

Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa¹

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1 Introduction

The right of access to adequate housing enshrined in section 26 of the Constitution of the Republic of South Africa, 1996 (the South African Constitution or the Constitution)³ has been the most frequently litigated socio-economic right in the post-apartheid era.⁴ This is unsurprising given the apartheid legacy of denying the majority (predominantly black African) population access to adequate housing, valorizing property ownership at the expense of all other forms of property rights and using evictions as a means to systemically relocate black people far away from urban centers and opportunities.

At the end of apartheid the South African Constitution, with its justiciable socio-economic rights, sought to bring about large-scale societal transformation;⁵ from a divisive and manifestly unequal apartheid society, to an egalitarian society founded on social justice. In order to achieve the objective of substantive equality and social justice, the Constitution compels a contextual re-examination of existing power structures and social relationships, as well as an engagement with social vulnerability and disadvantage.⁶ The realization of the collective good, through redistributive justice and the dismantling of social vulnerability, lies at the heart of the transformative mandate.⁷

¹ The paper draws heavily on the public interest litigation undertaken by the Socio-Economic Rights Institute of South Africa (SERI), which was intimately involved in a significant number of progressive housing and eviction cases. Furthermore, this paper draws on research conducted by SERI, namely M Clark "Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implication for Local Government" SERI Research Report (November 2013): http://www.seri-sa.org/images/Evictions_Jurisprudence_Nov13.pdf.

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³ Section 26 of the South African Constitution reads:

(1) Everyone has the right to housing;

(2) The state must take reasonable measures, within 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 all the relevant circumstances. No legislation may permit arbitrary evictions."

⁴ The majority of socio-economic rights cases that have come before the Constitutional Court of South Africa (the highest Court in all matters) have related to the right of access to adequate housing.

⁵ The South African Constitution has often been described as a transformative document. To develop a more comprehensive understanding of "transformative constitutionalism" in relation to the South African Constitution, see KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal of Human Rights* 146; C Albertyn and B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *South African Journal of Human Rights* 248; D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 *South African Journal of Human Rights* 309; M Pieterse "What do we mean when we talk about Transformative Constitutionalism?" (2005) 20 *South African Public Law* 155; P Langa "Transformative Constitutionalism" (2006) 17 *Stellenbosch Law Review* 351; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) ch 2; and various chapters in H Botha, A van der Walt and J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003).

⁶ Moseneke (2002) *South African Journal of Human Rights* 318-319; Pieterse (2005) *South African Public Law* 159.

⁷ Moseneke (2002) *South African Journal of Human Rights* 317.

It is in this context that the right of access to adequate housing laid the foundation for a progressive legal framework in relation to housing and evictions that is markedly different from the position at common law. This change has been realized substantially by relying on potentially progressive legislation such as the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 (PIE or the PIE Act), which sought to provide occupiers with rights against arbitrary and unlawful evictions.

However, the constitutional provisions and progressive legislation supporting the position of unlawful occupiers did not instantaneously bring an end to the apartheid-inherited cultures and practices of unjust evictions and tenure insecurity. Instead it has taken almost two decades of concerted action through the South African courts – particularly the Supreme Court of Appeal (SCA) and the Constitutional Court (CC) – to interpret, clarify and develop the law relating to housing and evictions in order to establish a “new normality in property relations”.⁸ The new normality provides for a legal framework infused with a number of essential substantive and procedural protections afforded to occupiers, regardless of the lawfulness of their occupation. At the core of this new paradigm is the notion that occupation of land gives expression to the right of access to adequate housing as contained in the Constitution and deprivation of such possession consequently also constitutes a breach of this right.⁹ The new normality thus provides a framework that seeks to reconcile the opposing legal entitlements of property owners and unlawful occupiers that face the threat of homelessness, and articulates clear obligations in respect of these parties as well as the state.

This shift in the legal framework governing housing and evictions has therefore significantly contributed to a realignment of the power relations in respect of property and housing in South Africa, in an attempt to address the vulnerability of many unlawful occupiers. This has been done predominantly by providing essential protections to unlawful occupiers to guard against manifestly arbitrary or unfair evictions. In this regard, the South African judiciary has, arguably, sought to give effect to its transformative mandate in the development of the right of access to adequate housing.

However, the judiciary has not escaped criticism. Among the chief criticisms levelled against the courts is the failure to adopt a minimum core approach to the realization of the right to housing.¹⁰ Some have argued that the courts have been hesitant to give explicit content or meaning to the right to housing resulting in the need for continued litigation to clarify legal principles.¹¹ It has been argued that this is illustrative of an executive-minded judiciary that has not gone far enough when interpreting and developing the constitutional obligations that flow

⁸ S Wilson “Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality” (2009) 126(2) *South African Law Journal* 270-290.

⁹ Wilson (2009) *South African Law Journal* 288. Wilson points out that these principles do not apply to ejections from commercial property, or from homes occupied by affluent tenants.

¹⁰ See, for example, S Liebenberg “South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?” (2002) 6 *Law, Democracy and Development Law Journal* 159; D Bilchitz “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance” (2002) 118 *South African Law Journal* 484; D Bilchitz “Towards a Reasonableness Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 *South African Journal of Human Rights* 383-417; C Scott and P Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney’s* Legacy and *Grootboom’s* Promise” (2000) 16 *South African Journal of Human Rights* 244-245.

¹¹ See J Dugard “Beyond *Blue Moonlight*: The implications of Judicial Avoidance in Relation to the Provision of Alternative Housing” (forthcoming 2014) 5 *Constitutional Court Review*; B Ray “Evictions, Avoidance and the Aspirational Impulse” (forthcoming 2014) 5 *Constitutional Court Review*.

from section 26.¹² Perhaps unsurprisingly given the incremental nature of this development, new and complex legal challenges have also arisen. These include increasingly evasive state that seeks to circumvent the protections laid down in jurisprudence, the rising number of court decisions that the state fails or refuses to implement, and a reticent judiciary that has become increasingly restrained in realizing its transformative mandate.¹³ It is in this light that the paper will analyze the development by the courts, especially the SCA and CC, of the law pertaining to housing and evictions.

This paper is structured in three parts. Section two of this paper analyses the key legal principles developed through South African jurisprudence, as well as the new legal relationships that have been created through the case law. Section considers whether the South African judiciary has become increasingly hesitant to determine constitutional issues in relation to socio-economic rights by looking at two recent cases, namely *Zulu* and *Fischer*. The final section of this paper delivers some concluding remarks by commenting from a pro-transformation perspective on the gains made by the courts in relation to developing the law pertaining to housing and evictions.

2 Key legal principles as developed by the South African courts

2.1 The reasonableness approach

In *Government of the Republic of South Africa v Grootboom (Grootboom)*,¹⁴ a case concerning 900 individuals that had set up a rudimentary camp on private land following their eviction in mid-winter Cape Town, the Constitutional Court adopted the reasonableness standard to assess state compliance with its positive duties in relation to the right to housing. This test focuses on whether state action undertaken to give expression to the right to housing is appropriate or reasonable.¹⁵ Much of the *Grootboom* judgment set out the parameters of a “reasonable policy”. A reasonable housing policy must be:

- comprehensive, coherent, flexible and effective;
- have sufficient regard for the social, historic and economic context of poverty and deprivation;
- take into account the availability of resources;
- take a phased approach, including short, medium and long-term plans;
- allocate responsibilities clearly to all three spheres of government;
- respond with care and concern to the needs of the most desperate; and
- be free of bureaucratic inefficiency or overly onerous regulations.¹⁶

When determining reasonableness, courts should “not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent”.¹⁷ Rather, reasonableness requires courts to adopt a flexible approach, in terms of

¹² Dugard (forthcoming 2014) *Constitutional Court Review*. See also S Wilson and J Dugard “Constitutional Jurisprudence: The First and Second Waves” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 35-62.

