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LABOUR LAW AND SOCIAL SECURITY LAW PERSPECTIVES ON LAND TENURE IN SOUTH AFRICA

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CHAPTER 1

1.1 INTRODUCTION

Chapter 2 of the Constitution of the Republic of South Africa provides for an obligation on the State to enable citizens to gain access to land on an equitable basis, to achieve the progressive realisation of the right to adequate housing and to prevent evictions or demolitions of houses without an Order of Court¹

This dissertation will explore the South African Government's initiative in affording everyone in South Africa the right and protection provided for in the Constitution, with specific reference to the rights and measures mentioned above.

The role of this dissertation is to highlight the reformist approach to the drastic incursion upon the Common Law, namely the protection of Land Ownership and housing rights, in view of the goals of Sections 25 and 26 of the Constitution, the subsequent legislative measures introduced by the Government and the impact of the Labour Relations Act (LRA)² upon such legislative measures. These measures will be discussed later in this work.

Over the last few years South Africa has witnessed profound political, social and economic changes. In 1994, democratic elections were held which effectively removed the era of apartheid. The government, working within the framework of the RDP,³ geared itself to remove social disparities and inequalities inherited from the previous regime. Prior to the 1994 election, a major recession led to falling living standards for the majority of the population⁴.

In sum, the legacy of the industrial policies which favoured protection of the employer, has been changed by the introduction of legislative measures to allow a sufficient degree of protection to employees, providing a measure of employment security. This is attained by the introduction of legislation such as LRA⁵, ESTA⁶ and PIE⁷.

¹ Section 26 of Act 108 of 1996 – The Constitution of the Republic of South Africa.

² Labour Relations Act 66 of 1995.

³ Reconstruction and Development Programme.

⁴ Hayter S, Reinecke G and Torres R: *Studies on the social dimensions of globalization in South Africa*. Geneva: ILO (International Labour organisation) 1999.

⁵ Labour Relations Act 66 of 1995.

⁶ The Extension of Security and Tenure Act 62 of 1997.

⁷ Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998.

Whilst conceding that much has to be done, discussions and settlements within the framework of NEDLAC⁸ need to be retained so as to allow government, employers, unions and third parties to negotiate on issues, including social security issues, such as the right of access to adequate housing.

One wonders whether the trade liberalisation process initiated in 1994 may have contributed to job losses in recent years. Homelessness is often a direct consequence of job losses. One, also, cannot argue away the important connection on the country's ability to comply with section 26 of the Constitution being almost wholly and critically dependant on the country's employment performance. Macro-economic changes, the end of apartheid, emigration in droves, the creation of democratic institutions, the adoption of new labour regulations, have had a negative impact on the country's progress and realisation of the promises made in the Constitution.

Legislative reforms resulted from a tripartite negotiation process involving labour, business and government at NEDLAC. A number of Labour Market Institutions were created⁹. The reforms were mostly enacted through a new legislative framework¹⁰. The commitment of South Africa to align itself to International Labour Organisation standards, is seen in its ratification of five (5) out of seven (7) core ILO conventions in 1996 and 1997 respectively¹¹. Indeed the report of the CLMC¹² opens with the following statement:- *"Labour Market policy was arguably the centrepiece of apartheid's mechanism of social control and its economic growth strategy. Poverty, discrimination and inequality were the hallmarks of its workings and consequences."*¹³

19th Century advances saw an increase in trade which resulted in capital growth while workers' expectations were not realised. The fact that employer's labour gains were more important than social security is apparent from workers who were lured from relatively secure and sustainable livelihoods on the agricultural land and moved to urban slums and sweatshops that were created with the resultant decline in the living standards.¹⁴

⁸ National Economic Development and Labour Council.

⁹ In particular the Labour Court (LC), the Labour Appeal Court (LAC), Commission for Conciliation, Mediation and Arbitration (CCMA) and an Essential Services Committee (ESC).

¹⁰ The Labour Relations Act (LRA) 66 of 1995, the Basic Conditions of Employment Act (BCEA) 75 of 1997 an Employment Equity Act 55 of 1998 and the Skills Development Act 97 of 1998.

¹¹ Freedom of Association and Protection of the right to organize convention 1948 (No 87) Right to organize and Collective Bargaining Convention 1949 (No 98) Forced labour convention 1957 (No 105) Discrimination Employment and Occupation Convention 1958 (No 111).

¹² Comprehensive Labour Market Commission (CLMC).

¹³ RSA 1996 D :1X.

¹⁴ See Governance of Globalization : ILO's Contribution by Robert Kyloh,

A new class of factory owners argued that economic survival was dependant on cheap and abundant labour. Political influence was mustered to cause labourers to flood the cities, accepting low wages and poor conditions, tearing life and labour market norms apart. Workers became “raw materials” bought and sold as labour market flexibility reached its peak.

Even though it is accepted that the influx of pass bearing black males was initiated during the apartheid era, little can be seen to have been done by the present government to alleviate the situation. The new democratic government has caused legislation to be introduced in accordance with the Constitution which has influenced families who were denied the opportunity of living and settling in urban areas by the Group Areas Act to infiltrate urban and peri-urban areas in droves, which caused the mushrooming of informal settlements. These informal settlements are generally short of proper housing, water and sanitation facilities. The Government of South Africa inadvertently landed itself in a “catch-twenty-two” situation by being under the obligations created in terms of section 26 of the Constitution and the failure to meet the demand for housing, created by the influx.

Upon a cursory glance at the Bill of Rights contained in chapter 2 of the Constitution of the Republic of South Africa, which supports one law for one nation, one cannot impute fault upon a lay person for having to believe (albeit incorrectly) that he or she has an unqualified right in terms of section 26(1) of the Constitution to access to adequate housing. This perception probably prompted Irene *Grootboom* to institute proceedings in the Cape High Court where the Court held that the State was bound to provide rudimentary shelter irrespective of the availability of recourses. This perception was removed by the Constitutional Court’s decision in *Grootboom’s* case.¹⁵ This perception was strong and became the basis of the people’s belief that incursion by Government and public officials to be an infringement of their right to occupy their homestead peacefully without fear of violence to themselves or to their property.¹⁶

The right contained in section 26(1) may be more easily accomplished by independent organisations such as the American based National Association of Coloured Women’s Clubs (NACWC), whose motto is “lifting as we climb,” which has as its official goal to raise the morale of women,

¹⁵ *Grootboom v Oostenberg Municipality and others* 2000(3) BCLR 277 (C).

¹⁶ *The Government of South Africa v Grootboom* 2001 (1) SA 464 (CC) (hereunder referred to as *Grootboom*).

standards of the home and to improve the standards for family living.¹⁷ Organisations such as the NACWC could be of importance in South Africa for the purpose of having to implement an awareness programme within the illiterate part of the population on their rights embraced in sections 25 and 26 of the Constitution.

Having to be without a house, expresses connotations of coldness, indifference, presenting stress, misery, alienation and instability.

In SA, officials of the Gauteng Provincial Housing Department and Greater Johannesburg Metropolitan Council consider homeless people to be “..... people without (i) adequate shelter, (ii) secure tenure, (iii) living in squatter settlements, (iv) living in backrooms and, (v) living in slums.” Three groups of homeless street people are identified by the Johannesburg inner city being (i) pavement or street dwellers, (ii) those who live in temporary shelters, bus and taxi ranks, stations and (iii) those who live in city shelters, (shelters provided by NGO’s or faith based organisations).¹⁸

This dissertation will attempt to show the phenomenal change in the people’s right to housing, which was governed by the common law prior to the Constitution coming into being and the subsequent legislation and developments, which legislation and developments were presented to accord with the provisions of sections 25 and 26 of the Constitution. Wherever necessary the developments around sections 25 and 26 of the Constitution which have had an impact on labour law shall be dealt with.

1.2. HISTORY

In Roman Law, the contract of letting and hiring, locatio conductio had as one of its forms locatio conductio rei being the letting and hiring of a thing.¹⁹

The letting and hiring of a thing is called a lease whereby the Lessor agrees to give to the Lessee use and enjoyment of the property in return for remuneration.²⁰

¹⁷ Shapiro V, *Economic activity as Political Activity*– University of Wisconsin, Madison, on a paper prepared for delivery at the Annual Meeting of the American Political Science Association, Washington DC 2000.

¹⁸ Olufemi, A “*Johannesburg Inner city – A Preliminary Survey*” *Environmental and Urbanization* 19(2)223 – 224 October, Wits University, on Street Homelessness.

¹⁹ Grotius 19:2:1; Voet 19:2:1, 66,333 Lee 299, Willes Principles of South African law 8 edition, 407 JUTA 1991, Maasdorps Institutes of South African Law Volume 3 . The Law of Contracts 9th Edition JUTA, 1978;

²⁰ *Kessler v Krogmann* 1908 TS 290 at 297; *Young v Smith and another* 1961(3) SA 793 at 797F.

It is important to note that no matter what label is attached to it, or what form an agreement assumes, the Court will give effect to the real intention of the parties.²¹

There developed a distinction between an urban tenement and rural tenement which did not depend on geographics but rather on the purpose for which the tenement was intended to be put to use²² A rural tenement is one used for agricultural or pastoral purposes.²³ An urban tenement is one used for domestic, business, trade, manufacturing or mining purposes.²⁴

Occupation of the premises could be terminated in the absence of an agreement by either party giving reasonable notice to the other party of its intention to terminate the lease.

For the purpose of this dissertation, the historical survey of legislation introduced in response to rent or rental and the restriction upon a lessor's right to eject a lessee upon expiration of a lease, shall be discussed. Legislation was enacted for the first time in 1920 under the Tenant's Protection Act²⁵ and the Rents Act.²⁶ This legislation was founded on English legislation, namely the Increase of Rent and Mortgage Interest (non restrictions) Act 1915.²⁷

The Rents Act protected the tenants by creating the Rent Board²⁸ which had the powers to investigate complaints, fix reasonable rents for dwellings and to reduce rent agreed to by parties to a lease²⁹ and to order refund of excess rental.³⁰ Since 1950 the Rents Act was amended to give the Lessees of dwellings, subject to the Rents Act 1950 as amended, security of tenure.³¹ This Act created a drastic inroad upon the common law rights of lessors and was accordingly required to be strictly construed so as to minimise discrimination.³²

²¹ *Zandberg v van Zyl* 1910 AD 302 at 309, *Bayee v Khoza* 1937 AD at 253 and *CIR v Randles Brothers and Hudson Ltd* 1939 AD 369 at 382 – 3.

²² *Henderson and Hanekom* 1903 20 SC 513 at 522.

²³ *Swarts v Landmark* 1882 26C 5 at 8.

²⁴ *Henderson v Hanekom* see note 22 above.

²⁵ Tenants Protection (temporary) Act 7 of 1920.

²⁶ Rents Act 13 of 1920.

²⁷ Cooper, W E: *South African Law of Landlord and Tenant*, 2nd edition, JUTA, 1994

²⁸ See s 1.

²⁹ See s 6.

³⁰ See s 7.

³¹ See *Keeler Lodge Pty Ltd v Durban Rent Board and others* 1965(1) SA 308 (N) at 308- 311.

³² *Ayob Ltd v Alli* 1953 (3) SA 48 (7) at 50G.

Until 1991 the Land Tenure system was based on race. The most notorious acts were the so-called Lands Acts,³³ i.e. the Black Land Act of 1913,³⁴ the Development Trust and Land Act of 1936,³⁵ the Natives (Urban areas) Act of 1923,³⁶ the Black Communities Development Act of 1945,³⁷ and the Group Areas Act of 1966³⁸ in terms of which segregation was obtained through various means, including eviction and forced removals.³⁹

After 1991 the White Paper on Land Reform was tabled in Parliament. Its policy objectives were to broaden access to land rights to the whole population and to move towards progressively restoring land to people who had to be removed in terms of the repealed apartheid legislation.⁴⁰

The Abolition of Racially Based Land Measures Act⁴¹ has repealed the majority of racially based land laws. In South Africa the duty to protect the right to housing has been given effect through the enactment of statutes which give protection to people whose tenure of their homes is insecure and who are vulnerable to eviction.⁴²

If one has to consider the pre-ambls of the above Statutes one will recognise that it is the purpose of each one to give effect to the Constitution. Most recently the President has assented to the Social Assistance Act which re-affirms the government's commitment to take steps to achieve amongst other rights, the right to access to adequate housing.⁴³

³³ See du Plessis W and Olivier N.J.J. "Plakkery en Uitsettings Bevele" 1970 SAJHR 307-310

³⁴ Act 27 of 1913.

³⁵ Act 18 of 1936.

³⁶ Act 21 of 1923.

³⁷ Act 25 of 1945

³⁸ Act 36 of 1966.

