further efforts to find a solution to a situation that is manifestly unsatisfactory to all concerned” (ibid para 61).

²²⁹ Ibid para 43; *Occupiers of 51 Olivia Road* (note 162 above) para 20.

²³⁰ *PE Municipality* (note 12 above) para 61.

²³¹ Ibid para 54.

²³² Ibid para 55.

²³³ C Mbazira “*Grootboom*: A paradigm of individual remedies versus reasonable programmes” (2011) 26 *SAPL* 69.

Writing for the tenth anniversary of the *Grootboom* decision, Willene Holness provided a useful outline of three forms of participation which exist in South Africa (some more prevalent than others):

- i. Traditional participation is a one-way process which weighs heavily in favour of government, which “decides just ‘how much’ participation occurs, often paying lip-service to the concerns of citizens.”²³⁴
- ii. Mutual participation is the favourite of courts today. It is slightly less government-oriented than traditional participation in that it allows the government to make the final decision, but requires its decision to be “informed by the concerns” of the community being consulted.²³⁵ It is an onerous process which is best suited to “discretely defined groups and specific issues” arising out of policy decisions. It would therefore be suitable when implementing a policy of slum upgrading, but not for the formulation of policy, or drafting of legislation at a national level.²³⁶ It is also a difficult obligation to test because “there is no consensus on what constitutes adequate engagement or even successful engagement.”²³⁷
- iii. Radical participation is at the end of the engagement spectrum, and refers to public protest, be it through media and social media campaigns, or tyre-burning and road blockades. It is a backlash to government failure, high-handedness, authoritarianism, and also to the inefficacy of institutionalised participation mechanisms.²³⁸

In *Occupiers of 51 Olivia Road*, the City of Johannesburg sought the eviction of residents of a building for reasons of health and safety. The court did not provide the unlawful occupiers with direct relief, but instead, in a three-staged approach to an

²³⁴ W.A Holness “Equality of the graveyard: Participatory democracy in the context of housing delivery” (2011) 26 *SAPL* 16.

²³⁵ *Ibid* 29.

²³⁶ *Ibid* 16.

²³⁷ *Ibid* 30.

²³⁸ *Ibid* 2 – 5.

eviction application, granted them a procedural right to be consulted. In the first two stages, the court ordered, on an interim basis, engagement between the municipality and the occupiers (aimed at addressing the consequences of eviction and the assistance which the municipality could provide),²³⁹ and later endorsed the positive outcomes of this engagement.²⁴⁰

The duty of the municipality to engage included managing the process in a pro-active, reasonable and open way, inclusive of civil society.²⁴¹ Engagement is a “two-way process”, and though people cannot be forced to engage with the municipality, there is a heightened duty on the part of the municipality to engage with the initially unwilling:

People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.²⁴²

The third and final stage of the court’s approach to evictions is marked by the court’s faith in ongoing engagement as a remedy in this case, as it held repeatedly in *Occupiers of 51 Olivia Road* that there was “every reason” to believe in future

²³⁹ *Occupiers of 51 Olivia Road* (note 162 above) para 5 In this way, the Court held that there can be no question eviction without engagement (paras 21 – 23).

²⁴⁰ In terms of the parties’ settlement, filed several weeks later in the required progress reports, the parties agreed that the municipality would improve existing services at the buildings and provide additional services aimed at making the properties “safer and more habitable” (ibid para 26), and that it would provide alternative accommodation to the occupiers “pending the provision of suitable permanent housing solutions”, developed “in consultation” with the occupiers concerned (ibid para 27). This fulfilled at least some of the objectives of engagement (see para 14). The settlement was endorsed by the Court (ibid para 28).

²⁴¹ Ibid para 21

²⁴² Ibid at para 15.

negotiations continuing in good faith, and that there was “no reason” to not believe in future engagement leading to a meaningful result,²⁴³ and consequently declined to address most of the substantive issues which it was asked to determine.²⁴⁴ In other words, the court held that it would be premature to examine substantive questions in circumstances where the municipality committed to consult with the occupiers on these issues, but opened the door for a review of the decision-making process which led to the substantive dispute.²⁴⁵ Its order that the parties “sort things out” themselves conceptualises the right to housing under section 26 of the Constitution as a right based on mutual participation.²⁴⁶ This is not to say that participatory or procedural rights and concomitant remedies are inherently weak. The engagement remedy may offer substantive relief if government engages meaningfully and takes people’s views into genuine account when making housing decisions. When a court orders engagement as a remedy, it ought to retain a supervisory jurisdiction to ensure that the remedy is managed and implemented in a way which respects the substantive component of socio-economic rights and respects the views of participants. Flippant gestures towards the views of the affected people, and the failure of the government to incorporate these views into its final decision, where appropriate, would be at odds with a genuine “two way process” envisaged in *Occupiers of 51 Olivia Road* and therefore should not constitute compliance with the engagement order.

²⁴³ Ibid para 35.

²⁴⁴ The questions before the Court are set out in para 31 (ibid). It determined only two (related) issues before it, namely the constitutionality of sections 12(4)(b) and 12(6) of the National Building Regulations and Building Standards Act (ibid paras 39 – 51).

²⁴⁵ Ibid paras 34 – 35.

²⁴⁶ The critics of the Constitutional Court on this front are numerous. See for example: D Brand “The proceduralisation of South African socio-economics rights jurisprudence” in H Botha *et al* (eds) *Rights and Democracy in a Transformative Constitution* (2003); J Dugard “Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice” (2008) *SAJHR* 214. In respect of the *Joe Slovo* decision, Kirsty McLean is particularly scathing: “[The approach of the Court is different to ‘judicial avoidance’, or minimalism, where courts seek only to decide the narrow issues before [them]; rather it appears to be a more extensive unwillingness to decide the issue at all” (K McLean “Meaningful engagement: One step forward or two back? Some thoughts on *Joe Slovo*” (2010) 3 *Constitutional Court Review* 223, 239).

Less talked about is the seedy underbelly of participation: clientelism. When it is manifested at local government level, participation often takes on the insidious form of clientelism, which is understood as one of the risks inherent in increased closeness between people and the state.²⁴⁷ When making engagement orders as the final remedies, courts would need to be mindful of the risk of clientelism, which is notably prevalent in housing delivery:

[T]he processes by which the houses are allocated have increasingly been incorporated into clientelist relationships mediated through local party structures.²⁴⁸

Whilst clientelism may technically constitute a form of “responsiveness” and provide short-term reprieve for particular groups willing to exchange political support, including votes, for delivery, it does little to alleviate the broader flaws in the system and it undermines parallel struggles which are no less important.

