

# Adequate Housing and Eviction

## A Brief Overview of Namibian and South African (Case) Law in the Context of Informal Settlements



Support to Land Reform Programme  
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)  
and  
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#### **GIZ Registered offices**

Bonn and Eschborn, Germany  
GIZ Support to Land Reform  
GIZ Office, 88 John Meinert Street, Windhoek, Namibia  
Telephone (+264) (0)61-222447 • Fax (+264) (0)61-222427  
Email [giz-namibia@giz.de](mailto:giz-namibia@giz.de) • Website [www.giz.de/de/weltweit/323.html](http://www.giz.de/de/weltweit/323.html)

#### **Legal Assistance Centre (LAC)**

4 Marien Ngouabi Street (former name Körner Street) Windhoek  
P.O. Box 604, Windhoek, Namibia  
Telephone (+264) (0)61-223356 • Fax (+264) (0)61-234953  
Email [info@lac.org.na](mailto:info@lac.org.na) • Website [www.lac.org.na](http://www.lac.org.na)

#### **Front cover image:**

Informal settlement on the outskirts of Katutura in Windhoek, Namibia.  
(Photo source: <https://www.flickr.com/photos/carlmonus/4323132017>)

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# Abbreviations Used in this Paper

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CESCR	Committee on Economic, Social and Cultural Rights (of the UN)
Covenant	International Covenant on Economic, Social and Cultural Rights
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
LAC	Legal Assistance Centre
LEAD	Land, Environment and Development Project (of the LAC)
NC	Constitution of the Republic of Namibia (“Namibian Constitution”)
OHCHR	Office of the United Nations High Commissioner for Human Rights
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
SAC	Constitution of the Republic of South Africa (“South African Constitution”)
UN	United Nations

# 1

## Introduction

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Given the shortage of land and housing in urban areas, illegal settlements constitute permanent features and a growing challenge in African cities. More and more people are migrating from rural areas to live permanently in urban areas. This trend, long since a reality in cities such as Nairobi, Kinshasa, Dar es Salaam, Luanda and Mombasa, is now posing an ever-increasing challenge in Windhoek. Efforts to upgrade informal settlements and provide formal low-cost housing or other measures do not seem to be meeting the people's expectations in terms of fast results. In Namibia frustration is growing because of the slow progress in land delivery to low- and middle-income households. The Affirmative Repositioning movement and its demands have clearly demonstrated this frustration. In this context a lot of demands and assertions have been made concerning people's rights in relation to housing and land. Against this background, this paper focuses on questions concerning the rights of illegal occupants in Namibia. For instance, what guarantees does the right to adequate housing actually embody, or which obligations of the State derive from this right and what limitations can the State impose on this right? More specifically, how do eviction proceedings affect the rights and obligations of the parties concerned, and what other rights must be taken into account?

Judgments delivered by South African and Namibian courts in cases dealing with the right to adequate housing, or more specifically the eviction of illegal occupants, have in many ways restricted the authorities' power to act against illegal settlements. Often, especially when illegal settlements are erected on state land, the State is forced to tolerate them unless it is willing and able to provide suitable alternative accommodation. Likewise, private landowners, depending on the circumstances, may have to temporarily tolerate illegal settlers while the State, which still bears the ultimate responsibility for resolving the problem, seeks a solution. At the same time, the courts have defined extensive obligations of the States with a view to progressively achieving realisation of the right to adequate housing.

Focusing on Namibian and South African judgments – without claiming to be exhaustive in doing so – this paper provides a brief overview of the two countries' respective jurisprudence regarding eviction and the right to adequate housing. In order to place this case law in a proper context, it is appropriate to first briefly outline the relevant legal foundations in international and national law.

# The Right to Adequate Housing in International Law

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The right to adequate housing is part of the right to an adequate standard of living. The right to an adequate standard of living belongs to the body of so-called socio-economic rights, which are sometimes referred to as the second generation of human rights.<sup>1</sup>

The right to an adequate standard of living is mentioned for the first time in Article 25 of the Universal Declaration of Human Rights.<sup>2</sup> Though not a legally binding treaty itself,<sup>3</sup> this Declaration is still of fundamental importance as it was adopted specifically for the purpose of defining the fundamental freedoms and human rights in the Charter of the United Nations (UN), which is binding on all UN Member States.<sup>4</sup> This Declaration served as the foundation for the legally binding International Covenant on Economic, Social and Cultural Rights (hereinafter “the Covenant”),<sup>5</sup> according to which all States Parties (including Namibia since its accession to this treaty in 1994) recognise the right of everyone to an adequate standard of living in terms of its Article 11.