¹³ K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal for Human Rights* 149.

¹⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

¹⁵ Wilson and Dugard “Constitutional Jurisprudence” in *Socio-Economic Rights* 39.

¹⁶ See Wilson and Dugard “Constitutional Jurisprudence” in *Socio-Economic Rights* 40. See also *Grootboom* paras 39, 42, 43, 44, 45, and 99.

¹⁷ *Grootboom* para 41.

which a “wide range of possible measures” could be adopted by the state in order to comply with its constitutional obligations.¹⁸ The state thus has a relatively broad discretion in relation to the policy and legislative interventions it adopts, provided that the policy or legislation “falls within the bounds of reasonableness”.¹⁹

Ultimately, *Grootboom* was decided on the basis that, in failing to have any plan for vulnerable people evicted without the ability to find alternative accommodation, the state’s policy lacked both comprehensiveness and sufficient concern for the shelter needs of the most desperate.²⁰ Thus the state had failed to take steps to assist those “with literally no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations” and the Court made a declaratory order that it was in breach of section 26(2) of the Constitution.²¹

In adopting the reasonableness standard, the Constitutional Court rejected the minimum core approach, which would have meant that socio-economic rights would include certain minimum entitlements that would have been immediately claimable.²² Some have severely criticised the Court’s judgment in *Grootboom* in this respect, as this approach to the realization of socio-economic rights fails to give more concrete content to the right to housing.²³ It may be argued that the Court opted for the reasonableness test in order to give expression to separation of powers concerns. The Court seemed to believe that it was ill-suited to determining the substantive content of socio-economic rights.²⁴ As the Court stated: “[T]he precise contours and content of the measures adopted [by the state] are primarily a matter for the legislature and executive”.²⁵ Despite granting the executive branch significant leeway in relation to the specific content of the right and measures through which to realise the right, the courts maintained the power to scrutinize housing and eviction cases by reviewing the reasonableness of the measures adopted by the state.

Although this approach gives expression to legitimate separation of power and institutional competence concerns, it has also significantly curtailed the judiciary’s potential role in determining the substantive content of the right to housing. In some respects this approach has also diminished the potential relief the judiciary is capable of providing to vulnerable applicants to only the most severe infringements of the right to housing or intervening when it is clear that there is a manifest failure to put in place an effective housing programme.

2.2 Procedural requirements for an eviction

Section 26(3) of the Constitution, along with the PIE Act, provides a number of essential procedural protections to unlawful occupiers who face evictions. First, and most importantly, section 26(3) provides that no one may be evicted from their home or have their home

¹⁸ *Grootboom* para 41.

¹⁹ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 9.

²⁰ The Court also stated that if state measures to realize the right to housing were “statistically successful” but failed to “respond to the needs of those most desperate, they may not pass the [reasonableness] test”. *Grootboom* para 44.

²¹ *Grootboom* para 99.

²² This approach would be in accordance with international human rights law and the United Nations Committee on Economic, Social and Cultural Rights’ (CESR) “General Comment No 3: Nature of States’ Parties Obligations” UN Doc E/1991/23 (1991), which sets out the obligations of states parties to fulfil these rights. See also Wilson and Dugard “Constitutional Jurisprudence” in *Socio-Economic Rights* 39.

²³ See, for example, the references mentioned in footnote 10 above.

²⁴ *Grootboom* para 41. See also the Constitutional Court’s comments in *Minister of Health and Others v Treatment Action Campaign (TAC) and Others (No 2)* 2002 (5) SA 721 (CC) para 38; and K McLean “Towards a Framework for Understanding Constitutional Deference” (2010) 25(2) *South African Public Law* 465.

²⁵ *Grootboom* para 41.

demolished without a court order authorizing such eviction after having due regard to “all the relevant circumstances”.²⁶

The PIE Act expands on this requirement by stating that a court may not grant an eviction order unless the eviction sought would be “just and equitable” in the circumstances.²⁷ This requires a court to have regard for various factors, including whether the occupiers include vulnerable categories of persons (the elderly, children and female-headed households), the duration of occupation and the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers are unable to obtain alternatives on their own. The legal framework thus establishes that an eviction order may not be granted if an eviction would not be just and equitable. It further ensures that evictions (and particularly evictions of vulnerable groups) are subject to judicial scrutiny.

In *Port Elizabeth Municipality v Various Occupiers* (“PE Municipality”),²⁸ the Constitutional Court considerably developed these procedural protections through an expansive interpretation of the phrase “just and equitable”. In this case, the Constitutional Court had to consider an application for the eviction of a group of 68 people, including 29 children, from privately owned land in Port Elizabeth. The main issue in the case was whether the occupiers could be granted some measure of tenure security if they were relocated to alternative land, given that many of the occupiers had been evicted before. Although the municipality had offered to provide alternative accommodation to the occupiers, it sought a declaration from the Constitutional Court that it was not obliged to provide such accommodation as a matter of course when evicting unlawful occupiers.

In the Constitutional Court, it was recognized that section 26(3) and PIE have greatly altered eviction law. In fact, section 26 and PIE have entirely reversed the position under the common law by requiring that unlawful occupiers be treated humanely with “dignity and respect” and not as “obnoxious social nuisances”.²⁹ The Court found that the inclusion of the right to housing in the Constitution means that the “normal ownership rights” of property owners are now offset by the “equally relevant” right to housing and protection against eviction.³⁰ Most importantly, the Court highlighted that it was not enough for the state to show that it had put in place a housing program that would effectively provide housing opportunities on a progressive basis if such housing program was unable to provide to those with immediate housing needs. The Court held that if the state was unable to provide alternative accommodation or land to relatively established occupiers who would be rendered homeless upon eviction, then its policy or program may be unreasonable and the eviction consequently refused.³¹

PE Municipality therefore significantly developed the right of access to adequate housing by finding that, as part of determining whether an eviction is “just and equitable” in the circumstances, courts are obliged to consider whether such an eviction would result in

²⁶ This principle was affirmed in *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (*Pheko*) para 35, where the Constitutional Court stated that section 26(3) of the Constitution does not permit legislation authorising eviction without a court order.

²⁷ Section 4(6) and 4(7) of the PIE Act lay out a number of these circumstances. However, the factors listed in section 4(6) and 4(7) do not constitute an exhaustive list of circumstances that may be considered. This means that courts could consider any factor they deem relevant in the circumstances. *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) (*Shulana Court*) para 13.

²⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC).

²⁹ *PE Municipality* paras 12 and 41.

³⁰ *PE Municipality* para 23.

³¹ *PE Municipality* para 29.

homelessness. In instances where the eviction would lead to homelessness, courts are empowered to refuse such eviction unless the state provides temporary alternative accommodation to avert homelessness.