Despite the *Occupiers of 51 Olivia Road* decision and those in a similar vein, municipalities, which are meant to maintain the closest links with citizens, often adopt top-down decision-making processes characterised by a formalistic “tick-the-box”²⁴⁹ approach to engagement (or by clientelist approaches to delivery). This leads us back to the matter concerning the residents of Joe Slovo, already discussed under the topic of alternative accommodation (see paragraph 1.6 above), who were not consulted when government took the decision to relocate them in order to upgrade their shacks as part of BNG.

²⁴⁷ For a useful explanation of the roots of clientelism, which debunks the public participation myth, see C Benit-Gbaffou “‘Up Close and Personal’ – How does local democracy help the poor assess the state? Stories of accountability and clientelism in Johannesburg” (2011) 46(5) *Journal Asian and African Studies* 453.

²⁴⁸ Hendricks & Pithouse (note 37 above) 116. See also: P S Reddy & J Govender “Democratic decentralisation, citizen engagement and service delivery in South Africa: A critique of legislative and policy considerations” (2013) 43(1) *Africanus* 78, 94; Benit-Gbaffou (note 247 above) 454.

²⁴⁹ The term is taken from Holness (note 234 above) 11.

2.3. “Don’t look back”: The Constitutional Court’s instruction in *Joe Slovo* to shack dwellers facing forced removal

Following its previous and consistent emphasis on meaningful engagement between government and unlawful occupiers in eviction matters, the Constitutional Court made an about turn, when it acknowledged and decried, *and then accepted* the failure of the state to engage with approximately 20,000 residents, comprising 4,000 households,²⁵⁰ of Joe Slovo when taking the decision to relocate them.²⁵¹ The key findings of the court were that the residents were unlawful occupiers and PIE was applicable, and secondly that their eviction by the state²⁵² would be just and equitable in the circumstances. The court effectively held that coercive eviction and relocation by the state *in the absence of meaningful engagement* is constitutionally permissible.

- i. Yacoob J acknowledged the argument, raised by both the applicants and the amici, that “the state could and should have been more alive to the human factor and that more intensive consultation could have prevented the impasse that had resulted”, but held that “these factors in themselves are insufficient to tilt the scale against eviction and relocation”²⁵³ because (i) there was some consultation, which, although it fell short of the “ideal” of individual and careful engagement, was reasonable in the circumstances;²⁵⁴ (ii) the plan was by and large reasonable;²⁵⁵ and (iii) the court would order future engagement on the relocation process.
- ii. Moseneke DCJ stated that whether or not government had engaged with unlawful occupiers was a relevant consideration when determining whether it

²⁵⁰ *Joe Slovo* (note 29 above) para 125.

²⁵¹ *Ibid* paras 109; 112 – 113; 247;

²⁵² *Ibid* para 126: The eviction and relocation of this community was not sought by the owner of the land (the City of Cape Town) but by Thubelisha Homes Ltd, which is a public company established by the government to undertake several of its housing functions as a national public entity and agency.

²⁵³ *Ibid* para 113.

²⁵⁴ *Ibid* para 117.

²⁵⁵ *Ibid* para 116.

would be just and equitable to order an eviction, and criticised decision-making in these cases at a purely state-political level.²⁵⁶ After being exceedingly critical of the state's lack of engagement and high-handedness in this case,²⁵⁷ he held that the eviction would be just and equitable because of the guarantee of solid alternative accommodation.²⁵⁸

iii. Ngcobo CJ, drawing extensively on international law and South African constitutional principles, held that meaningful engagement is essential to relocations.²⁵⁹ However, his conception of engagement is problematic in two regards: Firstly, in the context of relocations, the purpose of engagement is to provide affected residents with “details of the programme, its purpose and its implementation”.²⁶⁰ On this conception, there is no obligation to engage residents on the question of whether or not to relocate them in the first place, and therefore Ngcobo CJ did not foresee a role for engagement which would address the actual problems of the residents in this case.²⁶¹ Secondly, Ngcobo CJ's idea of engagement in this matter as a one-way information session is weak, if not lifeless and hollow:

[The former Mayor of Cape Town] stated that the community *was informed of the plans* to develop Joe Slovo to provide access to adequate housing. The community *was also informed* that, as Joe Slovo was densely populated, it

²⁵⁶ *Ibid* para 166.

²⁵⁷ “In the present case the government respondents openly admit that they have not given so much as a formal notice before the urgent eviction application was launched against the residents of Joe Slovo. It follows that they did not give the residents of Joe Slovo the courtesy and the respect of meaningful engagement which is a pre-requisite of an eviction order under section 6 of PIE. This failure to engage the residents is compounded by a history of what appears to be the government respondents’ “broken promises” to the residents” (*ibid* para 167).

²⁵⁸ *Ibid* para 173.

²⁵⁹ *Ibid* paras 236 – 238.

²⁶⁰ *Ibid* para 242.

²⁶¹ The residents sought an order for further engagement, as opposed to eviction because, amongst other things, they “did not accept that a legally valid case for eviction had been made out” or “that it was not possible for people to move to another part of Joe Slovo while development was taking place” or “that Delft was the only suitable location for temporary or permanent accommodation” (from para 401 per Sachs J).

would be impossible for all residents to be allocated houses in Joe Slovo after development. In addition, the community *was informed that it would be necessary for them to move* to temporary accommodation, pending the allocation of permanent houses to them. *The record therefore shows that there was engagement with the residents on the project*²⁶² (emphasis added).

- iv. The desirability of in situ upgrading of informal settlements is a factor militating against relocation in terms of BNG. Despite this clear policy statement, O'Regan J repositioned the debate to accommodate the decision of the government to relocate the residents of Joe Slovo and to divorce the view of the applicants from the question of the reasonableness of their relocation. In this way, the applicant's dismay at "the fact that the plan does not provide for in situ upgrading"²⁶³ (which is also a key aspect of BNG) became irrelevant. O'Regan J balanced the state's grossly inadequate and sometimes misleading engagement with the residents, with the facts that this was a flagship project and there was a broader pressing city-wide housing need, which went beyond the residents of Joe Slovo.²⁶⁴
- v. Sachs J too noted the inadequate engagement and criticised the "top-down" approach, as well as the confusion which is created. He noted, however, that "[t]he inadequacies of the engagement towards the end appear to have been serious, but would not necessarily have been fatal to the whole process" as the determination of the overall adequacy of the process was not confined to an assessment of the engagement procedures, but rather merited a polycentric approach, and "a large discretion" of the state.²⁶⁵ On a holistic approach, Sachs J held that relocation was "not so disproportionately out of kilter with the goals of the meritorious [N2 Gateway] Project as to require a court to declare them to be beyond the pale of reasonableness."²⁶⁶

²⁶² Ibid para 256. This conception of engagement is entrenched in the subsequent paragraph, which does not depart from the idea of dispensing information from on high.