³⁹ Murray C. and C. O'Reagan "No place to rest; forced removals and the law in South Africa" 1990 SAJHR 124.

⁴⁰ See ss 89 – 96

⁴¹ The Abolition of Racially Based Land Measures Act 108 of 1991

⁴² The most important statutes are the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Informal Land Rights 31 of 1996, the Extension of Security of Tenure Act 62 of 1997 (the ESTA) the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and to a certain extent the Labour Relations Act 66 of 1995 (LRA).

⁴³ Act 9 of 2004 which recognises as part of the pre-ambles (1) the obligation on the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights and (ii) to provide for a National Security Policy to prevent the proliferation of Laws and Policies relating to Social Security from prejudicing beneficiaries or the economy of the Republic or the implementation of National Social Security Economic Policy.

1.3. THE COMMON LAW WITH SPECIFIC REFERENCE TO LAND OWNERSHIP AND LEGAL POSSESSION OF PROPERTY.

1.3.1 REI VINDICATIO:

The basis for occupying another person's property is ordinary contractual. If there is no contract, the defendant/occupier is in a disadvantageous position in having to resist a vindicatory action. There are, however, different agreements which can give rise to the occupier being in lawful occupation or possession.

A lease can be affected by the status of the parties to an action, e.g. a tenant who sub-lets the property to another without the consent of the landlord will cause the status of the tenant and sub-tenant to be weak as against that of the landlord.

According to the Prescription Act⁴⁴ a person can claim ownership by way of occupation where he has openly been resident on the property or by way of acquisitive prescription where a person occupies a property with the intention to possess as well as continuity of physical control for an uninterrupted period of 30 years.

However, in both the above cases, the right to be on the premises can be challenged by means of a *Rei Vindicatio* action, normally referred to as an *actio in rem*. An owner cannot be deprived of his property against his will and is entitled to recover it from any person who retains it without the owner's consent.⁴⁵

The owner needs to prove that he is the owner and that the defendant is in occupation or possession at the commencement of the action. The owner bears the onus of having to prove that he is entitled to the res.⁴⁶

The defence raised by the Defendant may be that he pleads consent, in which case the Plaintiff must show that such consent was lawfully terminated, either by effluxion of time or that the Plaintiff was entitled to cancel the consent. In terms of *Chetty v Naidoo* supra : 1974 (3) AD at page 21 paragraph G.

⁴⁴ Section 1 of the Prescription Act 68 of 1969.

⁴⁵ Kley D G and Boraine A: Silberberg and Schoeman: The Law of Property 3rd Edition Butterworths 1992

⁴⁶ *Chetty v Naidoo* 1974 (3) SA 13 (A)

"A Plaintiff who claims possession by virtue of his ownership must *ex facie* his papers prove the termination of any right which he concedes that the Defendant would have, but for the termination."

The defendant occupier may also plead that the owner is not the owner or that the Plaintiff has no lawful title to the premises or that the Defendant has a lien on the premises. In such cases the Plaintiff must discharge the onus on a balance of probabilities.

1.3.2. SPOLIATION ORDER (MANDAMENT VAN SPOLIE)

The purpose of the Mandament van Spolie is to restore unlawfully deprived possession *ante omnia*. This remedy is designed to prevent people from taking the law into their own hands and is most frequently granted against lawful owners of property. The temporary relief granted to an applicant is possession restored *ante omnia*, without the question of rights of ownership having to be decided upon.

The Spoliation Order is a robust remedy. However, in considering an appropriate remedy, the Court exercises its discretion when considering the order, for example if restoration is practically impossible, or the thing is damaged beyond recognition. The possessor despoiled of his property cannot take the law into his own hands by committing counter-spoliation. He will have to use the remedy available in law, i.e. the Mandament van Spolie.

1.3.3. AN ORDER OF RESTITUTIO IN INTEGRUM DISTINGUISHED FROM THE RECOVERY OF PROPERTY ON THE GROUNDS OF A REAL RIGHT.

An order of restitution in integrum involves nullification of legal rights as compared to the real right to have possession of his property restored by virtue of his ownership of the property.⁴⁷ When an owner sues to recover possession of his property the order sought may be an order for restoration of the owner's legal right to possession whereas an order of restitution in integrum nullifies legal rights and restores the *status quo ante*.

⁴⁷ To recover possession of his property an owner need only establish firstly that he is the owner and secondly that the other person is in possession – *Chetty v Naidoo* 1974(3) SA 13(A); *Agbar v Patel* 1974 (4) SA 104 (T) Silberberg and Schoeman on *The Law of Property* pages 289 – 290 Labiris, M A: *Orders of Specific Performance and Restitutio in Integrum in South African Law* 2000 at 317, Butterworths.

CHAPTER 2. THE CONSTITUTIONAL RIGHT TO ACCESS TO ADEQUATE HOUSING

2.1. THE CONSTITUTION OF SOUTH AFRICA ON PROTECTION OF SOCIO-ECONOMIC RIGHTS PARTICULARLY THE RIGHT TO ACCESS TO ADEQUATE HOUSING

Section 26 of the Constitution of South Africa 1996⁴⁸ refers to the right to have access to adequate housing.⁴⁹ Human rights instruments invariably impose three types of obligations on the State parties; namely the obligation to respect, protect and fulfil the right.⁵⁰ Some Commentators add a further dimension, namely, the obligation to promote the right.⁵¹

The South African Constitutional Assembly introduced these obligations in section 7(2) of the Constitution which states that the State must “*respect, protect, promote and fulfil the rights in the Bill of Rights.*”

The leading landmark decision which deals particularly with the right to have access to adequate housing is the *Government of South Africa v Grootboom* case. *Grootboom*'s decision was followed subsequently by the High Court in *Residents of Bon Vista Mansions v Southern Metropolitan Council*.⁵²

2.1.1 THE OBLIGATION TO “RESPECT” THE RIGHT TO ACCESS TO ADEQUATE HOUSING.

This obligation requires the State to refrain from directly or indirectly interfering with the enjoyment of the right.⁵³ Although section 26 of the Constitution does not expressly state this, there exists at the very least a negative obligation on the State and other entities and

⁴⁸ See note 1 above

⁴⁹ Section 26 (1): Everyone has the right to have access to adequate housing; (2) The State must take reasonable legislative and other measures 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.

⁵⁰ General Comment 14 on the International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI) 21, U N G A O R Supp (No 16) at 49 U N Dec A 6316 (1966 993 UNTS 3) entered into force on 3 January 1976.

⁵¹ Craven, MCR: *The International Covenant of Economic and Social and Cultural Rights* (Clarendon Oxford 1995 at 109).

⁵² *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2002 (6) BCLR 625 (W).

⁵³ General Comment 14 E.C. 12/2000/4 para 33.

persons, not to prevent or impair the right of access to housing.⁵⁴ The negative right is further spelt out in section 26(3). The obligation in terms of the right to respect is of particular importance when the individual already enjoys the right to some extent and there is a threat to remove it,

Liebenberg has written that a duty to respect a right arises when the state through legislative or administrative conduct, seeks to deprive people of the access they enjoy to socio-economic rights.⁵⁵

This approach was adopted by the High Court following a local authority's decision to terminate water supply to a block of flats.⁵⁶ The court held that the local authority's conduct amounted to a failure to respect the residents' right of access to water.

An interesting case which compares with *Grootboom* is an Indian case being *Olga Tellis*:⁵⁷

"..... portrays the plight of persons who live on pavements and in slums in the City of Bombay. Rabid dogs in search of stinking meat and cats in search of hungry rats, keep them (the people) company. Their daughters come of age, bathe under the nosy gaze of passersby, unmindful of their sense of bashfulness"

This case arose out of a series of social action cases filed by the pavement dwellers association, journalists and social workers on behalf of certain pavement dwellers in Bombay facing eviction and demolition of their dwellings by the Bombay Municipal Corporation. They claimed their eviction was a constructive means of depriving them of their livelihood as hawkers and luggage carriers, casual labourers and domestic workers in the City of Bombay. The Applicants contended that they had a fundamental right to live, a right which cannot be exercised without the right to livelihood. By giving a wide interpretation to the right to live, the Court held that the right to live included the right to livelihood. It was also stated that in the event of a statute permitting procedurally unfair evictions, the validity of the Law may be challenged or the Law is to be interpreted in a manner which does not lead to a breach of the right to housing.

⁵⁴ *Grootboom* at para 34

⁵⁵ Liebenberg S "Socio-Economic rights" in Chaskalson A and others (ed 5) *Constitutional Law of South Africa* at 41.

⁵⁶ See *Residents of Bon Vista* case – note 50 above.

⁵⁷ Meer, S *Olga Tellis v Bombay Municipal Corporation – on Litigating Fundamental Rights in India: A Lesson for South Africa* 1993 SAJHR at 358.

In the event of the State or private persons having to bring applications for the eviction of persons who would be left homeless, the Court will have regard to the obligation on the State to “respect” the right to housing in deciding whether to order an eviction and if so under what circumstances the eviction may take place.⁵⁸

An example of the breach of the duty to respect is found in a case before the Cape Provincial Division.⁵⁹ In *Van Rooyen’s* case a firm of attorneys caused poor debtors’ homes to be sold in execution for paltry debts. The Execution Creditors’ Attorneys purchased the homes and enjoyed a lucrative practice. The consequence is that poor people have been left homeless as a result of small debts incurred by them. Geoff Budlender contends that the relevant section of the Magistrate’s Court Act⁶⁰ which permits the sale in execution of immovable property, where there are no “less objectionable” means of satisfying the debt is inconsistent with the State’s obligation to “respect” the right of access to housing and suggests that the argument may or may not be sustained. A similar argument was raised by the Amicus curiae in the Constitutional Court in *De Beer’s* case.⁶¹ A Provincial Ordinance allowed the Council to sell the properties of ratepayers in execution, in order to satisfy arrears in respect of municipal rates, without first executing against the movable property of the ratepayer. Surprisingly the Constitutional Court did not address this issue in its judgment.

The uncertainty which prevailed on the issue as to whether section 66(1)(a) of the Magistrate’s Court Act was constitutional or not, was decided in 2004 in the celebrated Constitutional Court decision of *Jafta v Schoeman and others*.⁶² The facts of *Jafta’s* case briefly are as follows: Maggie Jafta and Christina van Rooyen were separate Appellants in the Cape High Court where both Appellants sought an Order interdicting the Respondents from evicting any previously disadvantaged residents of Prince Alfred who have acquired

⁵⁸ The Courts are part of the State and are bound by the Bill of Rights : s 8(1) of the Constitution of the Republic of South Africa.

⁵⁹ *Van Rooyen and others v Stolz* (Cape Provincial Division case no 8618/01); Budlender, G *Justiciability on the Right to Housing The South African Experience*, Legal Resources Centre, Cape Town. <http://www.lrc.org.za/4pub/papers/delhi%20paper.pdf>

⁶⁰ s 66(1) of Act 32 of 1944.

⁶¹ *De Beer N.O v North Central Local Council and others* 2002 (1) SA 429 (CC).

⁶² *Jafta v Schoeman and others* 2005(2) SA 140 (CC).

ownership of properties since 1994 with the assistance of Low Cost Housing subsidies ("the members of the Class") from their homes.

The Appellants' matters were both joined for the purpose of convenience and the Cape High Court held that the loss of right of the Appellants to occupy their homes, was not caused by the sale in execution process. Acknowledging that the execution process brings the ownership of the judgment debtor to an end, the Court held that it does not violate section 26 of the Constitution, because that section does not contain a right to ownership. The Appellants challenged the constitutionality of section 66(1) (a) and section 67 of the Magistrate's Court Act 32 of 1944 ("the Act"). Both the Appellants were indigent people indebted to their respective creditors in amounts of R250,00 and R190,00 respectively.

It was common cause that if the Appellants lost ownership of their homes by virtue of sales in execution, they would not be entitled to obtain other state-aided housing. It was also common cause that if the Appellants were evicted from their homes, they would have no alternative accommodation.

The Constitutional Court reiterated the decision in *Grootboom* that any claim based on socio-economic rights must necessarily engage the right to dignity. Although the concept of adequate housing was briefly discussed in *Grootboom*'s case, the Constitutional Court had yet to deal with it in detail.⁶³ This concept of adequate housing was however dealt with in detail by the United Nations Committee on Economic, Social and Cultural Rights (The Committee) in the context of the International Covenant on Economic, Social and Cultural Rights 1966 (the Covenant).⁶⁴ In terms of section 39(1) of the Constitution, the Court must consider International Law when interpreting the Bill of Rights. Therefore guidance may be sought from International Instruments that have considered the meaning of adequate housing.⁶⁵ The Covenant states:

"The State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The State Parties will take

⁶³ See para 23 of the *Jafta Judgment* note 62 above.