2.3 Meaningful engagement

A particularly interesting development in the South African housing and eviction jurisprudence is the requirement of “meaningful engagement”. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* (“*Olivia Road*”),³² the Constitutional Court expressly developed and provided content to the concept of meaningful engagement. This case related to several hundred desperately poor occupiers who were faced with eviction from a number of inner-city buildings at the hand of the City of Johannesburg. The City sought to evict the occupiers on the basis of the buildings being unfit for habitation. The occupiers argued that they would be rendered homeless if the eviction took place as they were unable to access alternative accommodation. Moreover, the eviction of the occupiers was part of a large-scale strategy on the part of the City to evict a significant number of people from various other unsafe properties in the inner city. Despite the fact that these evictions could result in a significant number of people becoming homeless, the City had no plan to find or provide alternative accommodation to those at risk of eviction. The unlawful occupiers argued that the absence of any plan to provide alternative accommodation to the vulnerable individuals who would become homeless due to an eviction, was an infringement of the right of access to housing.

In the Constitutional Court, the Court gave an interim ruling in terms of which it ordered the parties to engage meaningfully with one another in an attempt to reach mutually acceptable solutions to the issues raised before the Court and ways to improve the safety of the building in the interim. On the parties’ return, the Court gave reasons for its decision to order meaningful engagement and elaborated on what this form of engagement would entail. Stating that the obligation to engage meaningfully flowed from section 26(2) of the Constitution,³³ the Court clarified that meaningful engagement is an essential component of a reasonable state response to the housing program.³⁴ Thus when the state seeks to evict occupiers and homelessness could ensue, the state must meaningfully engage with the occupiers regarding the eviction and/or alternative accommodation options.³⁵ Courts are then empowered to endorse the agreements reached between the parties in instances where those agreements are reasonable, thereby exercising due diligence.³⁶

In theory, meaningful engagement means that the occupiers, owner and relevant state authority have to meaningfully engage on all aspects related to the eviction and the provision of temporary shelter to those who require it.³⁷ All the parties must be sincere during the engagement process by acting reasonably and approaching the engagement in good faith.³⁸ Parties should engage about the consequences of a possible eviction, whether the state can alleviate some of the potentially dire consequences that result from eviction, the obligations of the state in relation to any possible eviction, and how and when the state should fulfil its

³² *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) 208 (CC).

³³ *Olivia Road* paras 17-18.

³⁴ *Olivia Road* para 17.

³⁵ *Olivia Road* para 18.

³⁶ *Olivia Road* paras 24-30.

³⁷ *Olivia Road* para 14.

³⁸ *Olivia Road* para 20.

obligations.³⁹ Of particular importance in meaningful engagement is the need to address questions of homelessness that may ensue, potential temporary measures that may starve off homelessness (including sub-market leasing of the property by the occupiers) while the state provides alternative accommodation, whether the owner's interests could be vindicated without an eviction order being granted, or whether the owner could contribute to the efforts of the state to provide an alternative.⁴⁰ Engagement should aim at arriving at mutually acceptable solutions.

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Joe Slovo)*,⁴¹ a divided Constitutional Court laid down five separate concurring judgments. Each of these various judgments underscored the importance of meaningful engagement to a determination of the reasonableness of any housing project, especially when relocation or eviction is pursued to facilitate such project as was the case before the Court. The majority of the judges criticized the insufficient state engagement with the community.⁴²

In particular, Sachs J denounced the "top-down" approach to engagement adopted by the state, in terms of which state officials would unilaterally make decisions without consultation or inclusion of the community.⁴³ Sachs J's criticism of the government's top-down approach stood in stark conflict with Yacoob J's more deferential attitude towards engagement. According to Yacoob J, the state was only obliged to ensure that it reasonably engaged with the occupiers.⁴⁴ This means that although individual and careful engagement with each person or household might be desirable, the engagement between the parties in eviction proceedings should not be devoid of "realism and practicality".⁴⁵ O'Regan J also acknowledged that the limited state consultation with the occupiers did not constitute full and meaningful engagement.⁴⁶

O'Regan J, however, insisted that the appropriate inquiry in the circumstances was whether the "failure to have a coherent and meaningful strategy of engagement render[ed] the implementation of the plan unreasonable to the extent that the [state] failed to establish a right to evict the occupiers".⁴⁷ According to O'Regan J, it did not. In support of this assertion, O'Regan J determined that as this was the first large-scale attempt at a housing development in terms of the new housing policy this failure should be condoned. Moreover, she recognized that there was "some consultation" with the occupiers, however lacking, and that the limitations of this consultation could be remedied by an order requiring the parties to meaningfully engage about the timeframes and consequences of the eviction.⁴⁸ Arguably, the watered-down version of meaningful engagement contrasts starkly with the Court's earlier pronouncements in *Olivia Road*.

Despite the Court's recognition that state engagement was insufficient, the Court allowed the eviction. However, it ordered the state and the occupiers to engage meaningfully about a range of issues related to the time and consequences of the relocation.⁴⁹ This, the Court held, should include consultations relating to the individual relocations of households having due regard to their details and personal circumstances; the time, manner and conditions of the relocation; the

³⁹ *Olivia Road* para 14.

⁴⁰ Wilson (2009) *South African Law Journal* 290.

⁴¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 545 (CC) (*Joe Slovo*).

⁴² *Joe Slovo* paras 302-303 and 378.

⁴³ *Joe Slovo* para 378.

⁴⁴ *Joe Slovo* para 117.

⁴⁵ *Joe Slovo* para 117.

⁴⁶ *Joe Slovo* para 301.

⁴⁷ *Joe Slovo* para 302.

⁴⁸ *Joe Slovo* paras 302-303.

⁴⁹ *Joe Slovo* para 7.

provision of transport; and information about the current position of individual residents on the housing waiting list.⁵⁰

The judgment in *Joe Slovo* has given rise to considerable uncertainty about whether meaningful engagement should occur *before* an eviction is sought. In this regard, *Joe Slovo* sits uneasily alongside the Constitutional Court's assertion in *Olivia Road* that meaningful engagement is a constituent component of a reasonable state response to the realization of the right to housing⁵¹ and would therefore be essential to the assessment of the reasonableness of the state's actions. Overall, the Constitutional Court has emphasized that meaningful engagement should ordinarily take place before eviction proceedings have been instituted and matters have reached the courts.⁵² In practice, this would mean that eviction proceedings should not be embarked on unless and until municipalities and property owners have engaged with anyone involved in eviction proceedings or otherwise affected by such proceedings.⁵³ *Joe Slovo* does, however, indicate that meaningful engagement should also take place during the relocation process in instances where an eviction order has been granted. This principle is in keeping with the assertion in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality (Schubart Park)*⁵⁴ that engagement should take place at *every stage* of the eviction and housing process.⁵⁵

Although the obligation to meaningfully engage provides potentially significant protections for unlawful occupiers facing evictions and has far-reaching consequences for state decision-making in eviction proceedings, some have suggested that the requirement to meaningfully engage could be viewed as a "classic example of the proceduralisation of socio-economic rights through the adoption of administrative law norms".⁵⁶ Wilson and Dugard, in particular, argue that:

"Rather than ground the right to housing in substantive norms, the Court chose instead to create the space in which concrete entitlements could possibly be negotiated and implemented by agreement. This is a significant resource for poor people, but its exercise relies on them being well organized, appropriately resourced, and properly informed about the possibilities inherent in a process of engagement, It also requires the State to act in good faith with sympathy and respect towards the poor."⁵⁷

In fact, despite the potential benefits of this concept, there is a very real risk that meaningful engagement could become "a purely procedural 'box to tick'" thereby circumventing the quality and purpose of engagement.⁵⁸ It therefore seems that although the Court developed a potentially progressive tool to ensure greater protection for occupiers, that this development

⁵⁰ *Joe Slovo* para 7.