²⁶³ Ibid para 295.

²⁶⁴ Ibid paras 301 – 303.

²⁶⁵ Ibid paras 378 – 381.

²⁶⁶ Ibid para 400.

The court believed its eviction order to be tempered by its detailed orders on the promise of return to Joe Slovo and future engagement:

- i. The court ordered that 70% of the new development on the Joe Slovo site, which comprised at least 1,500 houses,²⁶⁷ be allocated, to the qualifying residents of Joe Slovo (including those who had already relocated to Delft), in terms of the original promise.²⁶⁸ It believed that such an order “assuag[es] the immediate melancholy associated with relocation by offering a rock hard promise of adequate housing and restored human dignity.”²⁶⁹
- ii. The court’s engagement order applies to all future engagement, which required the parties to engage on various matters within a month of the order being issued. The matters for engagement included: the date of the relocation; details of individual households and occupiers and their needs (including the need for transport of belongings and subsequent day-to-day transportation; and the prospect of permanent accommodation.²⁷⁰

The various judgments and the order are marked by a failure to link inadequate consultation with communities to misguided decisions by the state. Delivery in this coercive and expulsion-based form “is frequently a tool for assuming control and effecting exclusion rather than meeting people's urgent needs.”²⁷¹ In this way, whereas the court could have used the opening created by its earlier jurisprudence on meaningful engagement to reject such destructive authoritarianism by the state, it chose to defer to raw expressions of state power using arguments which simply do not make sense. The court’s disregard for the community’s views on the primary issue of relocation is also at odds with the same court’s comments in *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal*, where it

²⁶⁷ Ibid para 7.18. See also: paras 172 – 173 per Moseneke DCJ.

²⁶⁸ Ibid para 7.17.

²⁶⁹ Ibid para 173.

²⁷⁰ Ibid para 7.11.

²⁷¹ R Pithouse “From Lusaka to Marikana” *South African Civil Society Information Service* 20 March 2013 accessed at <http://sacsis.org.za/site/article/1608> on 25 July 2013.

held that proper engagement includes, amongst other things, “taking into account the wishes of the people who are to be evicted” and “whether the areas where they live may be upgraded in situ”.²⁷² In this matter, the majority of judges in the Constitutional Court rejected the attempt by the KwaZulu-Natal provincial legislature to write its pro-eviction anti-slum language into the statute books in the face of progressive and inclusive national legislation and policies: The majority held that section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 was at odds with section 26(2) of the Constitution because it “coerced” private owners and municipalities to evict unlawful occupiers regardless of whether such eviction complied with the protective injunctions contained in PIE, and additionally precluded reasonable engagement mandated by the National Housing Act and National Housing Code, and did not specifically limit the power of the Member of the Executive Council for Housing to issuing only eviction notices which were actually aimed at preventing the re-emergence of slums.²⁷³

3. THE DEVELOPMENT OF LOCAL GOVERNMENT’S OBLIGATIONS SINCE GROOTBOOM

Central to the *Grootboom*-approach to section 26 of the Constitution was the reasonableness of state policy and conduct, which required government concern for the utterly homeless. This concern was to be manifested through the provision of alternative temporary accommodation and engagement with people. The understanding that government can only be considered to be acting reasonably when it caters for those facing emergency situations of homelessness has led to decisions which consistently refuse to order evictions without alternative accommodation when these evictions will result in homelessness. Where privately-owned property (including vacant land) is concerned, the state is still required to provide alternative accommodation and a measure of patience may be demanded of the private owner. In line with section 26(2) of the Constitution, in terms of which government’s obligations are proscribed by the availability of resources, the obligation to provide alternative accommodation is dependent on resources being available. These are

²⁷² 2010 (2) BCLR 99 (CC) para 114.

²⁷³ Ibid paras 111 – 116.

positive developments on the original *Grootboom* principle concerning alternative accommodation. However, the merits of alternative accommodation do not mean that it can be forced on unlawful occupiers in every circumstance, regardless of their wishes.

Engagement was mentioned in *Grootboom* as the court expressed its disappointment, on the side of its main findings. Since then, engagement has developed into a remedy, and a process which municipalities must openly, sincerely and meaningfully undertake before they pursue an eviction order. It has the potential to facilitate dialogue between warring parties and to help craft inclusive and respectful government policies and actions. However, the Constitutional Court has not been consistent in its approach to meaningful engagement, as reflected in *Joe Slovo*. This inconsistency risks weakening a potentially powerful remedy.

Although these two key obligations (to consult meaningfully and to provide alternative accommodation where necessary), have not emerged from the philosophical concept of the right to the city, it is arguable that these obligations give some effect to the concept. The next chapter examines how the two obligations relate to the right to the city, and whether the concept provides an appropriate theoretical lens which may improve the shortcomings of the courts as set out in this chapter.

CHAPTER 6

Developing local government responsibilities in terms of the right to the city and an empirical assessment

The earlier chapters have established that the general obligations created by section 26(3) of the Constitution and PIE must be fulfilled by relevant municipalities specifically (and not by “government” in general), and that these responsibilities relate chiefly to: (i) meaningfully consulting with affected residents, and (ii) providing alternative accommodation where eviction is justified. The idea of meaningful consultation is not specific to eviction matters. Instead, it is a principle of overriding importance in our existing legal framework, premised on a democratic system of government. It also finds expression in administrative law. By contrast, the idea of alternative accommodation is specific and stems not from the principled or value-based conclusions of the Constitutional Court, but rather from PIE itself.

The preceding chapter (chapter 5) examined not only the high-points of the Constitutional Court’s jurisprudence on consultation and alternative accommodation, but also the various low-points. It is hoped that the explanation and examination of the right to the city in this chapter may suggest a framework within which the court’s decision-making in respect of urban unlawful occupiers may be improved.

1. THE RIGHT TO THE CITY

The concept of “the right to the city” was first expounded by Henri Lefebvre in the late 1960s as part of a tribute to Karl Marx.²⁷⁴ The concept has re-emerged in academic parlance as a “way to respond to neo-liberal urbanism and better empower urban dwellers” through “urban democracy”.²⁷⁵ It has extended to popular

²⁷⁴ H Lefebvre *Le Droit a la Ville* (1968). Lefebvre developed the concept in subsequent works including *Espace et Politique* (1973) and *Du Contrat de Citoyennete* (1990), cited in E Fernandes “The ‘right to the city’ in Brazil” (2007) 16(2) *Social Legal Studies* 201, 205.