⁶⁴ S.A. signed the Covenant on 3 October 1994 but has not as yet ratified the Covenant.

⁶⁵ Article 11(1) of the Covenant.

appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.”

In its General Comment 4, the Committee in giving content to Article 11(1) of the Covenant, emphasised the need not to give the right to housing a restrictive interpretation but to see it as “the right to live somewhere in security, peace and dignity”.⁶⁶ The stance of the Committee reflects the stance of the Constitutional Court in *Grootboom*’s case, that the right to dignity is inherently linked to socio-economic rights. The Committee points out that “*all persons should have a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.*”

The international law idea of adequate housing reinforces the notion of adequate housing in section 26 and the focus on security of tenure in section 26 of the Constitution emphasises a rejection of that part of our history where people were arbitrarily rendered homeless and double indignity by facing criminal action.⁶⁷ Justice Mokgoro at paragraph 28 of the *Jafta* judgment found it necessary to repeat the words of the late Justice Mohammed because they bear reference to the analysis of section 26 of the Constitution.⁶⁸ “..... *the South African Constitution is different; it retains from the past only what is defensible and represents a decisive break from and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the part which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.*”

The underlying problem in *Jafta*’s case is poverty which is a welfare problem being converted into a property one. After their state-subsidised homes are lost by way of a sale in execution, they become exposed to becoming “ideal candidates” to be thrown back into homeless informal settlements. The Constitutional Court in *Jafta*’s case rejected the High Court’s contention that there is no negative content to socio-economic rights.

⁶⁶ At para 24 of the *Jafta* judgment – The Right to adequate housing (art 11(1) UNESCR General Comment (1991) 13 Dec, 1991 E/1992/23 at para 7.

⁶⁷ O’Regan, C “*No more forced removals*” *an Historical analyses of the Prevention of Illegal Squatting Act* (1989) 5 SAJHR 361.

⁶⁸ *S v Makanyane and another* 1995(3) SA 391 CC.

Section 66(1) of the Magistrate's Court Act is a severe limitation of an important right. In terms of section 36 of The Constitution, a limitation must be reasonable and justifiable in an open and democratic society. When the focus is on the trifling nature of the debt, the importance of the purpose of the limitation is diminished.⁶⁹ The Court stated further that it is difficult to imagine how the collection of a small debt can be sufficiently compelling to allow the existing rights to housing to be totally destroyed.

The Constitutional Court therefore confirmed that section 66(1)(a) of the Act constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution of the homes of indigent debtors after which they lose their security of tenure.

The Court found that it would be improper for the Court to eliminate the provisions of section 66(1)(a) of the Magistrate's Court Act completely and that it had to be sensitive to the interests of creditors.

The Court, which finds constitutional inconsistency, must declare the provision invalid to the extent of the inconsistency.⁷⁰ The Constitution provides as follows:⁷¹

The Constitutional Court then directed to remedy the absence of judicial oversight over the process of execution of immovable property through amending section 66(1)(a) of the Magistrate's Court Act by adding the phrase:

"A Court after consideration of all the relevant circumstances, may order execution."

Thus, an execution creditor will no longer be able to merely obtain an endorsement by the Clerk of the Court for execution to be effected against immovable property. The Creditor will have to approach the Court, which will decide after considering all the relevant circumstances, to authorize the execution or not. All the other nine constitutional Court judges concurred with Mokgoro J's judgment.

⁶⁹ Paragraph 40 of the *Jafta* judgment.

⁷⁰ *Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

⁷¹ Section 172 (1) (a) of the Constitution provides: "When deciding a constitutional matter within its power a Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

2.1.2 THE DUTY TO “PROTECT” THE RIGHT TO HOUSING.

In South Africa the State has given effect to the provisions of the Constitution by introducing the enactments referred to previously. Section 26(3) of the Constitution gives expression to the meaning of “protect”. A law is arbitrary when it does not provide sufficient reason for eviction or is procedurally unfair.

The new statutes⁷² impact negatively on the traditional rights of landowners. Questions have been raised about the validity of the statutes in the light of the constitutional protection of the right to property.⁷³

If the obligation to “protect” the right to housing places an obligation on the State to enact protective legislation, the question to be answered is, what happens when the State fails to do this? There is no reason why a Court cannot, in certain circumstances, instruct the legislature to enact laws to remedy a defect in the civil procedure. The European Court of Human Rights has done this.⁷⁴ The UN Committee has similarly had no difficulty in finding such a duty to legislate in specific circumstances.⁷⁵

The protection afforded by the South African Constitution can also be found in other countries, for example Ireland.⁷⁶ Cunningham refers to the *Temple Buildings* case and the *Mospel Estates* case where tenants were given notice to vacate to enable developers to renovate buildings and sell them at a high profit. Judge Carroll states in an injunction hearing brought by a tenant, that the tenant had a “stateable case” on the question of whether her property rights under the Constitution had been infringed. The South African courts, accordingly, might entertain a challenge on the constitutional validity of indiscriminate evictions. Can one place a construction on the requirement that the Court is to make an order after considering all the relevant circumstances? Four possibilities exist:⁷⁷

⁷² See notes 10 and 42 above.

⁷³ See s 25 of the Constitution.

⁷⁴ *X and Y v The Netherlands*, 8 E H R R 235.

⁷⁵ See Craven, MCR *The International Covenant on Economic, Social and Cultural Rights* (Clarendon Oxford, 1995) at 109.

⁷⁶ Cunningham, M: *A Critical Evaluation of the Statutory Protection given to residential tenants in the Private Sector* <http://www.w.w.ruigtalway.ie/Law/GSLR/1998/html>

⁷⁷ Budlender, G: *The Justiciability of the Right to Housing—The South African Experience*. <http://www.lrc.org.za/4pub/papers/delhi%20paper.pdf>.

- (i) The first possibility is that the words have no real meaning as Courts are obliged to consider all the relevant circumstances of the judicial process.
- (ii) A second possibility is that the legislature is obliged to be clear about what “relevant” circumstances are..
- (iii) A third possibility is that it reverses the onus in proceedings for eviction. The onus under the common law was upon the Defendant to prove justification for occupation.⁷⁸ It is contended that the new Constitution shifts the onus upon the Plaintiff to prove all the relevant circumstances.⁷⁹ This issue will be returned to later under discussion of the eviction process.
- (iv) Under the common law the owner would be entitled to an order for eviction; now the Courts have an equitable discretion to refuse to order eviction or to stay the eviction order.⁸⁰ This view was rejected. It was held that “*all the relevant circumstances are those circumstances relevant in terms of the generally applicable law*”.

2.1.3 THE OBLIGATION TO “PROMOTE” THE RIGHT TO HOUSING.

To promote a right means to further or advance it⁸¹ The obligation to advance the rights clearly places a positive duty upon the State.⁸² The *Grootboom* decision and criticisms thereof and comparisons will be dealt with later in this dissertation.

2.1.4 THE OBLIGATION TO “FULFIL” THE RIGHT.

This is the most demanding obligation of all the components of social and economic rights. It requires the State to “adopt appropriate legislative, budgetary, judicial, promotional and other measures towards the full realisation of the right.”⁸³ *Grootboom*’s decision states that the positive obligation to fulfil the right to housing is justiciable even in resource-constrained situations.

⁷⁸ *Grootboom v Ridley* 1931 TPD 476.

⁷⁹ For conflicting views see *Ross v South Peninsula Municipality* 2000(1) SA 589 (C) and *Ellis v Viljoen* 2001(4) SA 795(C).

⁸⁰ *Brisley v Drotzky* 2002 (4) SA 1 SCA at 42.

⁸¹ See *S v Letoana* 1997 (11) BCLR 1581(W).

⁸² Van Hoof, GJH the Legal Nature of Economic Social and Cultural Rights: A Rebuttal of traditional views in Alston and Tomasevsky (eds). *The right to food* (1985) 97. See also *Grootboom* at para 35.

⁸³ General Comment 14 E/C 12/2000/4, paragraph 33.

2.2. THE IMPACT OF THE GREEN PAPER AND THE WHITE PAPER ON DEVELOPMENT AND PLANNING IN RELATION TO THE CONSTITUTION

2.2.1 THE DEVELOPMENTAL AND SOCIAL CONTENT.

The risk of natural, environmental and technological hazards caused concern for pro-activeness rather than reactiveness. The increase in the demand for housing required quick delivery. After the June 1994 floods on the Cape Flats, Cabinet resolved that the Department of Constitutional Development would be the focal point and the National Disaster Committee was formed especially in view of the Ladysmith, Merriespruit and Pietermaritzburg disasters. Emergency shelter was required for 5 500 people.⁸⁴

The effect of these disasters has had a direct impact on adequate housing, due to the migration of people to urban areas, which has resulted in uncontrolled urbanisation of vacant urban land which is unsuitable for safe housing.

COSATU⁸⁵ supports the Green Paper which states at page 19 ... *"the apartheid, geographical planning was chiefly motivated by racial segregation"*. Criticism levelled by the Green Paper is that land development procedures are slow and cumbersome to the extent that private sector development is losing faith in the system.⁸⁶

COSATU further submits that poor people are provided with housing on cheap land far away from their place of employment. This fuels urban sprawl.

2.2.2 THE WHITE PAPER ON LAND DEVELOPMENT, PUBLIC LAND MANAGEMENT AND LAND ADMINISTRATION.⁸⁷

The term Land Development is used to describe the process of identifying, acquiring and releasing land and water services for, amongst other reasons, the provision of housing, especially for people previously marginalised by apartheid policies.

⁸⁴ Green Paper on Disaster Management <http://www.Local.gov.za/DCD/policy/das/gpdm/html.->

⁸⁵ Cosatu's submission on the Green Paper on Development and Planning presented to the Department of Land Affairs 13 October 1999.

⁸⁶ See page 30 of the Green Paper.

⁸⁷ [http://land.puv.gov.za/White Paper/white 7htm.](http://land.puv.gov.za/White%20Paper/white%207.htm)

The constraints offered by zoning authorities and the reluctance of local authorities to identify and release land, and objections by residents to low cost housing being erected, are problems which have to be overcome. The Development and Planning Commission has introduced the Development Facilitation Act⁸⁸ (hereinafter referred to as the DFA) to have terms of reference and time frames to be shortened with a view to its recommendations being incorporated into policy and law as soon as possible. The Government is accordingly progressing to give effect to sections 25(5) and 26(1) of the Constitution.

2.2.3 COSATU'S RECOMMENDATION ON BOTH THE WHITE AND THE GREEN PAPER

Cosatu states that the local government Municipal Systems Act 32 of 2000, will ensure that development plans are integrated. A single law should be created and the White Paper should elaborate on the role of the legislatures in proposed spatial planning system. The DFA⁸⁹ has not been implemented in all Provinces to give effect to the DFA principles.

The White Paper should set clear time frames in terms of the DFA and a single law should be considered. Cosatu commends the efforts made by the Green Paper and provides insight into the first four (4) years of democracy with particular focus on the DFA.

CHAPTER 3. LEGISLATION

3.1 LEGISLATION INTRODUCED BY THE GOVERNMENT TO GIVE EFFECT TO SECTION 26 OF THE CONSTITUTION

Section 26 of the Constitution and Land Reform Laws have introduced provisions relating to the granting of eviction orders. The Land Reform Laws are primarily about "tenure". Security of tenure means that your right to live where you are is secure.

Reform laws were needed as, until 1990, black people could not own land. The townships or homelands rights were permit-based with the land being owned by the Government or the South African Development Trust.

⁸⁸ Act 67 of 1995.

⁸⁹ Cosatu's submission on the Green Paper on Development and Planning presented to the Department of Land Affairs 13 October 1999 <http://www.cosatu.org.za/docs/1999/plandev.htm>.

Until now three main pieces of legislation have been introduced to give people security of tenure and prevent illegal eviction.

(i) THE LAND REFORM (LABOUR TENANTS ACT), ACT 3 OF 1996.

The preamble to this act aims to provide protection for the existing rights of tenants and to make land available for labour tenants using the Land Acquisition or Settlement Grants. A labour tenant is one who is living on a farm with the arrangement that the tenant be allowed to grow crops or graze cattle in return for labour provided to the owner. If a labour tenant dies or gets so sick that he cannot provide the labour, he can appoint some other person to provide such labour. No remuneration however is paid by the farmer to the labour tenant.

Labour tenants can only be evicted by a court order granted by the Land Claims Court (LCC). The definition of "Court" in the Labour Tenants Act means the Land Claims Court established by Section 22 of the Restitution of Land Rights Act.⁹⁰ In such event the owner must compensate the labour tenant for crops and improvements. The labour tenant can be evicted if they breach their contract by not providing labour or there is a complete breakdown of the relationship between the owner and the labour tenant, when there is a real danger of damage to the farmer or property or the likely harm to the farmer is greater than the likely harm to the tenant.