⁵¹ *Olivia Road* paras 17-18.

⁵² *Olivia Road* para 30; *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) (*Abahlali*) paras 69 and 119-120. See also L Chenwi and K Tissington *Engaging Meaningfully with Government in the Realisation of Socio-Economic Rights in South Africa: A Focus of the Right to Housing* SERI and Community Law Centre (CLC) Research Report (2010) 21.

⁵³ Chenwi and Tissington *Engaging Meaningfully with Government* 21.

⁵⁴ *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).

⁵⁵ *Schubart Park* para 51.

⁵⁶ Wilson and Dugard "Constitutional Jurisprudence" in *Socio-Economic Rights* 45-47; K McLean "Meaningful Engagement: One Step Forward or Two Steps Back? Some Thoughts on *Joe Slovo*" (2010) 3 *Constitutional Court Review* 223-242.

⁵⁷ Wilson and Dugard "Constitutional Jurisprudence" in *Socio-Economic Rights* 46.

⁵⁸ Tissington *A Resource Guide to Housing* 46 n 179.

comes at the price of the Court elaborating on the substantive content of the right of access to adequate housing.

2.4 Municipal provision of alternative accommodation

The South African courts have found that the state is under a constitutional obligation to provide temporary alternative accommodation to unlawful occupiers who would become homeless as a result of an eviction.⁵⁹ This means that cases of eviction which could leave unlawful occupiers homeless are treated differently to all other cases of eviction.

This obligation was first flagged in the Supreme Court of Appeal (SCA) case of *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* (“*Modderklip SCA*”).⁶⁰ In this case, 400 people were evicted from an informal settlement which was established on municipal owned land. Having nowhere else to go, they moved onto a piece of privately owned farm land. The settlement grew rapidly, and by the time the owner had obtained an eviction order, there were 40 000 people living on the land. As a result of the significant number of occupiers, the owner was unable to afford the eviction of the occupiers and applied to the court to compel the state to execute the order on his behalf.

The SCA found that the eviction breached the “limited” right to housing that the unlawful occupiers were able to realize themselves by building informal structures on the farm.⁶¹ The Court stated that the core issue in the case was that the state had failed to take any steps to provide temporary alternative accommodation to the unlawful occupiers who were “in desperate need”.⁶² Referring to *Grootboom*, the SCA stated that there was an obligation on the state to ensure that at the very least, evictions were “executed humanely”.⁶³ In the case of the occupiers before the court, it was clear that the eviction could not be humane without the government providing some form of alternative accommodation or land for the occupiers to live on.⁶⁴ In fact, if the occupiers were evicted, they would have been rendered homeless and had nowhere else to go, which would, arguably, have led to them reoccupying the Modderklip land or occupying a vacant site elsewhere. Both of these options would have put the occupiers at risk of another eviction. According to the SCA, the best solution in the circumstances was for the state to allow the unlawful occupiers to remain on the Modderklip land until such time as the state could provide the occupiers alternative accommodation or land.⁶⁵

The state’s obligation to provide alternative accommodation if unlawful occupiers would become homeless was also stressed in *PE Municipality*. In this case, the Constitutional Court found that a court would be reluctant to grant an eviction order unless it was satisfied that reasonable alternative accommodation was available.⁶⁶ Whether an eviction would be “just and equitable” in the circumstances would usually depend on whether occupiers could find alternative

⁵⁹ Wilson (2009) *South African Journal of Human Rights* 289.

⁶⁰ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA). The SCA case was later confirmed in the Constitutional Court in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (“*Modderklip CC*”).

⁶¹ *Modderklip SCA* para 22.

⁶² *Modderklip SCA* para 22.

⁶³ *Modderklip SCA* para 26.

⁶⁴ *Modderklip SCA* para 26.

⁶⁵ *Modderklip SCA* para 41.

⁶⁶ *PE Municipality* para 28.

accommodation or, if not, whether the state took reasonable steps to provide alternative accommodation to occupiers who are unable to provide alternative shelter for themselves.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (“*Blue Moonlight*”),⁶⁷ the Constitutional Court was again faced with considering what the state’s (as specifically local government) obligations are in relation to the provision of alternative accommodation. In this case, occupiers of a building in inner-city Johannesburg faced eviction by the new owner of the property. The owner had bought the property with the intention of evicting the occupiers to redevelop the property for commercial use. The occupiers proved that they would become homeless as a result of the eviction and joined the City of Johannesburg to the eviction proceedings so that they could apply for an order requiring the City to provide alternative accommodation. The City, however, argued that it was not required to provide alternative accommodation to occupiers evicted by private owners⁶⁸ and that its obligation extended only to applying to provincial government for funding in terms of the Emergency Housing Policy (EHP).

The Constitutional Court emphasized that the Constitution that all three branches of government are mandated to gradually give effect to the right of access to adequate housing by cooperating with each one another.⁶⁹ This, however, did not mean that local government escaped responsibility for funding emergency accommodation for people who would be rendered homeless as result of an eviction. The Court found that absolute, inflexible divisions in governmental responsibilities are not appropriate. As a result, local government may need to self-fund the provision of alternative accommodation, especially in relation to emergencies or evictions where it is best suited to “react, engage and plan around the needs of local communities”.⁷⁰

The Court specifically stated that the very unpredictable nature of emergency situations would mean that local government cannot always rely on an application to provincial government to fund the provision of alternative accommodation. That would be contrary to the nature of an emergency housing policy.⁷¹ Moreover, the Court held that local government is compelled to make provision for flexible housing plans in order to realize their obligations in terms of section 26 of the Constitution.⁷²

The issue at the core of *Blue Moonlight* was the constitutionality of the municipality’s housing policy, which distinguished between people evicted by the municipality itself (usually from “bad buildings” in inner city Johannesburg) and people evicted by private property owners. The policy provided that those evicted by the City would be entitled to temporary accommodation if the eviction would result in them becoming homeless, while those evicted by private owners were not entitled to temporary accommodation. The Court had to decide whether the distinction in the policy could be considered reasonable in the light of the *Grootboom* judgment.⁷³ The Court found that the City’s policy failed to recognize the desperate need for housing when people become homeless and that the policy failed to provide for the needs of people affected

⁶⁷ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

⁶⁸ *Blue Moonlight* paras 48-49.

⁶⁹ *Blue Moonlight* para 42.

⁷⁰ *Blue Moonlight* para 57.

⁷¹ *Blue Moonlight* para 63.

⁷² *Blue Moonlight* para 66.

⁷³ *Blue Moonlight* para 89.

by evictions. After all, it matters very little to an evicted occupier whether they were evicted by the government or by a private owner.⁷⁴ The Court therefore found that the City's policy was unreasonable, unconstitutional and invalid.⁷⁵ This confirmed the obligation on the government (in this case, the municipality) to provide alternative accommodation in cases where people are made homeless by a private eviction.

In two other Constitutional Court cases, *Occupiers of Skurweplaas v PPC Aggregate Quarries* ("Skurweplaas")⁷⁶ and *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* ("Mooiplaats"),⁷⁷ these principles were expanded. Importantly, these cases made clear that even in cases where occupiers had not been living on the land for very long, alternative accommodation should be provided to the occupiers if they could become homeless as result of an eviction.⁷⁸ In *Mooiplaats* the Court stated that although the short period of occupation might be a relevant consideration, a court would still be obliged to consider "all the relevant circumstances", including whether an eviction would lead to the occupiers becoming homeless.⁷⁹

From these dictates, it is clear that the state is burdened with a duty to take positive steps in order to give effect to the right of access to adequate housing by providing temporary alternative accommodation in the event that an eviction would lead to homelessness.⁸⁰ The case law developed in relation to alternative accommodation also makes clear that local government in particular are obliged to take positive action to provide alternative accommodation to evictees and will no longer be allowed to rely on the escape hatch of provincial or national responsibility.