Article 11(1) of the Covenant provides:

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

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1 For more information on human rights, see Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Second Edition), Oxford University Press, 2008.

2 United Nations General Assembly Resolution 217 A (III) – accessed at <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>.

3 UN General Assembly resolutions are non-binding but still of considerable political weight.

4 Being the foundational treaty of the UN – accessed at <http://www.un.org/en/charter-united-nations>.

5 A multilateral treaty adopted by the UN General Assembly in 1966 and in force since January 1976 – accessed at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

Article 144 of the Constitution of the Republic of Namibia (NC)<sup>6</sup> accords the general rules of international law direct and automatic application in Namibian municipal law, therefore the right to adequate housing is directly incorporated into Namibian law.

What does the right to adequate housing actually entail?

Firstly, according to the Office of the UN High Commissioner for Human Rights (OHCHR) and UN-Habitat<sup>7</sup> –

***The right to adequate housing contains freedoms. These include:***

- *Protection against forced evictions and the arbitrary destruction and demolition of one's home;*
- *The right to be free from arbitrary interference with one's home, privacy and family; and*
- *The right to choose one's residence, to determine where to live and to freedom of movement.*

And, according to the UN Committee on Economic, Social and Cultural Rights (CESCR), forced evictions are “*prima facie incompatible*”<sup>8</sup> with the right to adequate housing and other provisions in the Covenant. The CESCR defines “forced evictions” as follows:

*... the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.*<sup>9</sup>

States themselves must refrain from carrying out forced evictions which are not in accordance with the law, and must also ensure adequate legal protection against forced evictions by third parties.<sup>10</sup> Evictions might be justifiable in some cases, but states have to ensure that they are carried out in accordance with the law and the Covenant, and that those affected can access legal recourse and adequate remedies.<sup>11</sup>

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6 Article 144 provides: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

7 OHCHR/UN-Habitat, *The Right to Adequate Housing, Fact Sheet No. 21 (Rev. 1)* – accessed at <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>.

8 CESCR, *General Comment No. 7: The right to adequate housing (art. 11(1) of the Covenant): Forced evictions*, issued 1997 – accessed at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11).

9 Id. at paragraph 3.

10 Cf. id. at paragraph 8.

11 Cf. id. at paragraph 11.

Secondly, according to the OHCHR and UN-Habitat<sup>12</sup> –

***The right to adequate housing contains entitlements. These entitlements include:***

- *Security of tenure;*
- *Housing, land and property restitution;*
- *Equal and non-discriminatory access to adequate housing;*
- *Participation in housing-related decision-making at the national and community levels.*

Whether shelter can be regarded as adequate housing depends on the following criteria developed by the CESCR:<sup>13</sup>

- *Legal security of tenure.*
- *Availability of services, materials, facilities and infrastructure* – including safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.
- *Affordability* – meaning states must take the necessary steps to ensure that housing costs are commensurate with income levels, and provide subsidies and financing for housing.
- *Habitability* – meaning adequate housing must provide protection from the elements, and must ensure physical safety by being structurally sound, sufficiently spacious and in compliance with health standards.
- *Accessibility* – meaning everyone entitled to adequate housing must be able to access it, and states must give special consideration and priority to the housing needs of disadvantaged groups.
- *Location* – allowing for easy access to employment options, healthcare services, schools, childcare centres and other social facilities.
- *Cultural adequacy* – meaning the structure types, the building materials used and the policies supporting these must enable the expression of cultural identity and diversity of housing.

The principal obligation in relation to the right to adequate housing incumbent upon the States Parties – as in respect of any of the rights listed in the Covenant – is to take the necessary steps to achieve “*progressively the full realization of the rights.*”<sup>14</sup> This wording makes clear the recognition that full realisation is not achievable in a short period of time.

According to the CESCR, the rights guaranteed by the Covenant also contain a minimum obligation for every State Party to ensure the satisfaction of, at the very least, minimum

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12 Cf. OHCHR/UN-Habitat, *supra*.