²⁷⁵ M Purcell (note 2 above) 99.

movements. So far, it has gained mainstream legal recognition only in Brazil in terms of the City Statute of 2001.²⁷⁶

Explaining the concept, David Harvey writes that it is “a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the process of urbani[s]ation.”²⁷⁷ Based on Lefebvre’s concept, the right to the city widens ordinary political rights of citizens as it includes the right to participation and the right to appropriation.²⁷⁸ Participation refers to direct participation, as opposed to participation through the election of representatives, and in this way embraces the ideas of mutual participation and moreover radical participation, and allows the people who inhabit and contribute to the city to “make and remake it”.²⁷⁹ Appropriation encompasses “the right of inhabitants to physically access, occupy, and use urban space” and “to be physically present in the space of the city.”²⁸⁰ The right to housing for poor people is therefore a way for them to appropriate (i.e. fully use in the course of their daily lives) the city. The basis for increased participation is simple: People should demand “greater democratic control over the production and utili[s]ation of the surplus. Since the urban process is a major channel of surplus use, establishing democratic management over its urban deployment constitutes the right to the city.”²⁸¹ And increased participation of all urban inhabitants, specifically the poor, will impact appropriation, or the physical aspect of the right to be present in the city:

“[D]emocrati[s]ation” of the right to a city is imperative to any empowerment of the urban poor, otherwise, we will continue in the old tradition of marginalisation.²⁸²

²⁷⁶ Federal Law no. 10.257. It aims to regulate the right to the city which is already recognised as a collective right in the Brazilian Federal Constitution, 1988 (Fernandes (note 274 above) 211).

²⁷⁷ D Harvey “The Right to the City” (2008) 53 *New Left Review* 23, 23.

²⁷⁸ Purcell (note 2 above) 101 – 102.

²⁷⁹ Harvey (note 277 above) 23.

²⁸⁰ Purcell (note 2 above) 103.

²⁸¹ Harvey (note 277 above) 37.

²⁸² *Ibid* 40.

In short, the right to the city encompasses a heightened form of participatory democracy, linked to substantive outcomes for the participants, including the rights to be present in the city and above all, to benefit from and enjoy it. Despite progressive legislation which speaks of “a culture” of participation, this is not presently manifested at the city level in South Africa:

The technocratic reduction of the urban question to a housing question by the state and much of civil society after apartheid resulted in a radical evasion of politics in the sense in which the term is used by Ranciere – “that activity which turns on equality as its principle”. Urban planning was reserved as a state and NGO function and progress was assumed to be a quantitative question of “units delivered”.²⁸³

The fact is, however, that Lefebvre did not conceptualise the right to the city for legal purposes, and so Edesio Fernandes writes:

To Lefebvre’s socio-political arguments, another line of arguments needs to be added, that is, legal arguments leading to a critique of the legal order not only from external socio-political or humanitarian values, but also from within the legal order.²⁸⁴

The legal order does have a role to play in realising the right to the city. In fact, it must play a significant role given the role of law before 1994 as a measure to create and propagate racially-based urban exclusion. In the light of interminable failures so far to address the urban question through law, it would be worth considering whether the right to the city can be transported, from its philosophical context, into the legal context in order to update existing anachronistic political rights, and to inform the application of third generation (socio-economic) rights.

This is not an argument in favour of “promoting judicial philanthropy in favour of the poor”.²⁸⁵ In fact, it is a rejection of paternalistic notion of “compassion”²⁸⁶ in favour

²⁸³ Pithouse (note 8 above) 8.

²⁸⁴ Fernandes (note 274 above) 208.

²⁸⁵ *PE Municipality* (note 12 above) para 14.

²⁸⁶ *Ibid.*

of influential and powerful participation (as opposed to the usual flippant gesture towards participatory democracy) in the context of urban planning. It is also a rejection of the simplistic understanding of social movements and poor people generally as being agents of revolt and opposition, whose militant aspirations of conquest must be managed.

This understanding of engagement, which is inextricably linked to the question of alternative accommodation (especially in cases of slum-upgrading), accords with the constitutional vision: The participatory elements of local governance in the Constitution, coupled with its planning functions turns the community, by virtue of its participation, into a planning agent. In this way our Constitution has primed the planning function of local government for the possibility of increased community participation in planning which would be state-led but happily susceptible to community influence.²⁸⁷ The central principles enounced in *Grootboom* (namely, flexible policy-making which is receptive to the needs of all citizens, including the most desperate and engagement with citizens) manifested, at a most basic level, this notion of the right to the city.

Unfortunately, the judicial approach has not always developed the commendable *Grootboom* principles. In the interests of remaining faithful to the original (*Grootboom*) approach to housing rights, and developing the right to the city in South African law, courts should move away from a state-centred conception of planning, and abandon views such as those expressed in *Joe Slovo*:

[T]he state owns the land and that it is the state that pays for the construction of housing. The state must be afforded some leeway in the design and structure of housing provided that it acts reasonably.²⁸⁸

Secondly, the constitutional commitment to participatory forms of government, especially at a local level, should automatically see courts rejecting examples of non-

²⁸⁷ The idea of taking urban planning beyond a fixed and exclusive state function is discussed in M. de Souza “Together with the state, despite the state, against the state: Social movements as ‘critical urban planning’ agents” (2006) 10(3) *City* 327.

²⁸⁸ *Joe Slovo* (note 29 above) para 111 per Yacoob J.

consultative technocratic planning, *especially where the state owns the land*. In this way, though courts are admittedly not at the forefront of a broader political struggle, they fulfil their role as impartial adjudicators, which remind society of and hold society to its principles.²⁸⁹ (In the context of the constitutional state, the society's principles are reflected in its earlier constitutional commitments.) In short, the duty to engage and the failure to fulfil this duty must inexorably lead to the illegitimacy of the policy concerned – anything less will be tantamount to denying the legitimacy of people's grievances.

To this end, the courts have taken many promising steps forward, but have yet to unscramble their understanding of the post-apartheid approach to urban dwellers. Significant steps include recognising that people cannot be left homeless, and that they ought to be meaningfully engaged on the question of how they should be housed. Another positive step is the recognition that unlawful occupiers are not, as a rule, criminally- or even politically-minded in their actions; that unlawful occupation is not their preference, but their means of survival – as Asef Bayat writes:

[T]heirs is *not* a politics or protest, but of redress and struggle for immediate outcomes largely through individual direct action (original emphasis).²⁹⁰

For the early *Grootboom* developments to remain relevant, courts must continue to view poor people as serious participants in the crafting of their future in the city in which they live and to whose development they contribute. A smaller space for the voices of the poor would mean the acceptance of a weakened state of democracy at the local level, where it should be maximised.

Of the apartheid city, Kriegler J wrote:

The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The results are tragic and absurd...

²⁸⁹ R Dworkin *Law's Empire* (1986) 257.