Although the jurisprudence in relation to housing and eviction law has affirmed that the state (and particularly municipalities) is obliged to provide alternative accommodation in instances where homelessness may ensue from an eviction, the jurisprudence has largely failed to address what constitutes "adequate" alternative accommodation.⁸¹

The South African courts have, however, laid down certain broad legal requirements that the provision of alternative accommodation must comply with. In the *Blue Moonlight* case, the Constitutional Court underscored the importance of the element of the location of alternative accommodation provided. This was clear from the Court's insistence that alternative

⁷⁴ *Blue Moonlight* para 92.

⁷⁵ *Blue Moonlight* para 95.

⁷⁶ *Occupiers of Skurweplaas v PPC Aggregate Quarries* 2012 (4) BCLR 382 (CC).

⁷⁷ *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 (2) SA 337 (CC).

⁷⁸ *Skurweplaas* para 14; *Mooiplaats* para 16.

⁷⁹ *Mooiplaats* para 16.

⁸⁰ Wilson (2009) *South African Law Journal* 289.

⁸¹ A notable exception to this statement, is the Constitutional Court order in *Joe Slovo*. In *Joe Slovo* the Court authorised the eviction of a large group of occupiers subject to a set of strict requirements in relation to the state's provision of alternative accommodation. In this case, the Court endorsed relocating the residents to Temporary Residential Units (TRUs) in terms of the EHP. However, in doing so, the Court set out in detail the nature and specifications of temporary accommodation to be provided in future, as well as a detailed timetable for the relocation. In ordering that all existing and future TRUs had to comply with the certain minimum specifications or be of superior quality, the Court effectively gave minimum content to alternative accommodation provided by the state. See *Joe Slovo* paras 5 and 7. Although the Court set out these specifications, their reticence to provide more guidance on the content of temporary alternative accommodation is inner city or urban contexts, where there is frequently considerable constraints on space, has led to the state developing deeply problematic models for the provision of alternative accommodation. See, in this regard, *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another*, South Gauteng High Court, Case No 39502/2012. For more details on the case and to access all the court papers, visit the SERI website: <http://www.seri-sa.org/index.php/litigation-9/cases>.

accommodation should be provided as close as reasonably possible to the property from which the occupiers were evicted.⁸² The courts have also indicated that when providing alternative accommodation, municipalities would have to have regard to the proximity of the alternative accommodation to schools, public amenities and the evictees' places of employment or access to employment opportunities.⁸³ Moreover, in *Baartman v Port Elizabeth Municipality* ("*Baartman*")⁸⁴ the SCA held that alternative accommodation should entail a measure of tenure security. In this case the SCA set aside an eviction order, stating that it would be contrary to the public interest to evict the occupiers only for them to be rendered subject to eviction once again.⁸⁵ Alternative accommodation should thus include a guarantee against eviction, albeit limited.⁸⁶

These principles, however, do little more than frame some essential legal requirements of alternative accommodation, leaving a wide margin to municipalities regarding the provision of alternative accommodation. Possibly due to a lack of clarity in relation to the broader legal requirements for alternative accommodation, some municipalities have devised and implemented alternative accommodation models that violate key human rights. For example, the City of Johannesburg has adopted a shelter-based "managed care" model that had various problematic house rules. In terms of this model, occupiers who are evicted from their homes are housed in gender-differentiated dorms with virtually no privacy, effectively resulting in the separation of families. This model further subjected occupiers to a day-time lock-out, and the City has also limited the time period in terms of which persons are able to remain in such shelters to 6 months or a maximum of 12 months, after which it reserves the right to unilaterally evict an occupier without a court order. Although the courts have not yet clarified the full range of parameters that would constitute adequate alternative accommodation, the model proposed by the City was found to flout a number of human rights as entrenched in the Constitution in *Dladla v City of Johannesburg (Dladla)*.⁸⁷

2.3 Rights of private property owners

The new normality in South African property relations has also brought about substantial changes to the position of private land owners. The right of access to adequate housing now has the potential to limit the right to property.⁸⁸ The balancing of these rights mean that in instances where homelessness would otherwise result, unlawful occupiers would acquire a temporary, limited right of occupation "which persists for as long as the state does not perform its obligations to provide temporary shelter".⁸⁹ While ownership does "not automatically entitle

⁸² *Blue Moonlight* para 104(c)(iv). See also S Wilson "Curing the Poor: State Housing policy in Johannesburg after Blue Moonlight" (2012) 5 *Constitutional Court Review* (forthcoming).

⁸³ See *Joe Slovo* paras 249, 254 and 256; and *Rand Properties* (SCA) para 44. Although Ngcobo J's judgment in *Joe Slovo* acknowledges the importance of locality in the provision of alternative accommodation and the significant disruptive effects of alternative accommodation that is located far away from where occupiers originally resided, the issue of locality was largely glossed over by the remainder of the Court. For Ngcobo J's statements on locality of alternative accommodation, see *Joe Slovo* paras 241, 249 and 254-258.

⁸⁴ *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA). See also Wilson (2012) *Constitutional Court Review* (forthcoming).

⁸⁵ *Baartman* para 18.

⁸⁶ Wilson (2012) *Constitutional Court Review* (forthcoming).

⁸⁷ *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another*, South Gauteng High Court, Case No 39502/2012. For more details on the case and to access all the court papers, visit the SERI website: <http://www.seri-sa.org/index.php/litigation-9/cases>.

⁸⁸ Wilson (2009) *South African Law Journal* 288-289.

⁸⁹ Wilson (2009) *South African Law Journal* 289.

[an] owner to exclusive possession of this property”,⁹⁰ the right of access to adequate housing does not provide inalienable land rights for occupiers either.

In *Blue Moonlight*, the Constitutional Court affirmed that an owner’s right to property could be limited in instances where evictions may lead to homelessness. In this case, the Court dealt with the rights of a private owner of property that was unlawfully occupied and the obligations of a municipality to provide alternative accommodation to occupiers if they were evicted. The Court found that a private owners’ property rights (protected in terms of section 25 of the Constitution) could, in circumstances where an eviction leads to homelessness, conflict with the occupiers’ right of access to adequate housing (as protected by section 26 of the Constitution).⁹¹ In such situations, the protection against arbitrary deprivation of property in section 25 should be balanced by the protection against arbitrary eviction in section 26(3).⁹² The right of access to adequate housing may thus temporarily limit the right to private property in certain instances.⁹³

Undoubtedly, unlawful occupation results in the deprivation of property. But such deprivation may pass constitutional scrutiny if it is mandated by legislation and is not arbitrary.⁹⁴ In *Blue Moonlight*, the Constitutional Court also addressed the question whether the eviction was just and equitable in terms of the PIE Act. This suggests that if a court refused to authorize an eviction on the grounds that such eviction was not “just and equitable” in the circumstances, such refusal would amount to a legitimate limitation of the right to property in terms of section 25 of the Constitution.⁹⁵

The Court in *Blue Moonlight* considered an open list of factors to determine whether an eviction would be just and equitable given the circumstances, which included the length and duration of occupation by the occupiers; whether their occupation was once lawful; whether the owner was aware of the occupiers when purchasing the property; whether the eviction would lead to homelessness; and whether there is a competing risk of homelessness on the part of the private owner of the property.⁹⁶

A consideration of these factors led the Court to conclude that owners may have to be patient while their ownership rights are temporarily restricted by unlawful occupation in situations where evictions may lead to homelessness.⁹⁷

This nuanced position was further etched out in *Skurweplaas*. In this case, the Constitutional Court specified that it would not be just and equitable for a court to authorize an eviction without ensuring that such eviction would not lead to homelessness prior to the provision of alternative accommodation.⁹⁸ The Court thus reinforced the need for a linkage between the date of the

⁹⁰ Wilson (2009) *South African Law Journal* 288-289.