13 CESCR, *General Comment No. 4: The right to adequate housing (art. 11(1) of the Covenant)*, issued 1991 – accessed at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11).

14 CESCR, *General Comment No. 3: The right to adequate housing (art. 11(1) of the Covenant)*, issued 1991 – accessed at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11).



essential levels of the rights. To determine this minimum core obligation, one has to take the particular State's resources into account.<sup>15</sup>

However, the right to adequate housing does not require the State to build housing for the entire population. People without shelter cannot just demand a house from their government:

*Rather, the right to adequate housing covers measures that are needed to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalized groups, ensure security of tenure to all, and guarantee that everyone's housing is adequate.*<sup>16</sup>

What exactly constitutes the most appropriate means to achieve the realisation of the right to adequate housing will differ from country to country. It might sometimes be appropriate to spend state money directly on the construction of new housing, but in most cases, “*experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing.*”<sup>17</sup> States should thus rather promote strategies to enable people to afford to acquire adequate housing themselves.

Also, the right to adequate housing does not equate to a right to property or to land. Security of tenure can be achieved through a variety of measures, such as rental rights, leasehold rights or any other legal institution that gives its holder a right to occupy specific premises.<sup>18</sup>

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15 Id. at paragraph 10.

16 OHCHR/UN-Habitat, *supra*, p. 6.

17 CESCR, *supra*, at paragraph 14.

18 Cf. OHCHR/UN-Habitat, *supra*, p. 8.

# 3

## Relevant Legal Foundations in National Law

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In terms of case law, Namibian courts can also resort to judgments other than those delivered by these courts themselves. Because of the shared history of Namibia and South Africa and the similarities in these countries' legal systems and society generally, Namibian courts frequently resort to South African judgments.<sup>19</sup> Compared to the number of Namibian judgments delivered to date, there is an abundance of South African case law concerning eviction of illegal occupants and their respective rights, to which Namibian courts are likely to refer. This paper therefore focuses on South African as well as Namibian cases.

This section on specific cases begins with an outline of the relevant legal foundations in both South African and Namibian law, and the differences that would have to be taken into account by Namibian courts when referring to South African case law in Namibia.<sup>20</sup>

### 3.1 The Constitutions

Both the NC of 1990<sup>21</sup> and the Constitution of the Republic of South Africa (SAC) of 1996<sup>22</sup> are relatively young Constitutions. Their provisions reflect the post-apartheid spirit, in that they include human rights and fundamental freedoms, and socio-economic rights.

Through Article 144 of the NC, Namibia has included in its constitutional framework the socio-economic rights as provided for by the Covenant, thus the right to adequate housing is an integrated part of Namibian law. However, the NC itself does not contain any explicit guarantees with regard to adequate housing.

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19 South African judgments after 1990 (when Namibia became an independent state) have persuasive authority in Namibian courts. In Namibia the courts are bound by authoritative sources, such as the Namibian High Court and Supreme Court, whereas those of persuasive authority may serve to convince a court to apply or interpret a legal rule in a particular manner.

20 There are many more constitutional and statutory provisions that might generally be of interest, but this summary of case law is limited to those provisions of direct relevance to the cases concerned.

21 Adopted by the Constituent Assembly on 9 February 1990, shortly before Independence on 21 March.

22 Adopted and amended by the Constitutional Assembly on 8 May 1996 and 11 October 1996 respectively.

South Africa, on the other hand, by way of an extensive Bill of Rights, is one of the few countries which have directly included socio-economic rights in their Constitutions. Sections 26(1) and 26(2) guarantee a right of *access to adequate housing*, using slightly different wording to that of the Covenant:

- (1) *Everyone has the right to have access to adequate housing.*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.*

Furthermore, section 26(3) of the SAC states that no one may be evicted from their home without an order of court:

- (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.*

Other relevant provisions in both the NC and SAC are those providing for a right of access to courts.