²⁹⁰ A Bayat "Politics of the 'informal people'" (1997) 18(1) *Third World Quarterly* 53, 59.

He continued to outline the differences between black and white in South Africa as the difference between having “hardly a tree in sight” contrasted to “trees and water and birds”, and the difference between “towering flood lights” and “streetlit suburbs and parks”.²⁹¹ The obvious question is: Why is the post-apartheid city no different? The right to the city should allow a person to use and benefit from the very essence of the city, and for this reason, granting the right to alternative accommodation in the form of a right to relocation to Delft on the peripheries of the city “does not translate into a right to the city, or a right to urban life”.²⁹²

In addition to rectifying the vacillating approach of courts, which moves in one instances towards the right to the city (for example, *PE Municipality*), and in other instances, away from it (*Joe Slovo*), a second battle against the executive remains. Recent events in eThekweni point to an unwillingness by municipalities to respect court decisions protecting urban dwellers where these urban dwellers do not fit municipal government objectives and aspirations. The eThekweni Municipality’s handling of the Cato Crest occupiers is detailed below.

2. AN EMPIRICAL ASSESSMENT: THE CATO CREST OCCUPIERS

Within the boundaries of eThekweni there are more than 410,000 people living in 150,000 shacks in the city’s 484 informal settlements, and 11,000 families living in its temporary relocation areas.²⁹³ The old problems persist: Poor black people (usually African), occupy centrally-located land which does not “belong to them”, defying the persistence, in non-racial and democratic times, of spatial apartheid. They do not hold reassuring legal documents like title deeds or even lease agreements, and despite this uncertainty, they build their lives in and around this land

²⁹¹ *Fedsure Life Assurance Ltd* (note 83 above) para 122.

²⁹² See Hendricks & Pithouse (note 37 above) 109.

²⁹³ Rondganger & Nene (note 1 above). In 2009, the number of shacks in eThekweni stood at approximately 173,000, following other major metropolises, namely, Ekurhuleni (286,000), Johannesburg (260,000) and Cape Town (180,000) (Department of Co-operative Governance and Traditional Affairs “State of Local Government in South Africa: Overview Report” (Working document) 2009 para 3.14, accessed at <http://www.info.gov.za/view/DownloadFileAction?id=110100> on 27 July 2013.

which could, at any moment, be pulled from under their feet. Inevitably this happens: Their homes are either confiscated in the name of a private owner's assertion of his constitutional right to property, or they are razed to the ground in the name of improvement, development, upgrading, and overall slum eradication. As the land they once occupied is captured, they move themselves and their gathered belongings to whatever other unused land they can find, be it sports fields or spaces alongside highways. As the Constitutional Court per Sachs J acknowledged:

[H]omeless people tend to erect their shelters on relatively deserted land, rather than on open spaces like golf courses, public commons or private gardens. They seek to tuck themselves away in places from which they are unlikely to be evicted, rather than to choose spots which would inevitably and immediately provoke confrontation.²⁹⁴

The occupation and the unlawfulness begin.

The recent Cato Crest example illustrates the sequence: On Monday 11 March 2013, displaced shack dwellers began clearing open unused tracts of municipal land located along the King Cetshwayo Highway in eThekweni, after their shacks in the nearby Cato Crest were demolished to make way for a housing development.²⁹⁵ They dubbed the occupation "Marikana".²⁹⁶ The next day, partially completed flats in that area were also occupied.

The violence comes next.

On Wednesday 13 March, after a local ward councillor, Mkipheni Mzimuni Ngiba, beseeched the shack dwellers to desist in their illegal occupation, his home and office

²⁹⁴ *PE Municipality* (note 12 above) para 33.

²⁹⁵ Rondganger & Nene (note 1 above).

²⁹⁶ eThekweni Mayor, James Nxumalo said in light of the current tensions, political parties should not go to the area, or try to take advantage of the situation for campaigning purposes. "Political parties must stay away from the situation, otherwise we will experience serious bloodshed. We don't want another Marikana in eThekweni" (M Madlala "Parties warned" *Daily News* 21 March 2013, accessed at http://www.iol.co.za/dailynews/news/parties-warned-1.1489824#.Uc1DWioh_f8 on 25 July 2013).

were stoned by about 500 shack dwellers armed with pangas, spades and bush knives. The next day, Mr Ngiba fled his home with his family. Speaking after fleeing, Ngiba told the media that “[The shack dwellers] demand houses which do not belong to them. They make continuous threats to invade any piece of vacant land (...) There are certain protocols that need to be followed before allocating these houses.”²⁹⁷ On Thursday 14 March 2013, Thembinkosi Qumbelo, president of the Cato Crest Residential Association, attempted to address the occupiers and hopefully placate them. He was chased away,²⁹⁸ and “called a traitor, stoned and attacked with sticks after he agreed to meet with police and officials to discuss the evictions and consequent occupation without a mandate from the occupiers.”²⁹⁹ Later in the day, a member of Mr Qumbelo’s committee was shot, though not killed.³⁰⁰ The following evening, Mr Qumbelo was shot several times in the back in a tavern on 15 March 2013. It is believed that he was shot by an external “third force” which had infiltrated the Cato Crest group:

A good number of people think that he was assassinated from above rather than below but at this point all kinds of sometimes-contradictory accounts are circulating.³⁰¹

By the end of the week, the invading shack dwellers numbered about 1,000 occupiers (it has since multiplied), demanding that the eThekweni Municipality allocate council houses to shack dwellers whose homes were demolished to make way for the housing development in Cato Crest. Throughout March, the occupation and erection of shacks continued. It was supplemented by an illegal march in Cato Crest, and by violence, including beating other residents of Cato Crest who the occupiers claimed

²⁹⁷ N Nene “Thousand-strong mob damages councillor’s home at Cato Crest” *Daily News* 13 March 2013, accessed at http://www.iol.co.za/dailynews/news/thousand-strong-mob-damages-councillor-s-home-at-cato-crest-1.1485367#.Uc1BxSoh_f8 on 25 July 2013.

²⁹⁸ N Nene “Cato Crest community leader gunned down” *Daily News* 18 March 2013, accessed at http://www.iol.co.za/news/crime-courts/cato-crest-community-leader-gunned-down-1.1488319#.Uc097Soh_f8 on 25 July 2013.

²⁹⁹ Pithouse (note 271 above).

³⁰⁰ A committee of 10 members was elected pursuant to an address made by Mayor James Nxumalo, with the purpose of meeting with the eThekweni Municipality.