The Magistrate's Court has no jurisdiction. The LCC, however, may in terms of section 19(1) of the Labour Tenants Act appoint an Arbitrator to hear applications of labour tenants. The Land Claims Court can give orders to transfer, give rights to water and other servitudes, and to grant compensation.

(ii) THE EXTENSION OF SECURITY ACT (THE ESTA), ACT 62 OF 1999.

(a) INTRODUCTION.

The ESTA was aimed at changing the land holding and eviction structure which existed during the apartheid era. According to the policy documents of the Green and White Papers, reform in this area consists of restitution, redistribution and tenure reform. For the purpose

⁹⁰ Act 22 of 1994.

of this discussion it will be necessary to concentrate primarily on tenure reform, which has as its provision new forms of tenure for those whose existing rights are insufficiently secure or otherwise inappropriate to their needs.

The new development seeks the State intervening in the relationship between owners and occupiers of land which has seen a high degree of unfair evictions for those who wished to pre-empt the law or take advantage of gaps in legislation.

The ESTA is the most ambitious of land reform measures and implementation depends on the Departments of Land Affairs, Justice and Labour, as well as NGO's and local and provincial government. The Magistrates Court in the main are expected to adjudicate matters arising out of the ESTA with the Land Claims Court having concurrent jurisdiction.⁹¹

(b) MAIN OBJECTS OF ESTA.

The main objects of ESTA are to prevent occupiers of peri urban and rural land from unfair eviction, to bring certainty to the relationship between owner and occupier and to provide a solution to secure independent tenure for the occupier.

For the purposes of this dissertation, the object of protection of occupiers against unfair eviction shall be concentrated on because of its almost indistinguishable link with section 26, social security connotations and to a certain extent its interplay with the Labour Relations Act.

Occupiers in terms of the ESTA are persons who have a right or consent to reside on rural and peri urban land belonging to someone else as at 4 February 1977. It excludes persons wanting to use the land for industrial or commercial purposes but includes a person who works the land himself without employing persons who are not his family. The rule in *Chetty v Naidoo*⁹² applies equally to the ESTA and the Labour Tenants Act. The onus of proof will be on the defendant occupier to show that the matter falls within the appropriate definition as contained in the Act.

⁹¹ See sec 17(1) 2 and 2A of ESTA.

⁹² Supra. See note 46

The key is consent, whether verbal or in writing and which can be inferred from the owner's conduct.⁹³ In a particular case the occupiers took occupation of property belonging to the Council without consent. The Council sought to evict the occupiers on the basis of the occupiers causing a nuisance. However, by a resolution passed, by the latest 4 November 1997 (at par 1016F of the judgment) by the Council, water and sanitation facilities were to be provided as a matter of urgency to the occupiers. The Council was accordingly aware of the occupiers occupying the property and by its very own conduct acquiesced therein. The ESTA accordingly applied to the proceedings. Two presumptions exist in favour of occupiers in terms of the ESTA:

- (i) If a person has resided openly on the land for the preceding year, such person shall be presumed to have consent until the contrary is proved.
- (ii) If a person has lived on the land continuously for a period of three years, that person shall be deemed to have occupied the land with the knowledge of the owner or person in charge. These provisions do not apply to the State.⁹⁴

Anyone who can prove that consent to remain on land was lawfully withdrawn prior to 4 February 1997 but nevertheless continued to remain on the land is deemed to be an occupier in terms of the ESTA.⁹⁵ To enable the right in law to reside on land, there must be some measure of permanence in the residence. Locked premises with only a few items left behind does not alter the conclusion that it is no longer a person's permanent home.⁹⁶ The ESTA is designed to protect indigent peoples' right of occupation and social security. The salary of a person who seeks to be protected by the ESTA must not exceed R5000,00 per month.

(c) ARE AN OCCUPIER'S DEPENDANTS PROTECTED?

Unlike the Labour Tenants Act⁹⁷ an occupier's dependants are not automatically protected. Each dependant will have to satisfy the definition of occupier within their own right. However, this issue seems to be in conflict with section 6(2)(d) of the ESTA which provides

⁹³ See *Rademeyer & others v Western District Council & others* 1998(3) SA 1011 SE.

⁹⁴ See ss 3(4) and 3(5) and 3(6) of the Esta.

⁹⁵ See *Atkinson v van Wyk and other* LCC 7 R/98 at para 9.

⁹⁶ See *Robertson v Boss* LCC case 6R/98 in referring to *Tuck v Brouder and another* 1973(1) SA 461 at 469E.

⁹⁷ s 3(1) of the Labour Tenants Act.

for occupiers to have the right to family life in accordance with their culture. The implication is that members of an occupier's immediate family will have the right to live with them on a permanent basis.

(d) OVERVIEW OF THE EVICTION PROCESS.

There are two parts to the eviction process, namely the termination of the occupier's right of residence which is an extra-curial act and the eviction process proper, which culminates by way of an order of court being made for the eviction. These two issues will accordingly be discussed under separate headings:

(d) A TERMINATION OF RIGHT OF RESIDENCE

(d) A.1 THE GENERAL POSITION.

The most important rights in terms of section 6(1) of the ESTA is the right to use the land resided on or after 4 February 1997 and to have access to services as agreed upon with the owner or person in charge. Statutory rights in terms of sub-sections (5) and (6) are included as well as rights to demand provision of services which would otherwise amount to a denial or deprivation in terms of section 6(2)(e) or (f) of the ESTA.⁹⁸

Section 8(1) significantly provides that an occupier's right of residence may be terminated on any lawful grounds which effectively gives the Court the discretion to decide whether the particular termination was fair in all the circumstances even though the termination was in compliance with terms and conditions of the residence agreement.

(d) A.2 TERMINATION OF THE RIGHT OF RESIDENCE WHICH ARISES SOLELY FROM AN EMPLOYMENT CONTRACT.

Section 8(2) of the ESTA provides that the right of residence of an occupier who is an employee and whose rights of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with

⁹⁸ These two paragraphs provide that an occupier is not to be deprived access to water (s 6(2)(e)) and not to be denied educational or health services (6(2)(f)) In the case of water, arbitrary termination will amount to eviction as defined in section (1)(i) On its own, deprivation of educational or health services will not constitute eviction but will constitute a violation of the affected occupier's rights under section 6(2)(f) allowing the occupier to obtain an interdict against such action continuing.

the Labour Relations Act.⁹⁹ In the event of the employee not having resigned or being dismissed in terms of the LRA, the termination of the right of residence would be premature.

In *Kanhym v Mashiloane*¹⁰⁰ (a section 19(3) automatic review), the Judge stated that the Applicant employer had failed to prove compliance with section 10(3) (c) of the ESTA in that the operation of the applicant will be seriously prejudiced unless the dwelling is available for another employer. The Magistrate's order was accordingly set aside.

In *Karabos* case¹⁰¹ the Land Claims Court interpreted section 8(3) of the ESTA to mean that all avenues of redress, however lengthy and complicated, must be exhausted under the LRA before a right of residence falling in this category can be terminated. Justice Gildenhuys stated that, if there was a dispute about the validity of the termination of employment and if that dispute was before the Labour Court on appeal, the owner of the land was obliged to continue housing the dismissed employees while the validity of the dismissal is pending.

(d) A.3 TERMINATION OF RIGHT OF RESIDENCE OF A LONG -TERM PROTECTED OCCUPIER.

This special category of occupiers are protected by the provisions of section 8(4) of the ESTA. Should an occupier have resided on the land belonging to the owner for 10 years and by reason of having reached 60 years, or through disability cannot supply labour, such persons cannot be evicted unless such person commits a breach in terms of section 10(1)(a), (b) or (c).¹⁰² This section shows the interplay between labour on the one hand and provision of social security for employees who have toiled for their employers.

⁹⁹ This subsection was applied in *Kanhym (Pty)Ltd v Shabangee LLC* case 16R/98 at para 10 & 11 of Moloto J's judgment.

¹⁰⁰ *Kanhym (Pty) Ltd v Maske Kashiloane LCC* 17/R/98.

¹⁰¹ See *Karabo and others v KOK and others* 1998(3) all SA 625 (L.C.C).

¹⁰² If the employee commits a breach which if remedied would not be able to restore the relationship between owner and occupier.

(d) A.4 TERMINATION OF THE RIGHT OF RESIDENCE OF AN OCCUPIER OR THE SPOUSE OR DEPENDANT OF A LONG -TERM OCCUPIER.

The spouse or dependant of an occupier does not necessarily mean that they are occupiers. In terms of section 8(5) of ESTA, on the death of the long-term occupier, the spouse or dependant of such occupier may have his or her right terminated only on 12 months' written notice to leave the land. In any event, the spouse or dependant may have acquired his or her own rights by virtue of having resided on the property for more than 10 years. Each category of these people will have to be assessed in terms of their individual relationship to the employer. The spouse or dependant may also not have their right of residence terminated by virtue of such person being over 60 years old and/or has had on 4 February 1997 or thereafter consent to reside on such land. Section 8(5) of ESTA has to be considered in conjunction with the rights embodied in section 5 of ESTA which includes the right to human dignity, freedom and security of the person and freedom of association with due regard to the objects of the Constitution.. The occupier's right to family life in accordance with the culture of his family as created in terms of section 6(d) of the ESTA is closely linked to the right of dependants and spouses enjoying the right to maintenance and support recognised in family law.

(d) B. THE EVICTION PROCESS.

If an occupier fails to leave the premises voluntarily, the occupier may only be evicted under a court order in terms of section 9 of the ESTA. Deprivation against the occupier's will, without an order of court, entitles the occupier to relief through a spoliation order.¹⁰³

The Court will only grant an order for eviction of the occupier if the occupier has been given proper notice to comply with the notice and two calendar months notice has been given to the owner and to the municipality and served upon the Department of Land Affairs for information purposes. An argument by the Plaintiff that the land does not fall within a municipal area, will not suffice. A municipality in terms of the ESTA is defined as a municipality in terms of section 10B of the Land Government Transition Act 1993 (Act 209

¹⁰³ *Nino Bonino v de Lange* 1906 TS 120.

of 1993) which includes a local and district council. In the *Lategan v Koopman* case¹⁰⁴ the Court stated that there must be compliance with the notice being served at least on the Provincial Office of the Department of Land Affairs. At the least, it is submitted that all rural and peri-urban land in South Africa falls within a District Council.

The grounds upon which an eviction order may be granted will differ depending on whether the occupier is an "effective date" occupier (occupier as at 4 February 1977) and people who become occupiers after 4 February 1977, i.e. "future occupiers."

(d) B.(i) EVICTON OF EFFECTIVE DATE OCCUPIERS.

In terms of section 10(1) of the ESTA, effective date occupiers may be evicted if they breach section 6(3) of the Act and fail to remedy the breach, or breach a material term of the contract, breach a fundamental term of the owner/occupier relationship, or the occupier voluntarily resigns from an employment contract.

In terms of section 3 of the ESTA there is a range of things an occupier may not do, for example in *Roux's* case¹⁰⁵ under a section 19(3) automatic review, an occupier's association with her son in threatening the owner with a firearm was sufficient to constitute a section 6(3) breach. The Court will consider before granting an eviction order whether the agreement was fair and whether the breach committed was one which the occupier could reasonably have expected to comply with and whether the occupier remedied the breach after being given one month's notice to comply with.

In *Embrators* case¹⁰⁶ proof of valid dismissal under the LRA was sufficient to grant an eviction order.

In terms of section 10(1) the resignation must not amount to constructive dismissal. In *du Toit's* case¹⁰⁷ the Court set aside an eviction order as the occupier had not resigned but was dismissed after a disciplinary hearing.

¹⁰⁴ *Lategan v Koopman en 'n ander* 1998 (3) SA 457 (C).

¹⁰⁵ *Roux v Lekisikiso* LCC 13/R/98.

¹⁰⁶ *Embrator Investments (Pty) Ltd v De Koker* LCC case 11 R/98.

¹⁰⁷ *Du Toit v Le Kay* LCC case 9 R/98.

(d) B(ii) GROUNDS FOR EVICTION OF "FUTURE" OCCUPIERS.

Owing to the protection afforded by the ESTA the growing fear was that owners would refuse to give consent to occupiers to avoid the impact of legislation. Occupiers after 4 February 1997 are given lesser protection than effective date occupiers.

A further inroad created by the ESTA upon the common law, is that even if there exists a tenancy agreement which contains "express, material or fair terms" the court has an equitable discretion not to grant the order. Factors such as fairness of the agreement, unavailability of land and consideration of competing interests are important. In *Redelinghuys*' case¹⁰⁸ this principle was applied, but not elaborated upon.