Article 12 of the NC states:

*In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law.*

Section 34 of the SAC states:

*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*

And section 38 of the SAC states:

*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. [...]*

## **3.2 Other Legislation**

In Namibia to date, the only other law dealing with eviction of illegal occupants is the Squatters Proclamation, AG 21 of 1985, an apartheid-era law which remains in force but only in part, as in 2013 the court in the *Shaanika* case (discussed on page 10) declared

certain provisions to be “inconsistent with the Constitution, and invalid and of no force and effect”.<sup>23</sup> These provisions are sections 4(1) and 4(3):

**4. (1) Notwithstanding anything to the contrary in any law contained and without the authority of an order of court or prior notice of whatever nature to any person –**

- (a) *the owner of land may demolish and remove together with its contents any building or structure intended for human habitation or occupied by human beings which has been erected or is occupied without his consent on such land;*
- (b) *any building or structure intended for human habitation or occupied by human beings which has been erected on land within the area of jurisdiction of any local authority, without the prior approval of that or any former local authority of any plan or description of such building or structure required by law, may at the expense of the owner of the land be demolished or removed together with its contents by the local authority or the Secretary of any officer employed in his department and authorized thereto by him.*

**4. (3) Unless a person first satisfies the court on a preponderance of probabilities –**

- (a) **that he is lawfully entitled to occupy the land on which any building or structure has been erected; and**
- (b) *in the case of a person whose right of occupation is based on the consent of any person other than the owner of such land, that such other person is lawfully entitled to allow other persons to occupy such land,*

*such first-mentioned person shall not have recourse to any court of law in any civil proceedings founded on the demolition or removal or intended demolition or removal of such building or structure under this section as it shall not be competent for any court of law to grant any relief in any such proceedings to such last-mentioned person.*

[author’s emphasis]

South Africa in 1998 – thus after the apartheid era – enacted the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which, contrary to the Squatters Proclamation, already incorporates the post-apartheid constitutional values, aimed at redressing the social implications of the past discriminatory laws.

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<sup>23</sup> *Shaanika and Others v Windhoek City Police and Others* (SA35/2010) [2013] (15 July 2013).

Section 4(7) of the PIE provides as follows in relation to eviction sought by an owner of land:

*If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is **just and equitable** to do so, after **considering all the relevant circumstances**, including [...] **whether land has been made available or can reasonably be made available by a municipality or other organ of state** or another land owner for the relocation of the unlawful occupier [...]. [author's emphasis]*

Section 6 of the PIE provides as follows in relation to eviction sought by an organ of state:

- (1) *An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction [...] and the court may grant such an order if it is **just and equitable** to do so, after **considering all the relevant circumstances** [...]*
- (3) *In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to –*
  - (a) *the **circumstances under which the unlawful occupier occupied the land and erected the building or structure**;*
  - (b) *the **period** the unlawful occupier and his or her family have resided on the land in question; and*
  - (c) *the **availability to the unlawful occupier of suitable alternative accommodation or land.***

[author's emphasis]

# 4

## Recent Court Judgments in Namibia and South Africa

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### 4.1 *Shaanika*: Squatters Proclamation v “Doctrine of Unclean Hands”

One important recent decision was delivered by the Supreme Court of Namibia in the *Shaanika* case in 2013,<sup>24</sup> concerning shacks erected in the informal settlement known as “Havana 6” in Goreangab Township, Katutura, Windhoek. The residents had applied to the High Court of Namibia for an order restraining the City of Windhoek from demolishing or removing the informal settlement as well as an order declaring sections 4(1) and 4(3) of the Squatters Proclamation to be unconstitutional.

The High Court dismissed the application on the basis of the so-called “doctrine of unclean hands”,<sup>25</sup> since the shacks had been erected unlawfully.

This judgment was overturned on appeal by the Supreme Court which ordered the City not to demolish and/or remove any structure or building belonging to the residents of Havana 6 without first obtaining an order of court. The Court primarily stated that an applicant who had acted only unlawfully is not barred from seeking relief from a court; he has to have also acted dishonestly or fraudulently, which could not be established in respect of the applicable illegal occupants, who were occupying the land not out of wilful defiance of the law, but rather out of desperation since they had no place to reside.

In respect of the court order originally sought, the Supreme Court declared sections 4(1) and 4(3) of the Squatters Proclamation to be inconsistent with the right of access to courts provided for in Article 12 of the NC, and thus to be invalid with prospective effect. The Court stated that the right of access to courts is an aspect of the rule of law,

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<sup>24</sup> *Shaanika and Others v Windhoek City Police and Others* (SA35/2010) [2013] (15 July 2013).