⁹¹ *Blue Moonlight* paras 16-18.

⁹² *Blue Moonlight* para 34.

⁹³ See Wilson (2009) *South African Law Journal* 289.

⁹⁴ *Blue Moonlight* para 37.

⁹⁵ *Blue Moonlight* para 40.

⁹⁶ *Blue Moonlight* para 39.

⁹⁷ *Blue Moonlight* para 40. The Constitutional Court’s decision in *Blue Moonlight* appeared to turn, to some extent, on two considerations linked to the owners’ intention in relation to the property. The Court specifically emphasized the fact that the owner of the property was aware of the occupation of the property when it purchased it (*Blue Moonlight* para 40). In fact, the owner had bought the property with the intention of evicting the occupiers and redeveloping the property for higher-income residents. The Court also considered it relevant that the owner intended to use the property for commercial purposes and not as a home (*Blue Moonlight* para 40). By highlighting these factors, the Court left open the question whether an eviction would be just and equitable in instances where an owner was either unaware of the occupation when she purchased the property or intended to use the property as a home.

⁹⁸ *Skurweplaas* para 13.

eviction and the date upon which the municipality must provide alternative accommodation to ensure that vulnerable occupiers are not rendered homeless in the interim.⁹⁹

In *Skurweplaas* and *Mooiplaats* the Constitutional Court further confirmed the approach taken in *Blue Moonlight* that the right to ownership cannot be regarded as wholly unqualified.¹⁰⁰ In these cases the Court reiterated that owners may have to be patient while their ownership rights are temporarily restricted until alternative accommodation could be provided.¹⁰¹ Finally, the Court also considered the fact that the owner of the property was not going to use the property “gainfully in the foreseeable future”,¹⁰² which the Court held to be a factor militating against a speedy eviction.¹⁰³

These pronouncements have effectively resulted in a new regime in housing and property relations in terms of which the right to temporary emergency shelter may, on occasion, trump property owners’ unlimited rights to enjoy their property.¹⁰⁴ Although the limitation of ownership rights is usually temporary, in *Modderklip* the SCA (and the Constitutional Court) alluded to the fact that the limitation of property rights may have a potentially permanent effect in instances where the state unreasonably fails or refuses to provide alternative shelter or permanent housing. This is evident from the Court’s references to the deprivation of property and even expropriation.¹⁰⁵ The Court, however balanced these effects carefully by stating that such limitation may, in cases where the state unreasonably fails or refuses to provide alternative shelter, entitle the owner to compensation from the state.¹⁰⁶

3 Constitutional Avoidance

In the post-apartheid era, the South African judiciary has been mandated not only to apply the law, but to actively promote and uphold the democratic constitutional values that promote human dignity, equality and freedom.¹⁰⁷ Indeed, under the transformative vision of the Constitution, “judges bear the ultimate responsibility to justify their decision not only by reference to [legal] authority but also by reference to [the] ideas and values [of human dignity, freedom and equality]”.¹⁰⁸ Under the transformative character of the South African Constitution, the judiciary (along with the executive and the legislature) has a duty to develop and give content and effect to the Bill of Rights,¹⁰⁹ including socio-economic rights. Upholding these values and the transformative ideal of the Constitution therefore requires more than the routine application of the law to the facts. Instead constitutional adjudication requires a more ambitious judicial methodology,¹¹⁰ one that seeks to identify the underlying dispute between the parties and aims to forge new tools to bring about justice and equity.¹¹¹ Crucial to this project is the dismantling of existing power relations which contribute to or entrench socio-economic

⁹⁹ *Skurweplaas* para 13.

¹⁰⁰ *Skurweplaas* para 11; *Mooiplaats* para 17.

¹⁰¹ *Skurweplaas* para 11; *Mooiplaats* para 17.

¹⁰² *Skurweplaas* para 12; *Mooiplaats* para 18.

¹⁰³ *Skurweplaas* para 12; *Mooiplaats* para 18.

¹⁰⁴ Wilson (2009) *South African Law Journal* 270-290.

¹⁰⁵ *Modderklip* (SCA) paras 43-44.

¹⁰⁶ *Modderklip* (SCA) paras 43-44; Wilson (2009) *South African Law Journal* 289.

¹⁰⁷ Section 1 (a), Constitution of the Republic of South Africa, 1996 (the Constitution).

¹⁰⁸ Langa (2006) 17 *Stellenbosch Law Review* 351.

¹⁰⁹ Section 7(2) read with s 8(3) of the Constitution.

¹¹⁰ I. Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138.

¹¹¹ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*) at para 97. See also *Fischer* para 62.

disadvantage or marginalization.¹¹² In this vein, Albertyn and Goldblatt opine that transformative constitutionalism requires

“a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. [And] the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other ground of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.”¹¹³

As has been indicated in the discussion above, the South African Constitutional Court is justifiably regarded both domestically and internationally as a beacon of hope in the judicial enforcement and promotion of the socio-economic rights of the most poor, vulnerable and marginalized members of society.¹¹⁴ Indeed the Court’s jurisprudence is cited across the world for its progressive nature. However, the Court has also been criticized for being “unresponsive to the problems of the poor”¹¹⁵ by failing to meaningfully engage with its transformative mandate.¹¹⁶ This is primarily due to the Court’s approach in socio-economic rights cases, where it has been seen as being overly technical, procedural and unwilling to pronounce on any issue that does not have to be adjudicated upon for the purpose of deciding a case; or to play any wider or more long-term role than delivering the judgment.¹¹⁷ The judiciary’s reticence to determining constitutional issues unless absolutely necessary to the outcome of a particular case, has been described as an abdication of judicial responsibility or an act of “judicial avoidance.”¹¹⁸ In refusing to go any further than may be *prima facie* required in a particular case, the South African courts have diminished both the transformative objective of the Constitution and the full potential of the socio-economic rights contained therein.

Although courts should be mindful of separation of powers and institutional competence concerns,¹¹⁹ they are also mandated to fulfill the transformative mandate set out in the Constitution. Simply put, when other organs of state fail in their constitutional obligations to protect the rights of the most vulnerable, the courts should not be overly cautious and slow to intervene in a manner that would bring about transformation and equity. The duty to transform South African society along egalitarian lines does not fall solely to the executive and the legislative branches of government. The Constitution also commits the judiciary to the goal of achieving “social justice and the improvement of the quality of life for everyone”.¹²⁰

Despite the Constitutional Court in *Grootboom* placing the transformative constitutional project at the heart of the Court’s interpretation of the right of access to housing,¹²¹ the Constitutional Court has nonetheless been criticized for its failure to provide meaningful content to this right.¹²² This criticism has been reiterated throughout the Court’s development of housing and eviction law. Although the judiciary has developed a legal framework that is markedly different from the

¹¹² Moseneke (2002) *South African Journal of Human Rights* 318-319; Pieterse (2005) *South African Public Law* 159.