It is possible to interpret section 11 of the ESTA to mean that a future occupier who has done nothing wrong, ought not to be evicted. In terms of section 11(3) of the ESTA, the Court's discretion to grant an order for eviction is wide and shall depend on, the period that the occupier has resided on the land, the fairness of the terms of agreement between the parties, whether alternative accommodation is available to the occupier, the reason for the proposed eviction and the balance of the interests of the owner, occupier and remaining occupiers on the land.

(iii). THE PREVENTION OF ILLEGAL EVICTION AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF 1998 (PIE)

The PIE Act repealed the Illegal Squatting Act of 1951. The PIE Act has been described as "*a great step forward in the fight of occupiers of land in general and tenants in particular*" because the common law was cruel to occupiers and tenants who faced eviction.¹⁰⁹ The preamble of the PIE recites inter alia the wording of section 26(3) of the Constitution.¹¹⁰ The purpose of the PIE is to provide for the procedure to be used to eject a person who occupies land without the tacit consent of the owner or person in charge of the land.

The notices and documents relating to the eviction proceedings in terms of the PIE must be communicated to the Respondent within 14 days of the hearing to afford the Respondent the opportunity of noting the consequences of the proceedings, his opportunity to apply for

¹⁰⁸ *Redelinghuys v Claassen and another* LCC 117/98.

¹⁰⁹ Parshotam, R: "*Equity for tenants*" De Rebus June 1999 page 27.

¹¹⁰ See note 1 above.

Legal Aid. Notices and documents must also be served upon the municipality to enable the municipality to explore the possibility of alternative accommodation and to mediate.

In the *Cape Killarney* case¹¹¹ it was stated that for the notice to be effective, it should be communicated to the Respondent in his own language.

In *Vanessa Ross*'s case¹¹² acting Justice Josman stated that an eviction order may no longer be issued by the Registrar or Clerk of the Court but by the Judicial Officer after considering all the relevant circumstances.

3.2 **THE OVERLAPPING AND SALIENT DIFFERENCES BETWEEN THE ESTA AND THE PIE ACTS**

The common feature of the ESTA and the PIE acts is that both the acts are designed to prevent occupiers from being arbitrarily evicted without an order of court.

None of the provisions of the PIE Act is retrospective. There are similarly no deeming provisions or presumptions employed to extend the PIE's reach and no special remedies or safeguards are included to deal with evictions contrary to its provisions.

An eviction order granted by the Magistrate's Court contrary to the Act, will be open to normal appeal and review proceedings but no automatic review as provided for in terms of section 19(3) of the ESTA.

The PIE applies to all land whereas the ESTA's application is restricted to rural land; PIE applies to "unlawful occupiers" which includes a very wide range of occupiers.

The provisions dealing with eviction of unlawful occupiers in terms of the PIE expressly override the provisions of the common law. Section 4(1) of the PIE provides for this.¹¹³

The PIE may be relied upon as a pillar where the Labour Tenants Act or the ESTA does not apply.

¹¹¹ *Cape Killarney Property Investments v Mahamba and other* J O L 5 506 (c).

¹¹² *Vanessa Ross v South Peninsula Municipality* Case A741/98. Cape High Court.

¹¹³ Section 4(1) of the PIE reads "Notwithstanding anything to the contrary contained in any Law or the Common Law, the provisions of this section shall apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier"

CHAPTER 4. JURISDICTIONAL AND PROCEDURAL ISSUES.

As regards the ESTA eviction, matters in the main will be dealt with by the Magistrate's Court, subject to the Land Claims Court acting as a Court of Appeal and Review. Any party may choose however to institute proceedings in the Land Claims Court¹¹⁴ or if all parties agree, in the relevant High Court.¹¹⁵ It is precisely on this subsection that the Respondent in *Khulamo's* case successfully objected to the jurisdiction of the High Court.¹¹⁶

4.1 HAS THE LANDLORD'S COMMON LAW RIGHT TO SUE FOR EVICTION CHANGED AS A RESULT OF THE IMPACT OF THE CONSTITUTION AND REFORM DRIVEN PROTECTION OF VULNERABLE OCCUPIERS AGAINST EVICTION?

The Constitution and the Land Reform laws clearly place substantive and procedural restrictions, prohibitions and controls on the landowners' right to obtain eviction orders. It is necessary to consider whether the common law has been overruled or amended by the reform driven legislation.

It is worthy to consider the manner in which the Courts interpreting the law, arrived at different conclusions.

Uncertainty, in particular, has arisen where the occupation was not unlawful *ab-initio*, but becomes unlawful upon termination of the agreement. In *ABSA Bank v Amod*¹¹⁷ Justice Schwartzman stated that the definition of unlawful occupier ought to be restricted to persons who without any formality or right, moved onto another's land.

In *Groengras Eiendomme*¹¹⁸ it was held by Justice Rabie that section 26(3) of the Constitution did not intend to go further than to prevent people from being evicted from their homes in an unlawful manner without due process of law. It is certainly not intended to

¹¹⁴ See s17(1) of the ESTA.

¹¹⁵ See s 17(2) of ESTA.

¹¹⁶ *Khumalo v Potgieter* NPD 1471/98.

¹¹⁷ *ABSA Bank v Amod* (1999) 2 ALL SA 423(W).

¹¹⁸ *Groengras Eiendomme (Pty)Ltd & others v Elandsfontein Unlawful occupants and others* 2002(1) SA 1257.

protect lawful occupiers who later became unlawful occupiers, as that would be tantamount to unlawful expropriation of an owner's property in breach of section 25 of the Constitution.

In *Ndlovu's case*¹¹⁹ it was held by the majority of the Court that Parliament intended the Act to extend to cases of "holding over" of ex-tenants. It is argued that section 26(3) placed an extra onus upon the Applicant/owner to inform the Court of circumstances justifying the eviction by placing sufficient circumstances before the Court. The Court then in arriving at a decision has to take into consideration according to the PIE Act, the rights of the elderly, children, disabled persons, households headed by women and read those factors into section 26(3) of the Constitution before granting an order.

A similar approach was adopted in *Brisley's case*,¹²⁰ where the majority of the Court held that section 26(3) was horizontally enforceable and that an eviction order may only be granted once all the relevant circumstances have been considered.

In cases where the eviction proceedings relate to the legitimacy and finality of the process of an occupier's employment, the landowner will be required to prove that the occupier's employment has been lawfully terminated as it would otherwise not comply with the mandatory notice requirements for a lawful eviction.

In *Tweewaterskloof Holdings' case*¹²¹ the court required clearer proof of how the applicant's business would be detrimentally affected if the eviction order was not granted.

In *ABSA Bank v Murray and another*¹²² in an action for ejectment, the Respondents contended that it would not be just and equitable given their personal circumstances for the Court to evict them. The Court in striking a balance between the proprietary rights of the owner and the basic human rights of the occupier, held that the Respondents did not qualify for any special consideration. The Court granted an eviction order subject to a six weeks notice period.

¹¹⁹ *Ndlovu v Ngcobo; Bekker & another v Jika* 2003 (1)SA 113 (SCA).

¹²⁰ *Brisley v Drotsky* 2002 (4) SA (1) SCA.

¹²¹ *Tweewaterskloof Holdings (Edms)Bpk, Glaser Afdeling v Jacobs* 2002 (3) SA 401(LGC).

¹²² *ABSA Bank v Murray & another* 2004 (2) SA 15 (C).

In the recent decision of *FHP Management*¹²³ the Court stated that in terms of section 4(7) of the PIE and section 26(3) of the Constitution, it was not necessary for the Applicant in applying to Court, to evict an unlawful occupier to do more, than to place evidence before the Court that he is the owner of the property and that the Respondent is in unlawful occupation thereof.

It is then up to the occupier to disclose and place before the Court “relevant circumstances” as to why the order should not be granted. If the Respondent does not oppose and place the circumstances before the Court, the owner in principle will be entitled to an eviction order. “Relevant circumstances” are almost exclusively within the knowledge of the occupier. This approach seems to be a more preferable approach than the onerous obligation upon the owner having to provide evidence before the court on circumstances peculiar to the Respondent.

4.2 WILL AN OBJECTION TO MOTION PROCEEDINGS BROUGHT IN A MAGISTRATES COURT FOR AN EVICTION ORDER BE SUSTAINED?

The PIE endowed the Magistrate’s Court with jurisdiction to hear eviction proceedings brought before it by way of an application as opposed to action. In *Nduna’s* case¹²⁴ ABSA Bank brought an application for eviction proceedings against Nduna. The matter came before the judges by way of review proceedings on the basis of the magistrate not being competent to hear the matter by way of application but that the magistrate ought to have heard the matter by way of action relying on section 29(1) of the Magistrates Court Act 32 of 1944. The Court in rejecting the Applicant, Nduna’s, submissions, held that the pre-amble to the PIE Act read with section 9 thereof clearly empowered the Magistrates Court to entertain applications for eviction proceedings. The Court further held that section 5 of the PIE Act dealt with urgent proceedings and that it was inconceivable how a Magistrate could deal with such urgent proceedings by way of trial or action instead of by way of motion proceedings. To contend otherwise is clearly an attempt to frustrate the clear object of the statute.

¹²³ *FHP Management (Pty) Ltd v Thereon NO & another* 2004 (3) SA 392 (C).

¹²⁴ *Nduna v ABSA Bank Ltd & others* 2004(4) SA 453C.

CHAPTER 5: THE INTERPLAY BETWEEN LABOUR LAW AND HOUSING RIGHTS.

5.1. DISMISSAL AND EVICTION OF EMPLOYEES FROM THEIR EMPLOYER'S PREMISES

The protection of employees who reside in their employer's premises is not a novel concept. In the decision of *Ngewu*¹²⁵ the employer, by making the provision of accommodation dependent upon employment, in effect imposed the double penalty upon the employee in the event of the employee being dismissed. He loses both his employment and accommodation. In *Ngewu's* case it was highlighted as early as 1981 that even if the employment contract was terminated, the employer had to eject the employee by due process of law and not as was commonly done for example in the *Ngewu's* case, arbitrarily, with the assistance of the Police. In the *Rooiberg Minerals* case¹²⁶ the employee was entitled to reside on the employer's premises until the wrongfulness or otherwise of a dismissal dispute was settled.

In *Ngewu's* case which was particularly significant in that era, the common features of a labour dispute were present, where migrant workers were living on the employer's premises, their conditions of employment arbitrarily changed, the employer refusing to negotiate with the Union, work stopped and forcible eviction with the assistance of the Police and deportation ensued. In terms of the Black (Urban Areas Consolidation Act) Act 25 of 1945, employers were entitled to employ a fixed number or quota of migrant workers who provided cheap labour. In the event of the migrant workers having to remain on the employer's premises pending a dispute, the employer had to engage expensive local labour.

5.2

¹²⁵ *Ngewu & others v Union Co-Operative Bank & Sugar* (1983) 4ILJ 41(N).

¹²⁶ *Rooiberg Minerals Development Co Ltd v Du Toit* 1953 (2) SA (T).

5.3 THE LABOUR RELATIONS ACT AND ITS IMPACT ON THE RESIDENTIAL RIGHTS OF “EMPLOYEES”.

The Labour Relations Act applies with few exceptions to all employees, including agricultural workers.¹²⁷ The test for determining who an employee is, read with the definition of an employee as applied by the Courts is the “dominant impression test.”¹²⁸

In the long awaited amendment to the LRA in 2002 a compromise was effected between labour and business. Section 200A of the LRA introduces a rebuttable presumption as to who an employee is. Professor Marius Olivier expressed his concern regarding certain aspects of the amendments.¹²⁹ He submitted that the amendment has not widened the scope of the definition of “employee” contained in section 213. The presumption created remains rebuttable. Concern was expressed as to why higher paid employees were excluded from relying on the presumption. Further, new exclusions and unequal treatment may arise from the fact that the deeming provision is only applicable to employment laws which have been assigned to the Minister of Labour, including COIDA.¹³⁰ It excludes areas or laws, the administration of which has been assigned to other Ministries, for example ODMWA.¹³¹ Allowing the deeming provision to apply to COIDA and not to ODMWA goes against the need to integrate and align both the laws within the social security framework

5.4 EMPLOYER NEED NOT BE THE OWNER OR LANDLORD OF THE PREMISES WHICH THE EMPLOYEE OCCUPIES.

In a situation where a dispute exists regarding the fairness of a dismissal to which the question of continued residence is linked, section 8(2) of the ESTA provides that the right of

¹²⁷ Section 213 of the LRA.

¹²⁸ *The Medical Association of SA v Minister of Health* 1997 (18) ILJ 528 (LC); *Liberty Life v NISELOW* 1996 (7) 825 (LAC).