³⁰¹ Pithouse (note 271 above).

had illegally received houses. In April, six leaders of the group of occupiers were arrested and charged with illegally marching and public violence.³⁰² On Monday 24 June, there was a road blockade in Cato Crest starting at 2:00 a.m aimed at protesting against the method and nature of the housing allocations. This recommenced on Tuesday evening, and a delegate representing the protestors, Nkuleleko Gwala, was shot dead the following evening (Wednesday).³⁰³ His killing has been linked to his political role in exposing corruption in the housing sector and galvanising a popular struggle around housing delivery.³⁰⁴

At the end of March, shortly after the original occupation, the Durban High Court issued an interim order under case number 3329/2013 in favour of the eThekweni Municipality, the provincial housing department and the police. The order allowed the city and the police to demolish structures and evict people who occupy or attempt to invade 37 provincial housing department properties that have been earmarked for low-cost housing or are in the process of being developed.³⁰⁵ The order is significant in that it does not oblige the municipality to follow the procedures and safety net prescribed in terms of PIE, which stipulates steps to be taken before people can be evicted, including in some cases providing alternative accommodation. It states only that the eThekweni Municipality and Minister of Police “are hereby authorised to take all reasonable and necessary steps (...) to dismantle and/or demolish any structure or structures that may be constructed on the aforementioned properties subsequent to the grant of this order. The decision is not only at odds with the right to the city in its lofty sense, but the court order also sanctions a side-stepping of the protections in place under section 26(3) of the Constitution and PIE. It further undermines existing jurisprudence which is premised on meaningful consultation even with unlawful

³⁰² H Kweyama “Invasion stand off in Cato Crest” *Daily News* 22 April 2013 accessed at http://www.iol.co.za/dailynews/news/invasion-stand-off-in-cato-crest-1.1504199#.Uc1DmSoh_f8 on 25 July 2013.

³⁰³ Abahlali baseMjondolo Press Statement “Nkuleleko Gwala murdered in Cato Crest” *Abahlali baseMjondolo* 27 June 2013 accessed at <http://abahlali.org/node/9839> on 29 July 2013.

³⁰⁴ See for example: N Moore “Anatomy of an assassination” *Daily Maverick* 31 July 2013 accessed at <http://www.dailymaverick.co.za/article/2013-07-31-kzn-anatomy-of-an-assassination/#.UhpVkyqg7f8> on 25 August 2013.

³⁰⁵ The order concerned relevant spaces in Queensburgh, Cato Manor, Mayville and Bonela.

occupiers and tyrannically grants a blanket demolition order in respect of future developments. The order is being challenged by the people of the Madlala Village in Lamontville.³⁰⁶

eThekwini's response to the Cato Crest occupation involved an explanation that shack *owners* were and would be provided with low-cost government houses, and so the city's housing obligations were fulfilled. It distanced itself from the claims of shack *tenants* for accommodation, manifesting either a misunderstanding of or disregard for its constitutional obligations to people living within its jurisdiction:

This is not the city's issue, but they should be discussing that with their landlords.³⁰⁷

The law provides, however, that private parties do not bear any direct responsibility to alleviate the position of those facing homelessness.³⁰⁸

Mayor James Nxumalo also insisted on demolition without alternative accommodation, contrary to the one aspect of evictions and demolitions which the Constitutional Court has been clear on:

The shacks have to be demolished and houses need to be built because we cannot continue to build transit camps.³⁰⁹

The jurisprudence and government's Emergency Housing Policy clearly provide that local government is responsible for the provision of temporary accommodation of those in emergency situations, including homelessness resulting from evictions. This applies even in respect of unlawful occupiers who build shacks on land which they do

³⁰⁶ K Padayachee & T Broughton "Go-ahead to stop land grabs" *The Mercury* 13 May 2013 accessed at

http://www.iol.co.za/news/crime-courts/go-ahead-to-stop-ethekwi-land-grabs-1.1514663#.Uc1Dmloh_f8 on 25 July 2013.

³⁰⁷ M Madlala (note 296 above).

³⁰⁸ *Blue Moonlight* (note 63 above) paras 31, 40, 97.

³⁰⁹ M Madlala (note 296 above).

not own *without* the owner's permission, and not just in respect of shack owners who rent backyard shacks in an agreement with the registered land owners.³¹⁰

This is not necessarily a case of contempt for the judiciary on the part of the Mayor, but rather an indication of the difficulty faced by municipalities tasked with dedicating energy and resources to temporary accommodation on the one hand, and to permanent housing on the other. In a clearer case for contempt, recent actions of eThekweni come to mind: On 1 September 2013, eThekweni demolished shacks in Cato Crest contrary to its undertaking made to the Durban High Court that it would halt all evictions pending the final resolution of the Cato Crest dispute. (Redeeming itself following the dodgy decision of 28 March 2013 (discussed above), the court in this case interdicted the eThekweni Municipality and others from “demolishing, removing or otherwise disposing of any of the applicants informal structures” pending final resolution of the dispute. This matter was cited under case number 9189/2013. A second urgent interdict in the same matter (granted on 2 September 2013) did not prevent further evictions on 14 and 15 September 2013.³¹¹

Although the present attitude of local government is vastly different from national progressive policies and legislation,³¹² it aligns with the talk of politicians, which seeks to perpetuate the apartheid-esque exclusion of the urban poor, and to wonder at and then criminalise their protest,³¹³ occupation and radical participation:

³¹⁰ Clause 2.3.1(e) of the Emergency Housing Policy (see the discussion under chapter 3 (above)). The courts have upheld the rights of unlawful occupiers to be provided with alternative accommodation in the following cases discussed in this dissertation: *Grootboom* (note 3 above), *Modderklip* (note 29 above), *Blue Moonlight* (note 63 above) and *Joe Slovo* (note 29 above).

³¹¹ M Nxumalo “Ruling party 1: Shack dwellers 0” *Mail & Guardian* (21 September to 3 October 2013) 23. See also the statements by the General Council of the Bar of South Africa criticising eThekweni's unlawful action (M Madlala & N Barbeau “Advocates slam council demolitions” *Daily News* (26 September 2013) 3).

³¹² Writing in 2009, Pithouse states that “there has been a systemic failure to implement the substantive content of BNG that recommends and makes financial provision for participatory and collective in situ upgrades” (references omitted) (Pithouse (note 8 above) 1).