¹¹³ Albertyn and Goldblatt (1998) *South African journal of Human Rights* 249.

¹¹⁴ Legalbrief “The future of Transformative Constitutionalism in South Africa” *LegalBrief Today* (12 August 2008).

¹¹⁵ J Dugard “Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice” (2008) 24 *South African Journal of Human Rights* XXX.

¹¹⁶ Dugard (2008) *South African Journal of Human Rights* XXX.

¹¹⁷ Dugard (forthcoming 2014) *Constitutional Court Review*.

¹¹⁸ Dugard (forthcoming 2014) *Constitutional Court Review*

¹¹⁹ Dugard (forthcoming 2014) *Constitutional Court Review*.

¹²⁰ *Grootboom*. See also P de Vos “*Grootboom*, The Right of Access to Housing and Substantive Equality as Contextual Fairness” (2001) 17 *South African Journal of Human Rights* XXX.

¹²¹ De Vos (2001) *South African Journal of Human Rights* 269.

¹²² Dugard (forthcoming 2014) *Constitutional Court Review*.

position at common law and significantly altered the underlying power relationships that characterize property relations under apartheid, it has been hesitant to provide any concrete content to the right of access to adequate housing. As a result, poor people have been hindered in litigating all but the most severe infringements of their rights and manifest failures to implement state housing policy. This has occurred, in spite of the fact that the executive and legislative branches of the state have consistently failed to develop and implement reasonable housing policies and programmes.

More recently, there are indications that there has been a narrowing of space in the judiciary where the meaningful advancement of transformative justice can take place. In recent years, there has been a decrease in the judgments of the Constitutional Court and the SCA employing the language and intellectual conceptualization of the “transformative vision” set forth by the Constitution. This has coincided with a number of technical and procedural cases, particularly in relation to socio-economic rights cases. Although these occurrences may not be indicative of a change of direction on the part of the South African judiciary, we argue that the increased focus on procedural and technical consideration in housing cases “diminishes the capacity of the judiciary to act as an institutional voice of the poor” and is not conducive to the realization of the judiciary’s transformation mandate.¹²³ Below, we discuss two recent housing decisions in which the Constitutional Court and the SCA respectively considered the right of access to adequate housing of poor occupiers living in informal settlements. In both instances the courts relied significantly on technical and procedural reasoning instead of engaging with the pressing legal issues raised, thereby failing to provide legal certainty and much needed legal protection. We argue that these cases exhibit the courts’ constitutional avoidance approach.

In fact, the Court’s act of judicial avoidance and conservative approach to developing substantive content to socio-economic rights (and housing in particular) has often had the effect of pushing poor litigants further into inequality, unfairness and uncertainty¹²⁴

3.1 *Zulu and 389 Others v eThekweni Municipality and Others* (“Zulu”)

Zulu and 389 Others v eThekweni Municipality and Others (“Zulu”) was a case involving an application for the eviction of a number of occupiers from a piece of land colloquially referred to as Madlala Village, located near Lamontville Township in Durban. In March 2013, the KwaZulu-Natal Member of the Executive Committee (KZN MEC) for Human Settlements and Public Works obtained an interim order involving about 1 568 of its properties, permitting and obliging the eThekweni Metropolitan Municipality to ‘prevent any persons from invading and/or occupying and/or undertaking the construction of any structures’ on specified land within the municipality’s area of jurisdiction and to ‘remove any materials placed by any persons upon’ that land. The Madlala Village residents reside on one of the 1568 properties identified in the order (the “interim order”).

In April 2013 the KZN MEC and the municipality approached the KwaZulu-Natal High Court, Durban, for confirmation of the interim order. The Madlala Village residents then applied for leave to intervene, arguing that they are resident on one of the properties and that they had a “direct and substantial interest” in the proceedings as the plain reading of the order effectively authorised their eviction without complying with the provisions of section 26(3) of the

¹²³ Dugard (2008) *South African Journal of Human Rights* XXX.

¹²⁴ See Abahlali press release statement *Illegal Evictions in Madlala Village, Lamontville* 20 June 2014 on how the KZN MEC for Housing and eThekweni municipality used the interim order to conduct further evictions: <http://abahlali.org/node/13942/>

Constitution or the PIE Act.¹²⁵ The residents sought to intervene in this application because the interim order had been previously used to justify numerous evictions and demolitions at Madlala Village by the municipality's Anti-Land Invasion Unit ("the Unit"). Surprisingly, the High Court dismissed their application, finding that the PIE Act is not applicable and that they do not have a 'direct and substantial interest' in the finalization or confirmation of the interim order. The Madlala Village occupiers then approached the Supreme Court of Appeal ("SCA"); which also refused them leave to appeal.

As a result, the Madlala Village residents were forced to take their plight to the Constitutional Court for an order granting them leave to intervene. Before the Constitutional Court, the shack-dwellers' social movement Abahlali baseMjondolo (Abahlali) was admitted as *amicus curiae* (a friend of the court). Abahlali represented a number of people who had also been evicted from another piece of land by the Unit on various occasions in 2013. In effecting their eviction and the demolition of their informal dwellings, the Unit had utilized the same interim order.

The municipality argued before the Constitutional Court that the interim order could not be, and was not, used as an eviction order. The municipality made these assertions in spite of the fact that it had relied on the order to justify the eviction of the Madlala Village residents twenty five times; including a mere two days after the matter was heard in the Constitutional Court. The majority judgment found that that "there can be no doubt that the interim order authorised the taking of steps which could have the effect of evicting from the Lamontville property persons who were already living on the property or had completed building their homes on the property". The Court found the municipality's submission to be "unacceptable", particularly in light of evidence put before it that the municipality demolished a number of structures on the Lamontville property just one day after the hearing before the Court. The Court granted the occupiers leave to intervene in the proceedings; however the Constitutional Court did not set the interim order aside or express an opinion on the constitutional validity of the order. The Court simply granted the occupiers leave to intervene in the High Court proceedings and referred the case back to the High Court for determination. The Court's approach was that since the Madlala Village residents had only applied for leave to intervene as parties and did not explicitly attack the constitutionality of the interim order, the Court could was not required to pronounce thereon.

The refusal of the Court to consider the constitutional validity of the interim order based on technical and procedural consideration is highly problematic. First, section 172 of the Constitution states that the South African courts "must" declare any law or conduct that is inconsistent with the Constitution "invalid to the extent of this inconsistency".¹²⁶ Moreover, the courts are empowered to "make any order that it just and equitable" in the circumstances.¹²⁷ This constitutional provision clearly empowers the Court to consider the constitutional validity of any state act or piece of legislation without requiring that the Court be requested to pronounce on such issue. The Constitutional Court's failure to strike the order down therefore seems perplexing. Second, although the Madlala Village residents initially framed their case as an appeal against the High Court's order refusing them leave to intervene, as oral arguments before the Court took place, the question of the constitutional validity of the interim order became fundamental to the proceedings before the Court.¹²⁸ In fact the validity of the order was not only addressed in written argument but it was also extensively canvassed in oral argument on the day of the hearing, with the *amicus curiae's* submissions focused exclusively on the

¹²⁵ The Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 (PIE).

¹²⁶ See s 172(1)(a) of the Constitution.