¹²⁹ See “An overview of the main Legislative amendments to the Labour Relations Act and the Basic Conditions of Employment Act” by Prof Marius Olivier, Centre for International and Comparative Labour & Social Security Law, Rand Afrikaans University. Presented at the 3rd Practical Law Seminar organised by the Labour Law Unit, Technikon SA and held at Indaba Hotel Fourways 14 – 15 August 2002.

¹³⁰ Compensation for Occupational Injuries and Diseases Act 1993 (Act 30 of 1993).

¹³¹ Occupational Diseases in Mines and Works Act (Act 78 of 1973).

residence of an employee arises from an employment agreement. Therefore the landlord upon whose property the employee resides and the employer need not be the same person.

Chapter IV of ESTA seeks to determine finality of residential rights. The eviction process in terms of ESTA cannot be invoked whilst proceedings in the LRA are still underway to determine the dismissal dispute on which the residential rights are contingent.

In the recent decision of *Malan v Bulbring N O and others*¹³² the Labour Court severely criticised the Commissioner of the CCMA for having found that the employee's breach of the housing rules was not a breach of his employment contract and so could not amount to misconduct. The Commissioner's decision was found by the Labour Court to be mistaken and unjustifiable.

In *Malan's* decision the Court found that the disciplinary code included as a specific offence "abuse of privileges." Housing provided by the employer was a privilege or benefit, as it was provided "teen 'n normale huur" and the privilege was extended to the employee and his family as a direct result of his employment with the employer and for no other reason. Housing and accommodation, particularly in the farming sector, are integrally connected with each other.

The right to family life in accordance with the culture of the family extended to the employee in terms of section 6(2) of the ESTA is not absolute but is subject to legitimate limitations and must be balanced against the rights of the employer.

A right of residence arising solely as a result of employment, may thus be terminated as long as the employee is dismissed in terms of the LRA. The Labour Court in *Malan's* case found that the Commissioner of the CCMA erred in finding that the rules of rental payment by an employee was a term of the lease and not a term of the employment contract. The Commissioner erroneously found that contravention of the housing rules cannot give rise to disciplinary hearings and accordingly committed an irregularity by not allowing the employer a fair hearing in the CCMA.

¹³²*Malan v Bulbring N O and others* (2004) 25 ILJ 1737 LC

Support for a purposive approach to interpreting terms in a Statute exists even in pre-Constitutional Law.¹³³

5.5 JURISDICTION OF THE LABOUR COURT TO PROVIDE INTERIM RELIEF PROHIBITING EVICTION.

The CCMA conciliators and arbitrators have no jurisdiction to grant interim relief. The jurisdiction of the Labour Court is also circumscribed, despite its High Court status.¹³⁴ In *Rammekwas*' case¹³⁵ the Labour Court stated that it did not have jurisdiction to entertain a Spoliation Application to restore occupation provided for in an employment contract to the employee/applicant. The Court stated that the relief sought was not part of the concurrent jurisdiction which it shares with the High Court on a limited range of issues. See also *Sappi*'s case¹³⁶ and *Morapane*'s case.¹³⁷

Strict compliance was enforced in the *Denleigh Farms* case.¹³⁸ The defendant farm worker voluntarily resigned and was given written notice of termination of his residential rights. The Magistrate upon expiration of the date as stipulated in the notice, upon application, granted an order for eviction. On automatic review to the Land Claims Court, it was stated that the section 9 notices were not served upon the local municipality or the Department of Land Affairs, nor were the defendants given proper notice of the date of hearing. Default judgment was set aside by the Land Claims Court.

5.5. INTRODUCTION OF OTHER AMENDMENTS TO IMPROVE LABOUR RELATIONS AND SOCIAL SECURITY.

In the event of an employee residing on premises belonging to the Employer, the right of the employee to reside on the employer's premises will be dependant on the employee's continued employment with the employer.

¹³³ See *Public Carriers Association and others v Toll Road Concessionary (Pty)Ltd and others* 1990 (1) SA 925 (A).

¹³⁴ See Sections 151(1) and 157(2) of the LRA.

¹³⁵ *Rammekwa v Bophutatswana Broadcasting Corporation* Case No J.324/98.(unreported).

¹³⁶ *Sappi Fine Papers (Pty)Ltd v Paper Printing and Allied Workers Union & others* 1998 (19)ILJ 246 SE.

¹³⁷ *Morapane v Gilbeys Distillers and Vintners (Pty) Ltd and another* 1998 19 ILJ 635 (LC).

¹³⁸ *Denleigh Farms and another v Mhlanzi and others* 2000 (SLLD) 176 LCC.

The Labour Relations Act not only seeks to ensure security of employment, but directly plays a role in the protection of the social security of the employee and his family. Termination or dismissals for operational requirements must be a measure of last resort. The employer is obliged to consult meaningfully with the employees on measures to avoid dismissals and the minimizing of the number of persons to be retrenched.

In similar vein, section 36 of the Insolvency Act 24 of 1936, as amended in 2002, requires that employees or their representatives be given sufficient information and time to enable consultation and the opportunity of saving their jobs or minimising the number of people to be dismissed.

The LRA and section 36 of the Insolvency act is accordingly important as the employees have an opportunity of proposing alternative measures to save their jobs, thus ensuring security of housing for themselves and their families.

In terms of recent International Law developments, three levels of protection are afforded to employees of an insolvent employer:-¹³⁹

- (i) *Protection of claims of the employees;*
- (ii) *Procurement of compensation of the employees in the form of severance pay; and*
- (iii) *The safeguarding of the employment of the employees, inter alia, through efforts to rehabilitate enterprises where possible*

CHAPTER 6. THE COURTS AND THE CONSTITUTION ON THE RIGHT TO ACCESS TO ADEQUATE HOUSING

6.1. THE IMPACT OF THE JUDGMENT IN THE MATTER OF THE GOVERNMENT OF SOUTH AFRICA v GROOTBOOM.¹⁴⁰

Mrs Irene Grootboom and others were evicted from their informal homes, earmarked for low cost housing. The evicted residents applied to the High Court for an order requiring the

¹³⁹ Oliver MP and Potgieter, O: "The Legal Regulation of employment claims in insolvency and rescue proceedings: A comparative enquiry" 1995 : 16 ILJ 1295.

¹⁴⁰ *The Government of South Africa v Grootboom* 2001 (1) SA 464 (CC).

Government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. In interpreting section 28(1)(c) of the Constitution, the court found that the State is obliged to provide rudimentary shelter to children and their parents, should the parents be unable to shelter their children and that this obligation existed independently of and in addition to the obligation upon the State to take reasonable legislative and other measures in terms of section 26 of the Constitution. It further found that the State was obliged to provide the rudimentary shelter irrespective of the availability of resources.

The appeal to the Constitutional court was based on two constitutional provisions namely sections 26 and 28 of the Constitution.

In support of the contention that they had complied with the obligations upon them in terms of section 26, the Provincial authorities placed before the Constitutional Court proof of legislative and other measures they had adopted concerning housing, both at National and Provincial level. It was argued that the fragmented housing policy of the previous regime had been consolidated into a single system for low cost housing for people regardless of race.

It was further contended that the “progressive” realisation indicated that the right contained in section 26 could not be realised immediately but was dependant on the availability of resources. It was held that the programmes adopted by the State fell short of the requirements of section 26(2). This obligation required the State to devise and implement a coherent, co-ordinated programme designed to provide housing, health care, sufficient food and water and social security to those unable to support themselves and their dependants.

The debate as to whether socio-economic rights are justiciable at all was settled in the Certification Judgment.¹⁴¹ It was stated that the fact that socio-economic rights may give rise to budgetary implications does not exist as a bar to their justiciability. At the very minimum socio-economic rights can be negatively protected from improper invasion.

¹⁴¹ *Ex-Parte chairperson of the Assembly*. In the Certification of the Constitution of S A 1996 (4) SA 744 (CC): 1996 (10) BCLR 1253 at para 78.

The Constitutional Court, in rejecting the argument by the Amicus Curiae that the International Covenant on Economic, Social and Cultural Rights ("the Covenant") is significant in the understanding of positive obligations created by socio-economic rights in the Constitution, stated that the Covenant provides for the "*right to adequate housing*," as opposed to section 26(1) of the Constitution which provides for the right to have access to adequate housing. Further, the Covenant obliges the State to take *appropriate steps* whereas the South African Constitution obliges the State "*to take reasonable legislative and other measures*".

The Court, in referring to the international position and to the ICESCR accepted that every State party to the Covenant, in terms of the Covenant had to satisfy a minimum core obligation, including the minimum essential level of socio-economic rights which included the right to housing.¹⁴² Consequently in a State where a significant number of people are deprived of the basic shelter and housing, the State is in breach of its obligations and every effort must be made to use all the resources at its disposal to satisfy the minimum core obligation of the right. It is to be noted that the general comment does not specify precisely what the minimum core is.¹⁴³ In South Africa the State is not obliged to do more than its available resources permit.¹⁴⁴ In the *Soobramoney* case¹⁴⁵, Chaskalson J stated:

"No unqualified obligation exists upon the State to fulfil its obligations. Such obligations as are contained in sections 26 and 27 of the Constitution are dependant upon the resources available for such purposes"

In *Grootboom's* case the Constitutional Court in deciding on the correctness of the High Court, stated that on the High Court's interpretation, parents with children had dual rights as contained in sections 26 and 28(1)(c). This was clearly not what the Constitutional Scheme intended. Section 28 (1) (c) did not create any primary State obligation to provide shelter on demand to parents and their children, if the children were being cared for by their parents or families.

¹⁴² Para 30.

¹⁴³ Para 10 of general comment 3 issued in 1990 by the United Nations Committee on Economic, Social and Cultural Rights.

¹⁴⁴ See para 46.

¹⁴⁵ *Soobramoney v Minister of Health Kwa Zulu Natal* 1998 (1) SA 765 (CC); 1997 (12) BLLR 1696 at para 8.

It is necessary for the purposes of this dissertation to refer to the overlap between sections 25(5), 26 and 27 of the Constitution. The obligation created by section 28(1) (c) can be properly ascertained in the context of the rights and obligations created by sections 25(5), 26 and 27 of the Constitution. Sections 26 and 27 provide for the State to take reasonably legislative and other measures within its available resources to achieve the right with which they are concerned. Section 28(1) (c) creates the right of children to basic nutrition, shelter, basic health care and social services.¹⁴⁶

The extent of the State's obligation must be considered against the international obligations binding on South Africa. The United Nations Convention on the Rights of the Child imposes the obligation on the State to ensure that the rights of the children are properly protected. Section 28 is one of the mechanisms which allows the State to ensure that the child's rights are properly protected. The State is able to ensure that the child's section 28(1) rights are protected. This action may take various forms, for example, maintenance enquiries and if necessary, criminal prosecution may follow upon a parent's wilful default in contravening a court order to support his or her child. The conclusion is that the child has a right to parental care in the first place and the right to alternative proper care only where that is lacking.¹⁴⁷

The learned judge Yacoob stated that the conduct of the municipality was in conflict with the provisions of the PIE Act but did not deliberate the point further.¹⁴⁸

6.2 THE IMPACT OF THE SOCIO-ECONOMIC RIGHTS ANALYSIS ENTRENCHED IN THE GROOTBOOM DECISION.

The question arises whether the socio-economic rights analysis entrenched in the *Grootboom* decision can be of assistance in policy decisions and choices. This issue was considered by Sloth Nielsen J.¹⁴⁹

The *Grootboom* decision has been welcomed as a major step forward for socio-economic rights as the Court upheld the claim that the State was obliged under section 26(2) of the

¹⁴⁶ At para 74 of the *Grootboom* judgement.

¹⁴⁷ At para 77 of *Grootboom*.

¹⁴⁸ At para 90 of *Grootboom*.

¹⁴⁹ Sloth Nielsen, J: *The Child's right to Social Services, the right to Social Security and Primary prevention of child abuse. Some conclusions in the aftermath of Grootboom* (2001) SAJHR 210.

Constitution to provide emergency relief for those in desperate need. It is logically submitted by Sloth Nielsen that even though the *Grootboom* decision concerned itself with children's section 28(1)(c) rights to shelter, some conclusions about the "*scope, content and enforceability of the right to social services and its relationship with the right to social security/assistance may nevertheless be inferred from the reasoning of the Court*".

The *Grootboom* judgment can possibly be used to address the position of street children which was only partially addressed in the amendment of the Child Care Act¹⁵⁰ which inserted a definition of "shelter" which included subsidisation of shelters to street children. The *Grootboom* decision has been heralded by academics, lawyers and activists internationally as the landmark case signifying the undeniable justiciability of economic and social rights and in particular promised change for people living in "crisis situations"¹⁵¹ as regards their right to access to adequate housing. Despite the order of the Court, however, which required the implementation of a policy to deal with persons living in crisis, there has been no revolutionary change in either availability or delivery of housing for South Africa's urban poor.