<sup>25</sup> Defined as follows at [https://en.wikipedia.org/wiki/Clean\\_hands](https://en.wikipedia.org/wiki/Clean_hands): “*The doctrine of unclean/dirty hands is an equitable defence in which the defendant argues that the applicant is not entitled to obtain an equitable remedy because he is acting unethically or has acted in bad faith with respect to the subject of the complaint – that is, with ‘unclean hands’.*”

and the rule of law is one of the foundational values of a constitutional democracy. Interpreting Article 12 of the NC, the Court referred to the European Court of Human Rights (ECtHR) interpretation of Article 6(1) of the European Convention of Human Rights (ECHR),<sup>26</sup> and argued that any limitation of the right of access to courts<sup>27</sup> would in any case have to be consistent with the principle of proportionality as the ECtHR had reasoned in respect of Article 6(1) of the ECHR. The Court further argued that, given the personal importance of homes, it was hard to imagine a more invasive action than the destruction of homes or removal of their contents, and that, in a city with a shortage of affordable housing and land, the risk of social conflict is particularly high. Given these implications, the Court held that it is essential to ensure that an independent and impartial tribunal finds an eviction to be lawful before any harmful action is taken.

## **4.2 Tswelopele: Mandament van Spolie and Restoration of Demolished Shacks**

An older judgment relevant to eviction proceedings is the *Tswelopele* matter heard in 2007.<sup>28</sup> This case concerned the removal of informal settlers and the destruction of the shelters which they had erected in the suburb of Garsfontein, Pretoria, City of Tshwane, South Africa.

The Supreme Court of Appeal ultimately ordered the City and other respondents to restore the previously demolished shacks on the site where the settlers resided before moving to Garsfontein, and the majority of the community returned to the former site.

Given that the City had acted without first obtaining an order of court, the eviction was unlawful under section 26(3) of the SAC, as the respondents eventually conceded.<sup>29</sup>

The remaining (technical) question to be dealt with by the Supreme Court of Appeal was what relief, if any, the occupiers were entitled to obtain in terms of section 38 of the SAC.

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26 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols No. 11 and No. 14), 4 November 1950, ETS 5 – accessed at <http://www.refworld.org/docid/3ae6b3b04.html>.

27 The Supreme Court deliberately left open the question of whether Article 12 is in fact subject to any limitations.

28 *Tswelopele Non-Profit Organization v City of Tshwane Metropolitan Municipality* [2007] SCA 70 (RSA).

29 *Fischer and Another v Ramahlele and Others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) (4 June 2014). This case, heard in the South African Supreme Court of Appeal in 2014, raised another relating legal question, namely what actually constitutes a “home” in terms of Article 26(3) of the SAC. The City of Cape Town had demolished a number of structures without a court order, claiming that these had been erected only hours before the demolition, and had not yet been occupied and thus did not constitute homes or dwellings. This claim was disputed in the High Court hearing, and although the High Court had raised this question of what constitutes a “home”, on appeal the Supreme Court of Appeal decided that the High Court had failed to hear the evidence relevant to the case. The question thus remains open for answering.

The original claim was pouched under the common law “*mandament van spolie*” or “remedy of spoliation”.<sup>30</sup> The High Court had dismissed the application, arguing that restoration of the *status quo ante* was no longer possible since the shacks had already been demolished. The remedy is aimed at restoring possession, not reparation, and The Supreme Court in principle upheld this distinction, but granted the applicants a constitutional remedy based on section 38 of the SAC. The Court found it obvious that, because of the severe violation of the constitutional rights of the settlers, relief had to be granted. Since the Court held the view that none of the already existing remedies offered appropriate – i.e. fast and effective – relief, it resorted to the Constitution itself.

This decision was referred to in the decision of the High Court of Namibia in the matter of *Junias v The City of Windhoek* in 2014.<sup>31</sup> The Court found it impossible to *restore possession* of the demolished shacks to the applicants, and thus dismissed the application. However, in reference to the *Tswelopele* matter, the Court hinted that the applicants might be entitled to claim *restoration* of the demolished shacks. Nevertheless, since they had not sought such a remedy or argued in that direction, the judge saw no need to decide whether or not such a remedy should be granted in Namibia.