³¹³ “The only thing that is clear is that struggles around land and housing are becoming increasingly violent in Durban (...) This is unlikely to change for as long as the City continues to treat the

- i. The Chairman of eThekweni’s human settlement committee has stated that “[t]he mushrooming of informal settlements is a challenge for the city to beef up its land invasion control.”³¹⁴
- ii. The provincial housing department has said officially that “municipalities must be urged and assisted to introduce and enforce municipal legislation and policy instruments such as by-laws especially with regard to the clearance of slum areas. Municipalities must secure their environments against new invasions.”
- iii. Maurice Makhatini, a previous acting executive director of housing in eThekweni responding to a forced relocation at the hands of the municipal council explained that “[a]partheid was about grouping races. This proposal is about grouping classes. Those in the same economic bracket will obviously stay together. It is racially blind. Normal business practice demands that if tenants can’t pay rent, they must be evicted.”³¹⁵

These statements are at odds with the requirement that government (and private citizens) move away from thinking in antagonistic terms about shack dwellers and unlawful occupiers.³¹⁶ This attitude is not unique to eThekweni, but rather characterises the relationship between mainstream politicians and the urban poor. The City of Cape Town has established an Anti-Land Invasion Unit which monitors and patrols vacant land which has been “identified for residents on the City’s housing waiting list”, and stops people who attempt to illegally occupy this land.³¹⁷ The unit

gathering intensity of the popular aspiration for urban land and housing as an essentially criminal matter rather than a question of justice” (Pithouse (note 271 above)).

³¹⁴ Rondganger & Nene (note 1 above).

³¹⁵ Cited in A Desai *We are the Poors: Community Struggles in Post-Apartheid South Africa* (2002) 48.

³¹⁶ See the discussion under point 1.5 of chapter 5 (above).

³¹⁷ Accessed at <http://www.capetown.gov.za/en/Lawenforcement/Pages/AntilandinvasionunitALL.aspx> on 25 August 2013.

has been used to evict occupiers and demolish shacks without the court order required under section 26(3) of the Constitution and PIE.³¹⁸

South African city-planning and property law no longer has race as its centrepiece. Instead it is marked by policies of inclusion and improvement of the shack dwellers who are generally black, and usually African. However, there remains a failure at the level of implementation to include and respect the broader citizenship rights of poor people, as South Africa is generally criticised for joining the “shack-free cities” mantra, while failing to implement development in a manner which promotes inclusion and democracy:

In South Africa, it has been argued that the housing policy process from the early 1990s to date has been dominated, not by civil society, critical academic researchers, or even by the thinking in international agencies, but by a stubborn and dominant local technocratic elite (...) Since the gradual dismantling of apartheid legislation... the urban rights of the privileged have been upheld through market-oriented policy and discourse, which associates informal settlements primarily with threats to land values. More subtly, this is supported by the conservationist discourse, which associates land invasions primarily with the destruction of sensitive habitats and the pollution of waterways.³¹⁹

The manifestation of high-handedness at local government level is particularly concerning in the light of democratic, consultative and people-oriented roles envisaged for municipalities, and the clear judicial requirement of meaningful engagement with communities. The anti-slum agenda of local government in particular may be explained by neo-liberal restructuring, which requires government, even at the local level, to focus on profits, hence the market-centred approach to land and housing evinced by Mr Makhatini (see point iii above). As local governments

³¹⁸ F Slamdien “Cape Town anti-land invasion unit acting illegally, say rights lawyers” *West Cape News* 29 April 2013, accessed at <http://www.lrc.org.za/other-news/2696-2013-04-29-the-city-of-cape-towns-anti-land-invasion-unit-established-to-prevent-the-illegal-occupation-of-city-and-provincial-land-is-acting-unlawfully-says-lawyers-for-human-rights-lhr-lawyer-sheldon-magardie-said-the-unit-demolished-structures-with> on 25 August 2013.

³¹⁹ M Huchzermeyer cited in J Holder and C Harrison *Law and Geography: Current Legal Issues Volume 5* (2003) 299.

operate within the confines of demarcated areas (as opposed to wide national spaces), the cities which local governments are required to govern become the profit-machines, as “investment” and “world class cities” become ubiquitous buzzwords:

[L]ocal governments have become more concerned with ensuring that the local area competes effectively in the global economy (...) economic development and competitiveness have become the primary imperative that drives local policy-making.³²⁰

As a result, the needs of the poor are pushed aside by the institution which is constitutionally mandated to see to their development. Writing of the shortcomings of South African policy, Goldberg notes that “all concern to date has focused on how upwardly mobile blacks might penetrate what effectively remains white residential space”,³²¹ thus ignoring the broader integration of all blacks into sought after urban spaces which are able to remain white-dominated, with the exception of the inclusion of black junior elites.

Local government is faced with difficulties in ensuring long-term fiscal sustainability. However, the first step towards building a city is acknowledging that bankruptcy is not tied only to a lack of ratepayers but also to a lack of business activity, and that ratepayers grow out of the availability of jobs in the region. There is a misapprehension that the choice is between pro-poor development (which includes granting the poor a political space in which to operate) and economic sustainability. For example, the city of Detroit filed for bankruptcy after the automobile industry on which its local economy was based moved many of its manufacturing functions to other part of the United States and other parts of the world – in other words, after the automobile industry embraced globalisation.³²² The loss of industry and jobs caused the skilled workforce to flee to other parts of the United States, leaving Detroit emptied of its human resources and thus the viable tax base. In other words,

³²⁰ Purcell (note 2 above) 100.

³²¹ D T Goldberg “Polluting the Body Politic: Race and Urban Location” (1993) *Racist Culture* 185, 196.

³²² See the North American Free Trade Agreement, first signed in 1994, although the beginning of Detroit’s decline is said to extend even further back.

economic sustainability was shown to be linked to local industry as opposed to slum eradication.³²³ The destruction of slums or squatter camps and the accompanying residents who do not pay taxes, and the subsequent creation of middle class housing in their place have the immediate and obvious effect of increasing a city's tax revenue. The significance of this is not to be understated in an era where the decentralisation of power has required cities to raise their own revenue. However, the cost of social upheaval and its long-term consequences is not outweighed or even counter-balanced by an enlarged tax base. The Minister of Finance noted recently that "[t]he challenge we face of highly inefficient, segregated and exclusionary divides between town and township imposes costs not only on the economy and the fiscus, but also *on families and communities*" (emphasis added). The Minister also recognised, amongst other realities, "that we are a rapidly urbanising society" and that being in the process of urbanisation "means we have an opportunity to build an integrated urban landscape, with effective partnerships between municipalities, local businesses and civic associations."