The *Grootboom* decision is significant in that it was one of the rare occasions on which the ANC was challenged on its own policy by people who continue to be "in crisis" bringing an application to Court to challenge those policies.

The effect of the *Grootboom* decision is that the "Government can no longer pay lip-service to the housing crisis by telling the homeless to join the queue for a brick house in 10 years' time."¹⁵² Unfortunately, figures available from the years following the decision, do not suggest that this hope has been realised. In 2005 residents waiting for housing lost patience with government and protested against the lack of service delivery.¹⁵³ The outlook for a positive impact of the *Grootboom* decision, beyond serving as reinforcement of the fact that social economic rights are justiciable, remains distant.

¹⁵⁰ Section 1 of the Child Care Act 96 of 1996.

¹⁵¹ *Grootboom* at paragraph 99.

¹⁵² Concourt tells Government to Shelter the Poor, ANC Daily News briefings, Oct 4 2000 at www.anc.org.za/anc/newsbrief/2000/news_1005.txt.

¹⁵³ Daily News, Tuesday, December 2005 page 11.

Grootboom was not about eviction proceedings, but concerned an application to Court, to compel the Government to comply with its section 26 obligations. The housing rights issues, however, are clearly implicated in eviction proceedings and *Grootboom's* decision has been taken up in other decisions, for example the *Kayalami Ridge* decision. The Constitutional Court found that the limited consultation the Government undertook with residents to establish a temporary camp for flood victims, was enough to pass procedural fairness requirements given "the urgent need of flood victims".¹⁵⁴

In the *Sheffield Road* case¹⁵⁵ it was clear that the *Grootboom* judgement has made it more difficult for the state to evict people living illegally on their land without creating a programme to deal with people in crisis. In *Sheffield Road*, although the state's breach of section 26 of the Constitution was not directly before the Court, the judgment suggests that in eviction proceedings, an underlying concern will be that the Government will be in breach of the Constitution and the *Grootboom* requirements, by failing to have a programme in place.

It is submitted that the Constitutional Court's judgment in *Grootboom* was too broad and gave the Government too much leeway in fashioning a response to its breach of its section 26 obligations. The Government's attitude seems to be the same as in *Grootboom* – it has various policies in place, has limited funding and land and hundreds of thousands of persons ought to receive preference to those against whom an eviction order is sought. The Government did not until late 2003 adopt any policy of the sort envisioned by *Grootboom* aimed at people in crisis.¹⁵⁶

Grootboom's failure to define the scope of responsibility for each sphere of Government has lead to the one sphere shifting responsibility to another. In the unreported decision of

¹⁵⁴ *Minister of Public Works and others v Kayalami Ridge Environmental Association and others* 2001 (7) BCLR 652 (CC).

¹⁵⁵ *City of Cape Town v Various Occupiers of the Sheffield Road, Phillipi* Case No A5/2003.

¹⁵⁶ National Department of Housing, National Housing Programme:- Housing Assistance in Emergency Circumstances Policy Prescripts and Implementation Guidelines, April 2004 available at www.housing.gov.za/content/legislation. Previous programmes, including the Accelerated Managed Land Settlement Program originally offered as evidence of a developing policy by the City of Cape Town in the *Grootboom* litigation dealt primarily with the provision of housing subsidies to qualified person, not specifically to persons in crisis.

SARRC¹⁵⁷ the city and province blamed lack of funding on other spheres of government. The City argued that *Grootboom* said that the National Government bears overall responsibility for the implementation of section 26 of the Constitution. This is in conflict with *Grootboom*'s decision that all spheres are "intimately involved in housing delivery."¹⁵⁸ The City and Province argued that the SARRC is a government corporation and, it alone, is responsible for making land available. *Grootboom* has allowed people to secure rights, although such rights are limited, for example, where no land is available or no policy implemented, the courts will simply not grant applications for eviction.

The mandated obligation imposes both "negative" and "positive" obligations upon the State¹⁵⁹. The distinct positive and negative duties are outlined in Pierre de Vos' article.¹⁶⁰

The case of *Grootboom* can be seen to be a case concerning violation by way of an omission, the legislative or executive branches having breached their constitutional duty by failing to act in accordance with their duty.

On the "progressive realisation" of the right in *Grootboom*, the Court referred to Art 2.1 of ICESCR for its definition of progressive realisation. The progressive realisation is defined as:

"Individually and through International assistance and co-operation, especially economic and technical, to the maximum of its available resources, achieving progressively the full realization of these rights by all appropriate means including particularly the adoption of legislative measures".

In South Africa, however, the State is required to take deliberate, concrete and targeted actions towards the goal of meeting the needs of the people whilst allowing the State a degree of latitude in reaching that goal.

In the *TAC* judgment¹⁶¹ reference to the progressive realisation of the "right" clearly refers to the sections 26(1) and 27(1) rights. The two sections clearly show that there is a common

¹⁵⁷ *South African Rail Commuter Corporation v Unlawful Occupants of Western Cape Commuter Area*. (unreported)

¹⁵⁸ *Grootboom* at para 47.

¹⁵⁹ See Bollykny, T J R if $C > P + B$: a paradigm for judicial remedies of Socio-Economic Rights violations 2002 SAJHR 161.

¹⁶⁰ De Vos P, *Pious wishes or Directly enforceable Human Rights Social and Economic Rights in South Africa's 1996 Constitution* 1997 (13) SAJHR 67.

requirement of the State to take reasonable legislative and other measures to ensure the realisation of the right.

The *TAC* judgement sidesteps the need to give content to the right contained in section 27(1) as compared to *Grootboom* where there is some analysis by the Court of what the right in section 26(1) is designed to achieve. In the *TAC* judgment the court did refer to the *Grootboom* judgment where it was held that there was at least a negative obligation on the State to desist from “preventing” or impairing the right of access to housing.¹⁶² Sections 26(1) and 27(1) exist in unqualified terms. Sections 26(2) and 27(2) provide that the State’s obligation is limited by the resources available. Scarcity, thus conditions the extent to which the rights may be fulfilled.

In *Grootboom* the Court made it clear that it would not dictate to the State any particular policy option for giving effect to socio-economic rights. Measures adopted by the State to meet its obligations may be reviewed by the Court against the standard of reasonableness as required by the sections protecting socio-economic rights.¹⁶³ Social assistance programmes must not only be accessible to a larger number of people but to a wider range of people as time progresses.¹⁶⁴ Should the State have to cut back or curtail social programmes, the State should bear the burden of justifying such measures in accordance with the limitation clause in section 36 of the Constitution. The precise *ratio decidendi* of the *Grootboom* decision, negatively expressed, is that it is not reasonable for the State to exclude a portion of the society from the National Housing Programme,¹⁶⁵ in particular where such a group is poor or otherwise vulnerable.¹⁶⁶

The Court obviously recognised in *Grootboom* that the standard of review set in its first major socio-economic rights case would be important to determine the extent to which it would involve itself in political questions and in the allocation of resources. To the extent of having to prescribe to the executive and legislature on resource allocation powers, the Court

¹⁶¹ *Minister of Health v Treatment Action Campaign* 2002(5) SA 721 (CC).

¹⁶² Bilchitz, D, “Towards a Reasonable approach to the Minimum Care laying the foundation for future Socio-Economic Rights: 2003 (SAJHR) 1

¹⁶³ Para. 41 of *Grootboom*.

¹⁶⁴ Para. 45 of *Grootboom*.

¹⁶⁵ Para.43 of *Grootboom*.

¹⁶⁶ Paras 36, 63-65, 69 of *Grootboom*.

was cautious. To this extent the *Grootboom* judgment remains respectful of the political branch's primary budget setting and policy making powers.¹⁶⁷

6.3 WOMEN'S RIGHTS TO ACCESS TO HOUSING: IMPLICATIONS OF GROOTBOOM.

Women's access to adequate housing has in the past been limited by discriminatory laws and practices. The section 26 protection to the right of access to adequate housing cannot be looked at in isolation. The Constitution also endorses the right to equality, non racialism and non sexism are among the foundational values of the Constitution. Section 9 of the Constitution recognises that equality includes the full and equal enjoyment of all rights and freedoms. Section 9(3) specifically prohibits unfair discrimination on a host of grounds, which include sex and gender. Section 9(2) specifically recognises that special measures may be adopted to promote the achievement of equality amongst previously disadvantaged groups. Thus, when section 9 is read with section 26, it is clear that the State has an obligation to prohibit unfair discrimination in respect of housing rights and that the State can adopt special measures to promote equality for women in the housing sector. In *Grootboom's* decision the Court pronounced on key principles relating to specific groups of people. At para 52 of the *Grootboom* judgment, the Court referred to groups of people, which included people living in intolerable conditions. It is submitted that women are more likely than men to be living in intolerable conditions, hence the special consideration to be given to them. The following sections seek to examine the context within which women seek access.

¹⁶⁷ Roux, T: *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*: (2003) 10 *Democratisation* 92. Senior Research Officer, Centre for Applied Legal Studies, University of Witwatersrand.

(A) WOMEN'S RIGHTS TO ACCESS TO HOUSING AGAINST THE ECONOMIC CONTEXT.¹⁶⁸

The 1996 Census revealed that 26% of female household heads had incomes of less than R500,00 per month, compared to 13% of male household heads. In 2001 40% of all employed women worked in unskilled jobs¹⁶⁹. Close on 20% of employed women earned R200,00 or less per month compared to only 9% of employed men.¹⁷⁰ Interrupted work patterns occur as a result of women's child care and care giving responsibilities. Women aged 10 years and above spend an average of 216 minutes per day on unpaid housework while men spend an average of 83 minutes per day.¹⁷¹ The above situation impacts negatively on the women's access to credit and ability to afford housing.

(B) WOMEN'S RIGHTS TO ACCESS TO HOUSING AGAINST THE SOCIAL CONTEXT.

(i) PATRIARCHY

Pillay, Manjoo and others are of the opinion that most male partners register houses in their own names which forces women to remain in relationships to meet the household needs. Housing policy favours couples, which leaves single female headed households often excluded or discriminated against in housing practices.

(ii) CUSTOMARY RELIGIOUS LAWS AND PROCEDURES

Discriminatory customary or religious laws often work to the detriment of women's housing rights. Customary land tenure favours rights vested in traditional male leaders. The minority legal status of women has prevented women from independently being able to own property.

¹⁶⁸ Pillay, K, Manjoo R, Paulus E: *Rights, Roles and Resources. An analysis of Women's Housing Rights. Implications of the Grootboom case.*

www.idasa.org.za/index.asp?page=ouputs.asp%3FTID%3D7%26OTID%3D2

¹⁶⁹ At paragraph 1.3.2.

¹⁷⁰ At paragraph 1.3.3.

(iii) POLIGAMY

Poligamy has an adverse effect on women's rights. A 1997 study by the Development Action group found male hostel dwellers were accessing housing subsidies with women from urban areas. They subsequently brought their wives from rural areas, thus excluding the urban woman from the common house, resulting in her being excluded from obtaining a further subsidy.

(iv) DOMESTIC VIOLENCE

Domestic violence has a profound effect on a women's right to access to housing as they may remain in abusive relationships with nowhere to go.

(v) HIV AND AIDS

The woman who suffers from Aids is generally shunned by society and is often in a weaker position to explore the right to access to adequate housing because of the financial predicament they are placed in because of their ill-health or as care-givers to Aids sufferers or children orphaned by Aids.

C LEGISLATION ENACTED IN CONSEQUENCE OF THE CONSTITUTIONAL OBLIGATIONS WHICH IMPACT ON THE PROTECTION AFFORDED TO WOMEN.

The Housing Act 107 of 1997 is a key piece of legislation enacted wherein measures are promoted to prohibit unfair discrimination on the grounds of gender, especially through provision being made for marginalised women.

The Act does exhibit a sensitivity to vulnerable groups. The Housing Act does not define 'adequate housing', but does define the term "housing development" which means the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities. The definition has positive implications for women. These include, but is not limited to, the commitment to the standard and quality of housing, security of tenure and access to water, sanitation and domestic energy supply.

Sections 4(6) and 4(7) of the PIE Act states that eviction orders may be granted after consideration of all relevant circumstances, including the needs of “..... households headed by women”

The ESTA however lacks specific provision for woman as men usually acquire the right of occupation through labour on farms. It only provides for tenure to be terminated where it is just and equitable to do so.

The Recognition of Custom Marriages Act¹⁷¹ grants equal status and capacity to (female) spouses to acquire and dispose of assets.

The Rental Housing Act¹⁷² recognises housing rental as a tenure option. This Act recognises that ownership is not appropriate for all persons. All spheres of government have an obligation to promote a rental housing market. The Act has positive implications for women given that, due to their low economic status, the home ownership model is not often an option.