### 4.3 **Grootboom / Port Elizabeth / Joe Slovo: Right to Adequate Housing**

The famous **Grootboom** case,<sup>32</sup> heard in the South African Constitutional Court in 2000, dealt with a court order sought by illegal occupants to require the State to provide them with adequate basic shelter. Their eviction from their informal homes situated on private land had rendered them homeless. Two aspects of this case make it a very important case for the purposes of this paper.

Firstly, the Court set important ground rules relating to socio-economic rights, such as the right to adequate housing, and the justiciability of these rights.<sup>33</sup> The Court argued that the question was not whether socio-economic rights are justiciable at all, but rather

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30 Defined as follows at <https://roselawblog.wordpress.com/2013/04/15/what-is-a-spoliation-a-relic-of-roman-canon-law-alive-and-well-in-sa-in-2013/>: “... a specific remedy aimed exclusively at restoration of possession, meaning the return of the status quo ante, that essentially requires the applicant to prove two things: firstly that he was in peaceful and undisturbed possession – weather lawful or unlawful – of the thing concerned, and secondly that the spoliator wrongfully, that is, without due legal process or consent – e.g. without a court order – deprived him of the thing.”

31 *Junias v The Municipal Council of the Municipality of Windhoek* (A 35/2014) [2014] NAHCMD 80 (12 March 2014).

32 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

33 In relation to socio-economic rights, also compare: *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); and *Minister of Health and Others v Treatment Action Campaign and Others* (No. 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002).



it was how to enforce these rights in a given case – i.e. a question which has to be dealt with on a case-by-case basis.

Secondly, the Court specified the obligations imposed on the State by section 26(2) of the SAC. For a person to have access to adequate housing, there has to be land, services and a dwelling. Therefore, access to land for the purpose of housing is included in the right of access to adequate housing. The State has to create the conditions for access to adequate housing for people at all economic levels of society. However, the State's obligation to provide access to adequate housing depends on the context, and might differ in substance from case to case depending on the circumstances at hand.

According to the Court, the extent of this obligation is defined by three key elements deriving from section 26(2) of the SAC: the State must (a) “*take reasonable legislative and other measures*”; (b) “*to achieve the progressive realisation*” of the right; (c) “*within available resources.*”<sup>34</sup>

Section 26(2) of the SAC, as outlined by the Court, requires the State to devise and implement a comprehensive and coordinated programme to realise the right of access to adequate housing, and to include reasonable measures to provide relief for people in desperate need – meaning those who have no access to land and no roof over their heads, and who are living in intolerable conditions or crisis situations. Whether the measures taken by the State are “reasonable” under section 26 is subject to revision by a court, but in considering such revision, the court has to recognise that there may be a wide range of possible measures which can be judged as reasonable.

On the other hand, as the Court pointed out, the extent of the obligation imposed on the State is also defined by the fact that section 26 expects no more of the State than to take action *within its available resources*, and further, that section 26 recognises that the right to adequate housing cannot be realised immediately, but must be implemented progressively.

Hence the Court specifically stated that this judgment should not be understood as approving any practice of land invasion, and that section 26 did not entitle anyone to claim shelter or housing immediately on demand.

As to the circumstances at hand, the Court held that because the existing nationwide housing programme did not provide for any relief for people in desperate need (i.e. those who have no access to land and no roof over their heads, and who are living in intolerable conditions or crisis situations), such as the applicants concerned, the State had failed to meet its obligations in terms of section 26(2) of the SAC.

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<sup>34</sup> *Grootboom*, supra, at paragraph 38. The Court explicitly refrained from deciding the question of whether – as the CESCR has held in terms of the Covenant – there exists any minimum core obligation incumbent upon the State, reasoning that the Court did not have enough information to decide what would constitute such a minimum, and so focused instead on the question of reasonable measures.

These *Grootboom* findings were further developed by the Constitutional Court of South Africa in the **Port Elizabeth Municipality** matter in 2004.<sup>35</sup> The Court overturned the decision of the High Court which had granted an eviction order sought by local authorities against a total of 68 people who occupied 29 shacks which they had erected on privately owned land within the Port Elizabeth Municipality.