It appears that the Minister has embraced the lessons from Detroit's experience:

The lesson of Detroit is not that infrastructure and housing investments are foolish ones for a struggling city to make, but rather that it is foolish to arbitrarily exclude 25 percent of your city's population from the mainstream economy, to isolate them geographically, to deny them access to capital, to destroy their neighbo[u]rhoods, and to force them into smaller and smaller spaces with worse and worse quality of housing that is becoming more and more expensive. The lesson of Detroit is that it is foolish to embrace policies that rip up the urban fabric and attempt to compartmentali[s]e all of a city's functions, and to invest in infrastructure and housing policies that quickens the flow of residents into the suburbs. The result of these policies is the Detroit we see today: an infrastructure-poor, disproportionately black, and disproportionately impoverished city that is isolated from the affluence and tax revenues of its sprawling suburbs. This fate was brought about not by a loss

³²³ See also: H Butler & R E Brown "Corporocracy: The tyranny of neo-liberalism and Detroit's financial crisis" *44th Annual Meeting of the National Conference of Black Political Scientists* 4 March 2013, accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229554### on 27 August 2013.

of some all important “entrepreneurial culture” but by the wholesale embrace of racist and anti-urban ideals.³²⁴

The tasks of local government involve preserving the rates base, maintaining an economy apart from the contributions of ratepayers and not destroying units of low-cost housing. The challenge involves the balancing of these tasks, and not the abandonment of one goal for another. eThekweni’s approach to the inhabitants of Cato Crest is a clear illustration of the disjuncture between housing policy and practice as the handling of the Cato Crest occupation by eThekweni violates the major housing principles emerging since *Grootboom*.

All judicial determinations on the occupation in Cato Crest are interim orders. The first judgment regarding the Cato Crest occupiers is an aberration, as already explained. In any event, the two subsequent judgments under case number 9189/2013 have been breached at several stages by the eThekweni Municipality. The municipality’s engagement with these judgments suggests that even more work on the right to the city needs to be done at implementation-level. The conduct of the municipality shows that the achievement of the right is not a judicial task completely, but also a socio-political task which involves a shift in local governments’ ways of thinking and operating as “city managers”.

³²⁴ C Hughes “Is Ed Gleaser Wrong About Detroit?” *Rustwire* 9 April 2013, accessed at <http://rustwire.com/2013/04/09/is-ed-gleaser-wrong-about-detroit/> on 25 August 2013.

CHAPTER 7

Conclusion

The right to the city comprises a right to participation and a right to appropriation or “occupation”. It is a case for urban democracy and people’s autonomy (often wrongly confused by anarchy in this era of governmentalisation of the state). The Constitutional Court decisions indicate a shift towards a right to the city in requiring urban municipalities to consult with all urban occupiers (even shack dwellers and other squatters). At the same time however, the jurisprudence vacillates: There appears to be no authoritative statement that the views of these occupiers should be determinative in questions of city management. There is greater potential in the law for taking participatory rights of the urban citizenry closer to the right as envisioned in Lefebvre’s thesis. The challenge of community participation is greater in polarised societies where people have different interests and agendas as a consequence of human individuality and the inequitable distribution of wealth as result of capitalist pursuits and racial oppression. South Africa is still a country which allows disproportionately and sometimes ludicrously well-built and immaculately serviced neighbourhoods to develop simultaneously with slums. Local government in post-apartheid South Africa was intended to provide, not only development, but a link to communities which national projects may exclude or forget. However, the issue which arises most in evictions from informal settlements is exclusion of the poor from urban structuring, development and decision-making, at the level where it should be most accessible: the local level.

Writing in the Marxist tradition, Patrick Bond, Ashwin Desai and Trevor Ngwane note that the legal route is best used as a tactic, rather than a strategy, an accessory to the broader struggle, because the recourse to courts cannot fundamentally alter existing power relations:

By flirting with legalism and the rights discourse, movements have seen their demands watered down into court pleadings. Heartfelt pleas are offered but for the observance of the purely procedural: consult us before you evict us. Demands for housing that could be generalized and spread, become demands for “in situ

upgrading” and “reasonable government action” and hence feed the politics of local solutions to the exclusion of demands that can be “scaled up”.³²⁵

Sachs J acknowledged the broader struggle, and articulated the role of courts in the context of the bigger picture:

The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society.³²⁶

Ashwin Desai writes that “[t]aking on local government is in itself no more than an interim measure”. However, the fact remains from a legal perspective that local government stands at the forefront of a broader system which is becoming increasingly exclusionary under the guise of development, and so taking on local government in the courts is a form of self-defence.³²⁷ Whilst it would be naive to treat the legal system and the Constitution as panacea to the problems of urban poverty and exclusion, we must construct an approach to housing matters which makes the protective constitutional provisions more suitable to the broader political context of the struggles of the urban poor. The exclusion of the poor from decision-making has led to the remedy of alternative accommodation being forced onto people who demand to remain where they are, detracting from its original purpose as a safety net against inevitable evictions. Alternative accommodation is threatening to become a means of facilitating evictions, as opposed to ameliorating the consequences of evictions. On this note, the right to the city must be acknowledged as a vast concept, and as complex as the very cityscapes to which it applies. It would be grossly distorted if it is appropriated as part of a neo-liberal agenda to repress and “legalise”

³²⁵ P Bond et al “Uneven and combined Marxism within South Africa’s urban social movements” *Amandla!* 22 June 2012, accessed at <http://www.amandla.org.za/analysis/1390-uneven-and-combined-marxism-within-south-africas-urban-social-movements--by-patrick-bond-ashwin-desai-and-trevor-ngwane> on 25 July 2013.

³²⁶ *PE Municipality* (note 12 above) para 40.

³²⁷ See also: Desai (note 315 above) 142: “The forms of solidarity that enable poor people to stand together against evictions and cut-offs are not necessarily sufficient to change the system that keeps them impoverished.”

deeply political struggles, and turn a potentially dynamic idea into another attractive yet useless touchstone of our new democratic order.

After acknowledging that courts are a tiny piece in the answer to the problem of underdevelopment and sustained exclusion and “othering” of South Africa’s economic underclass, Sachs J went on to articulate the role of the courts in this light:

[Courts] can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails (...) When dealing with the dilemmas posed by PIE, the courts must accordingly do as well as they can with the evidential and procedural resources at their disposal.³²⁸

This would require courts to respect and uphold the participatory rights of unlawful occupiers at all times, while providing the necessary reprieve in the form of alternative accommodation where this fits the situation (i.e. where it is genuinely unavoidable or where the occupier agrees to it). As discussed, the second component of the right to the city is the right to appropriation, which is aimed at preventing exclusions from the common urban space. Alternative accommodation which involves, at the behest of government, relocation to ghettos on the outskirts of the city (for example, Delft), is a shift away from the right to the city.

Ultimately, the legislation which regulates housing is concerned with residential spaces, and the judicial and executive approaches to occupiers of such spaces (lawful or unlawful) should respect and be informed by the social function of the space:

Home is a place of peace, of shelter from terror, doubt, and division, a geography of relative self-determination and sanctity.³²⁹

The right to the city understands the function of city space and should therefore underpin the judicial interpretation and executive implementation of section 26 of the Constitution.

³²⁸ *PE Municipality* (note 12 above) para 40.

³²⁹ Goldberg (note 321 above) 199.

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