The Home Loan and Mortgage Disclosure Bill [B53 - 2000] aims to promote fair lending practices, thus removing the prejudices or consistent constraints women face in gaining access to credit and, indirectly, access to housing.

6.4. HAS THE GOVERNMENT OF SOUTH AFRICA DELIVERED IN ACCORDANCE WITH THE CONSTITUTIONAL COURT'S DECISION IN GROOTBOOM?

Whilst the *Grootboom* judgement in the Constitutional Court is regarded as a milestone judgement, questions have been raised about whether it has resulted in a significant improvement in the lives of the applicants.

An important concern is whether the formulation of the order in *Grootboom's* case has contributed to the non-implementation of the directives contained in the body of the judgment. The *Grootboom* judgment was quoted and referred to in numerous court decisions. It has also attracted international attention as it affects the lives and economic rights of people nationally.

¹⁷¹ Act 120 of 1998.

¹⁷² Act 50 of 1999.

Jurisprudence has been developed by the Constitutional Court which emphasises that in order to be "appropriate" a remedy must be "effective."¹⁷³

It is recognised that Courts are constrained in the sense of being prevented from having to tread upon the domain of the legislative and executive arms of the government, which has as their function, to establish policy and determine budgets and expenditure.¹⁷⁴

In *Grootboom* the Court made two orders, the first being the interlocutory order which gave effect to the agreement reached by the parties which secured benefits specifically for the *Grootboom* community. The second order was a declaratory one which set out the requirements of section 26(2) in relation to "reasonable state measures".¹⁷⁵ The court ordered that a co-ordinated programme must include reasonable measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

Despite a distinct allocation of roles in the Housing Act, *Grootboom*'s order lacks detail as to the allocation of responsibilities between the three spheres of government. The two spheres of government in the Western Cape, i.e. the Provincial Administration of Western Cape and the Oostenberg Municipality were initially resisting compliance with the court order on the basis of neither of them being specifically ordered to act in terms of the judgment.¹⁷⁶

According to Pillay, the National Department of Housing has recommended to Treasury that part of the housing budget be allocated to the *Grootboom* type of situation. Even though the *Grootboom* decision approved of rapid land release programmes, no significant implementation of the programme is apparent.

The Order in *Grootboom*'s case is silent about any obligation on the South African Human Rights Commission (SAHRC) to monitor or supervise the Order. The Court seems to make the reporting of the SAHRC optional, stating that the SAHRC should report "if necessary".

¹⁷³ See *Fose v Minister of Safety and Security* 1997 (3) 786 (CC).

¹⁷⁴ See *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC).

¹⁷⁵ At paragraph 2(b) of the order in *Grootboom*

¹⁷⁶ Pillay, K : "Implementation of *Grootboom*: Implications for the enforcement of Socio-economic rights," (2002) 2(6) Law, Democracy and Development 255 – 277

It is argued that the Courts ought to assure by way of an order, that the SAHRC monitor and report on the State's compliance with its section 26 obligations as a means of reducing the need for Courts to engage in budgetary and policy decisions.¹⁷⁷ By requiring the SAHRC to monitor and report, the Court can leave the budgetary implications and programmes to the State and implement them after hearing from all interested parties by the issue of a court order.

The argument for the SAHRC being required to monitor and report, is two-fold:-

Firstly, the Court performs the final function by encouraging the other arms of the Government to join it in co-ordinating constitutional construction.¹⁷⁸

Secondly, the information provided by the SAHRC will enable all parties to ventilate the issues on a factual basis, thus promoting judicial economy.

The process of collaboration allows a once and for all record to be developed, enabling the government to complete this difficult task without having to go through another process of Constitutional ruling.

In comparison with the *Grootboom* order, the Constitutional Court order in the *TAC* judgement¹⁷⁹ compelled the Government to act by way of a mandatory order. The Court retained jurisdiction. In the event of deliberate non-compliance, government officials may be charged with contempt of Court. The applicants in the *TAC* judgment drew the Court's attention to the difficulties experienced by the order of the Constitutional Court in *Grootboom*.

In *Neville Rudolph's* case¹⁸⁰ the City Council argued that Rudolph and others were "landgrabbers," guilty of self-help which was disapproved of in *Grootboom*. *Rudolph's*

¹⁷⁷ See Trengove, *Judicial remedies for Violation of Socio-Economic Rights 1998* (EST REV 8 {discussing the arsenal of remedies available to the Courts with respect to Constitutional violations}).

¹⁷⁸ See J Klaaren "Structures of Government in the 1996 Constitution" *Putting Democracy back into Human Rights* (1997) SAJHR, arguing that a facilitative role enables the judiciary to give meaning to Human Rights within the democratic process.

¹⁷⁹ See note 149 above.

¹⁸⁰ *City of Cape Town v Neville Rudolph and others* 2003 (1) BCLR 1236.

case was challenging the policies that *Grootboom* had held were required and not delivered. Judge Selikowitz dismissed the eviction application and delivered a detailed order which declared a Constitutional breach and ordered the Council to take specific steps and to deliver a report on compliance taken in accordance with such Order.

The Court's specific order in *Grootboom* has been implemented to a limited extent. According to Pillay¹⁸¹ R200 000,00 was made available to the Wallacedene community for the purchase of zinc sheets, windows and doors. In contravention of the Order, as at 2002 eight of the 20 toilets were not in working order. There is no adequate drainage on the sportsfield leading to water stagnation. There is no provision for refuse removal causing refuse to be dumped around surrounding taps and the community feels very insecure.

To a large extent however the difference between promise and product is lack of funding. The Government until late 2003 had not begun its implementation proper.¹⁸² Four years after the decision in *Grootboom*, a national housing programme specifically geared towards assisting persons in crisis situations was adopted as a new Chapter by the National Housing Code.¹⁸³

CHAPTER 7. POLITICAL PLOY OR GENUINE PROMISE?

In 1994 the African National Congress capitalised on the deplorable conditions that people lived in as a direct consequence of apartheid by promising "housing for all". The ANC in its run up campaign undertook to build 1 million homes within five years of taking office.¹⁸⁴ The new Housing Minister appointed after the ANC was voted into power, said:

*"It is our task to give millions of South Africans an essential piece of dignity in their lives, dignity that comes from having a solid roof over your head,"*¹⁸⁵

¹⁸¹ See note 176 above.

¹⁸² See National Department of Housing, National Housing Programme: "Housing assistance in emergency circumstances: Policy Prescripts and Implementation Guidelines" April 2004 available at www.housing.gov.za/content/legislation.policies.

¹⁸³ See Press Release: *Housing Assistance in Emergency Circumstances* Department of Housing April 1, 2004 at www.housing.gov.za/content/mediadesk noting that the amendment was in reaction to the *Grootboom* decision.

¹⁸⁴ ANC election manifesto 1994 at www.anc.org.za/anc.docs/policy/manifesto.html.

¹⁸⁵ Slovo, J, Prodder Newsletter Nov 1994.

Despite the promises made by the ANC, the housing crisis was not eradicated. Throughout the late 1990's the government fell short of delivery while the housing backlog continued to grow at an alarming rate.¹⁸⁶

Since the ANC came into power, the poor have benefited substantially by housing delivery. There is however a greater demand than supply of housing. In October 2000 the country's highest Court handed down a landmark decision in *Grootboom*. The decision provides a powerful tool for people involved in eviction proceedings. The effect of the *Grootboom* decision was that the Government was challenged on its own policy and could no longer pay lip service to the housing crisis by telling the homeless to join a queue for a brick house in ten years' time.¹⁸⁷

A year after the *Grootboom* decision the Constitutional Court was called upon to adjudicate on housing rights in the *Kyalami Ridge* case.¹⁸⁸ A residents association sought to interdict the Government from settling people "in a crisis situation" on government-owned land. The residents claimed the local environment would be damaged. The Constitutional Court, in overturning the High Court decision to grant the order, found that the government's limited consultation with the residents was sufficient in this case to pass procedural fairness given the "urgent needs" of flood victims.¹⁸⁹

In the unreported *Sheffield Road* case¹⁹⁰ in an appeal against the Magistrate's Order of eviction, the Judge granted the eviction but stayed same pending the availability of suitable alternative land. The eviction would otherwise lead to, in the *Grootboom* language, "a crisis situation" a *prima facie* breach of the Constitution.

The landmark decision of *Grootboom* was again used as the main crutch for support of the judgment in the Appeal Court.

¹⁸⁶ Garder D: *Housing Finance Resource programme, Getting South Africa under shelter; an overview of the South African Housing Sector 8 – 9* (August 2003) Johannesburg: Housing Finance Resource Programme.

¹⁸⁷ Con Court tells Government to shelter the poor, ANC Daily news briefing Oct 4, 2000 at www.anc.org.za/anc/newsbrief/2000/news.1005.txt.

¹⁸⁸ *Minister of Public Works & others v Kyalami Ridge Environmental Association and another (Mukhevhho Intervening)* 2001(3) SA 1151 (CC).

¹⁸⁹ See paragraphs 114-116 of the *Kyalami Ridge* case.

¹⁹⁰ *City of Cape Town v Various occupiers of the Road Reserve of applicant Parallel to Sheffield Road Phillipi* case A5/2003 (hereafter referred to as *Sheffield Road* case).

However, in the *Modderklip* judgment¹⁹¹ the court granted an eviction order of 40 000 people living on private land and authorised the South African Police Services to carry out the eviction.

On Appeal to the Supreme Court of Appeal¹⁹² the court held that the State breached its obligation to the landowner and to the unlawful occupiers by failing to provide alternative land and that the State at all three levels of government did not have a “*Grootboom* policy” in place and that the evictions must be executed humanely. The Supreme Court of Appeal ordered that the residents were entitled to remain on the land until alternative land is made available and that the landowner should not be unduly prejudiced and ordered the State to pay damages to the landowner.¹⁹³

CHAPTER 8 CONCLUSION

The socio-economic rights, particularly those contained in section 26 and 27 of the Constitution, have been widely acclaimed to have been adequately dealt with by the Constitution and the *Grootboom* decision. Positive judicial precedents such as those of *Grootboom* which have received the attention of international commentators, are essential if socio-economic rights are to be taken seriously.

The political platform of the ANC at the end of 1994, was “housing for all”. This was welcomed by people who were living in deplorable conditions for years under white minority rule.

Despite the promise by the ANC, after its landslide victory and the inclusion of the right to access to adequate housing in the new Constitution, the government has been unable to provide adequate housing to all, largely due to financial constraints. In *Grootboom*’s landmark decision on social and economic rights issue, the Constitutional Court’s declaration that the Government was in breach of its constitutional obligation received international praise, signifying that social and economic rights are justiciable.

Despite the absence of noticeable change in South Africa, *Grootboom* has provided a powerful tool for communities involved in eviction proceedings, building a growing body of right to housing case

¹⁹¹ *Modderklip Boerdery (Pty)Ltd v Modder East Squatters & Another* unreported, case SCA 213/2003

¹⁹² The squatters on appeal under SCA. case No 213/2003

¹⁹³ See *Landmark Rulings on eviction* <http://groups.yahoo.com/group/inescr>

law, in favour of different communities. The *Kayalami Ridge*, *Sheffield Road* and *Modderklip* judgements indicate that the judiciary is prepared to ensure that section 26's right to access to adequate housing may yet have a meaning for millions of South Africans as was originally intended in *Grootboom*.

The rights which people have secured in recent litigation by not being evicted from shacks in deplorable conditions, (unless alternative land is made available) is distant from Joe Slovo's statement in the *Prodder* newsletter, November 1994, when he promised that the ANC would secure "*the dignity that comes from having a solid roof over your head, running water and other services in an established community*," but, it is nevertheless a start.

Importantly, there is an urgent need for various levels of government to co-operate with each other and to implement housing rights through effective, coherent governance. Failure to do this, may result in an applicant's attempt to enforce his rights resulting in lengthy court battles with the one organ of state shifting responsibility to the other.

However, one must remember that the requirements of the Constitution may not be met if the government is not equipped with financial resources to implement programmes designed to meet the needs of the people.

The factors which make the socio-economic rights seem to be a "pot of gold", slowly disappearing over the horizon, include the high unemployment rate, the low threshold of the number of people being taxed on revenue and the high crime rate which hinders foreign investment.

The Constitutional Court in the most recent decision of *Jafta v Schoeman*¹⁹⁴ shows its prowess in protecting the section 26 right to adequate housing by protecting poor people's homes being sold in execution for paltry debt's, especially where there are less objectionable ways of recovering the debt.

The above chapters indicate that the new democracy and intense web of Labour legislation, has ushered in a labour dispensation which is highly protective, not only of labour, but indirectly of social security of employees and their dependants.

¹⁹⁴ See footnote 62

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