The Court first stated that the issue at hand was establishing an appropriate constitutional relationship between property rights and housing rights. In this regard, the Court held that “[t]here are three salient features of the way the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights”: Firstly, the rights of the dispossessed in relation to land are not generally intended to be immediately self-enforcing, but rather they presuppose the adoption of legislative and other measures to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing. Thus the SAC does not purport to effect transfer of title by constitutional fiat, nor does it sanction arbitrary seizure of land, whether by the State or by landless people. On the other hand, a landowner cannot simply say, “This is my land so I can do with it what I want,” and then send in the bulldozers or sledgehammers. Secondly, section 26(3) of the SAC expressly acknowledges that eviction of people living in informal settlements may take place. Thirdly, section 26(3) itself places emphasis on the need to seek concrete and case-specific solutions to the difficult problems which could arise.

Ultimately, however, given that the PIE is the relevant legal framework where eviction is concerned, and since it was the State seeking the eviction order, the decision centred on section 6 of the PIE.<sup>36</sup>

According to the Court, in terms of section 6 of the PIE, the ordinary prerequisite for the Municipality to be in a position to apply for an eviction order is that the occupation is unlawful and the structures are either unauthorized or unhealthy/unsafe. However, the mere establishment of these facts did not require the Court to make an eviction order; they merely triggered the Court’s discretion. In making its decision, the Court had to take all relevant circumstances into account, including the manner in which the occupation was effected, its duration, and the availability of suitable alternative accommodation or land. These indicators are outlined at length in the Court’s decision.<sup>37</sup>

The Court concluded that in considering whether it was “just and equitable” to make an eviction order in terms of section 6 of the PIE, it had to take into account the relevance of section 26 of the SAC regarding the responsibilities that municipalities (as opposed to private land owners) bear, because in this instance the decisive factor was not whether

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35 *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004).

36 Shown on page 9 herein.

37 As shown on page 9 herein, the requirements would differ slightly should the owner seek the order.

the land was publically or privately owned, but rather that the Municipality, not the landowner, had applied for the eviction order:

*Municipalities [...] have a duty systematically to improve access to housing for all within their area. They must do so in the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.*<sup>38</sup>

Ultimately the Court declared that an order for the eviction would not be just and equitable, in view of the following: the occupiers had lived on the land in question for a lengthy period; there was no evidence that either the Municipality or the landowner needed to put the land to some other productive use; there had been no significant attempt by the authorities to listen to and consider the problems of this particular group of occupiers; and this was a relatively small group of people who appeared to be genuinely homeless and in need.

In the *Joe Slovo*<sup>39</sup> matter heard in the Constitutional Court of South Africa in 2008 (final judgment delivered in 2009), the main legal questions that the Court had to answer were, firstly, whether the residents concerned were indeed *unlawful* occupiers of the land, and secondly, whether it was just and equitable (as required by the PIE), as well as reasonable (in terms of section 26(2) of the SAC), to evict them and to relocate them to another part of town.

Based on South Africa's housing legislation,<sup>40</sup> in 2004 the Government developed the "Comprehensive Plan for Development of Sustainable Human Settlements", known as the "Breaking New Ground Policy", aimed at upgrading and integrating informal settlements into the formal housing sector. In implementing this policy, a joint initiative of government, including the City of Cape Town, introduced one of several pilot projects, namely the N2 Housing Gateway Project, targeting the so-called Joe Slovo settlement, being an informal settlement located 10km east of Cape Town on land owned by the City. As this settlement continued to grow, the City, over time, provided tap water, toilets, refuse removal, roads, drainage and electricity, and it numbered the houses. However, living conditions remained precarious. At the time of implementing the N2 Housing Gateway Project, in order to develop formal and better housing on the site in question, some 20 000 residents were to be removed and relocated to alternative

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38 *Port Elizabeth Municipality v Various Occupiers*, supra, at paragraph 56.

39 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (10 June 2009).

40 The Housing Act 107 of 1997 laid the foundation for the National Housing Code, which in turn introduced the National Housing Programme.

accommodation provided by the State at Delft, some 15km from Joe Slovo. The facilities at Delft provided physically better and safer living conditions than those prevailing at Joe Slovo. After development at Joe Slovo, 70% of the newly built houses were to be allocated to current and former residents of Joe Slovo who applied and qualified for this housing, and the remaining residents would be provided with permanent housing at Delft. The residents of Joe Slovo had been involved to some extent in the planning of the project, and had originally, if partly, cooperated. However, a substantial number, namely the aforementioned 20 000, later refused to voluntarily move to Delft. This led to eviction proceedings under the PIE.