¹²⁷ See s 172(1)(b) of the Constitution.

¹²⁸ *Zulu* para 52.

validity of the interim order. Therefore, the Court's refusal to pronounce on the validity and constitutionality of the interim order on the basis that the issue was not before the court was not only overly technical but it could also be said that it was not line with the Court's transformative mandate. The Constitution already vests in the Court the power to make any order that is just and equitable.¹²⁹ Van der Westhuizen J, in a minority judgment, highlighted that "this power is aimed at achieving justice and equity, rather than trapping litigants in the unfairness that strict adherence to technical procedure may produce".¹³⁰

On a more practical level, the majority's general approach and the failure to set aside the interim order is problematic in that until a competent court sets it aside, the interim order (and other orders of a similar nature) will remain in legal force and potentially be used to evict residents in the KZN MEC's 1568 other properties and further afield. The Constitutional Court has therefore avoided and sidestepped the opportunity to establish legal certainty for those who are in a position similar to the Madala Village residents and regularly have their only homes demolished without a court order. In fact, since the Constitutional Court handed down its judgment the eThekweni Municipality has used the order to justify several more evictions, which is precisely why it was important for the Constitutional Court to determine the constitutional validity of the interim order and establish legal certainty¹³¹.

However Judge van der Westhuizen's progressive minority decision goes to the heart of the transformative vision of the Constitution. He reminds us of the dark days of apartheid, a time when 'the destitute and landless were considered unworthy of a hearing before they were unceremoniously removed from the land where they had tried to make their homes'¹³² and that it should not be repeated. Therefore in van der Westhuizen J's view he would have set aside the order. This was in stark contrast to the technical and procedural approach taken by the majority which fails to bring justice and equity to litigants in the position of the poor and vulnerable Madlala Village residents and others. The Madlala village residents and other vulnerable occupiers where courts have issued similar orders, continue to live in legal uncertainty and at risk of their homes being demolished without judicial oversight.

3.2 *Fischer v Unlawful Occupiers of Erf 150, Philippi East*

This brings me to the second case of *Fischer v Unlawful Occupiers of Erf 150, Philippi East*,¹³³ which concerns a group of desperately poor people in Cape Town who moved onto an open piece of land (now known as the Marikana Informal Settlement) as they were destitute, landless and simply had nowhere else to go. The City of Cape Town's Anti-Land Invasion Unit came to the land in January 2014 and demolished their homes without seeking any eviction or demolition order from the court. The City of Cape Town (like the MEC in *Zulu*) then obtained an interim order which interdicted and restrained those evicted or other people who were intending to further or again occupy the property. It further empowered the Sheriff, together with the South African Police Service and the Army, to remove such persons and demolish any vacant structure found on the land.

¹²⁹ *Zulu* para 62.

¹³⁰ *Zulu* para 62.

¹³¹ See Abahlali press release statement Illegal Evictions in Madlala Village, Lamontville 20 June 2014 on how the KZN MEC for Housing and eThekweni municipality used the interim order to conduct further evictions: <http://abahlali.org/node/13942/>

¹³² *Zulu* para 44.

¹³³ *Fischer and Another v Persons Whose Identities Are To The Applicants Unknown And Who Have Attempted Or Are Threatening To Unlawfully Occupy Erf 150 (Remaining Extent), Philippi, In Re: Ramahlele And Others V Fisher And Another* 2014 (3) SA 291 (WCC) ("Fischer").

The evicted occupiers then approached the Western Cape High Court to first claim restoration onto the property and their homes, and challenging the City's Anti-Land Invasion Unit's policy of arbitrary evictions without an order of court. In the High Court the City argued that the structures that were demolished were not yet homes and, because they were not homes, the City was not bound to observe the provisions of the PIE.¹³⁴ The City's view is that it simply does not need a court order to evict people living in shacks made of materials such as wood, plastic and iron because it has decided that these are not "homes" for the purposes of the law. On the City's interpretation, a shack is not a home if the person who lives in it is not present; or if the Unit finds only a few personal belongings in the shack; or if the shack is built out of new materials; or if the ground around the shack is disturbed, suggesting that it might be newly-constructed.¹³⁵ The Court, per Gamble J, quite remarkably found that the City's attempts to evade the law through evicting people using the Anti-Land Invasion Unit, and arbitrarily deciding whether people's shacks were homes or not, was unlawful and went on to describe it as "reminiscent of the well-documented operation conducted by the apartheid government in the 1980s".¹³⁶ According to Gamble J there should be a wide, rather than a restrictive, contextual interpretation to the word "home", stating that:

people with limited, if any, resources, such as the occupiers in this case, have managed to scrape together enough money to buy the basic materials (wood, iron and plastic sheeting) to erect the most basic of structures in which they wish to live peacefully would undoubtedly call those structures 'home'.¹³⁷

On appeal, the Supreme Court of Appeal found, on procedural and technical grounds, that Gamble J went too far by deciding matters that were not before his court –such as whether there was an eviction of people from their homes– and should therefore not have decided the matter without hearing further evidence as to whether the residents were indeed in occupation of the land. The question of whether there were indeed people's homes that were demolished was left unanswered and the case was referred to the High Court for an evidentiary hearing. Therefore by deciding the matter on procedural grounds the SCA avoided having to pronounce on the residents substantive right to adequate housing and the right not to have their homes demolished without a court order, in terms of section 26(1) and (3) of the Constitution, respectively.

Upon the occupiers appeal to it, the Constitutional Court also refused interfere with the SCA decision. In so doing, the Court tacitly endorsed the SCA's decision. This is another example of where the courts have preferred technical legal procedure over the transformative mandate imposed on them by the Constitution. In following this approach, we have time and again seen the Courts failing to bring about justice and equity to litigants whose socio-economic situation indicate that they undoubtedly need it much more than most.

Accordingly, in both *Fischer* (and in *Zulu*) the Court was required to 'scratch the surface to get to the real substance below'¹³⁸. It was more than just day to day applying of the law but it concerned the livelihood of the poorest of the poor who are at risk of their homes being

¹³⁴ *Fischer* para 47. See also S Wilson Evictions: South Africa's bitter year-round trauma, Daily Maverick. 15 July 2014.

¹³⁵ *Fischer* para 35.

¹³⁶ *Fischer* para 1.

¹³⁷ *Fischer* para 91.

¹³⁸ *Zulu* para 62. See also *Head of Department, Department of Education, Free State Province v Welkom High School and Others* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) at para 130.

demolished and being evicted without recourse to the Court. In *Fischer*, as result of the City's problematic view of the meaning of a "home" for the purposes of the law, many indigent people continue to be at risk of being evicted by the City's Anti-Land Invasion Unit. As once officials of the City Anti-Land Invasion unit have decided that a shack is not a home, it can simply demolish it without a court order and having to comply with the provisions of PIE. The Court therefore sidestepped an opportunity to provide content and clarity on the Constitutional meaning of a "home" in terms of section 26 of the Constitution and thereby failed to advance transformative justice and left many poor and vulnerable litigants out in the cold.

4 Conclusion

(The paper is still in the drafting phase and we are working towards finalizing the conclusion).

The transformative character of the Constitution demands simply that the judiciary do more than a technical and procedural application of the law. The judiciary should at all times take cognizance of their role in bringing about justice and equality. A failure on the part of the state to implement a programmatic and proactive response (to the right to housing) and a judiciary who is not fully alive to their transformative mandate will have to the effect of pushing poor and vulnerable individuals further into inequality.