The judges of the Constitutional Court ultimately agreed that an eviction order should be granted, but they granted it on condition of relocation. The order included, inter alia, a very specific description of the criteria with which the temporary accommodation had to comply, and obliged the parties concerned to engage meaningfully with each other to reach agreement on various issues, such as a timetable and issues relating to transport and other needs of the residents. Furthermore, to make sure that 70% of the newly constructed houses would indeed later be allocated to the qualifying residents of Joe Slovo, the Court included a specific order to this effect.

Although the eviction order was granted, the judges had not unanimously agreed on the underlying judicial issues, and their separate reasonings are set down in the judgment.

The main issue of debate was whether the City had given its (tacit) consent to the occupation of the land – by providing the aforementioned services there, and because for 15 years it had never undertaken to evict the residents, nor had ever told them that they were not permitted to reside there. In other words, were they indeed *unlawful* occupants in terms of the PIE? The judges generally agreed that the mere fulfilment of the City's constitutional duty to provide humane living conditions (e.g. provision of basic services) by itself could not amount to consent. However, considering the overall circumstances, including the fact that the City had done more than just provide basic services, the majority of the judges were of the view that the City had indeed given its tacit consent. Nonetheless, some argued, this consent could be revoked on good cause, such as the upgrading of an informal settlement, as was being done in this case. And some argued that this (tacit) consent was limited from the start, in that it was granted only until such time as it became necessary for residents to move out to allow for the realisation of the housing project, or otherwise until it was possible to relocate them. After all, by the time they were asked to relocate, the residents had long been aware of this pending fact. Ultimately the judges agreed that the residents, at least at the time of being requested to relocate, were unlawful residents in terms of the PIE.

The second issue to be decided was whether it was just and equitable (as required by the PIE) as well as reasonable (as required by section 26(2) of the SAC) to evict the residents in order to upgrade the settlement. The judges agreed that the policy and the Gateway project constituted reasonable legislative and other measures within the Government's

available resources to achieve the progressive realisation of the right of access to adequate housing. Whether this could be done only by relocating the residents was not to be decided by the courts, because it was not for the courts to tell the Government how to fulfil its obligations – as long as the measures taken by the Government could still be considered reasonable. All the judges stressed the importance of “*meaningful engagement*” between the Government and the residents concerned throughout the process of planning the relocation. For example, before evicting people on such a large scale –

*[The City] must consider the needs of each household so as to assess the nature and the extent of the disruption that relocation would cause and how this disruption might be ameliorated. People must know in advance the area to which they are to be relocated, and the date of such relocation; this is necessary to enable people to organise and plan their lives accordingly.*<sup>41</sup>

In this case, “*the government was apparently mindful of its obligation to engage with the community*”.<sup>42</sup> It had “*addressed the residents at various times about the Project*”, and “*it can fairly be accepted that the Project was explained to the residents*”.<sup>43</sup> It had also generally committed itself to alleviating the consequences of relocation – e.g. by providing transport to and from work or school. Ultimately the judges decided that the Government had done just about enough, but could have done better.

#### **4.4 Modderklip / Blue Moonlight Properties: Private Land Owners**

In the *Modderklip* case heard in the Constitutional Court of South Africa in 2004 and decided in 2005,<sup>44</sup> the Court had to decide on the scope of the State’s obligations to the landowner in respect of privately own land which was illegally occupied. Having been evicted by the Ekurhuleni Metropolitan Municipality from their informal settlement on the outskirts of the City of Benoni, the illegal occupants had moved to and built up their shacks on the adjoining farm owned by a private company named Modderklip Boerdery (Pty) Ltd (hereinafter “*Modderklip*”). Modderklip sought assistance from various organs of state, including the local police, and also offered to sell the applicable portion of land to the Municipality. But it was not given any assistance. It then obtained eviction orders against the illegal occupants as well as a corresponding writ of execution.

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41 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, supra, at paragraph 241. For further reference to “*meaningful engagement*” in this context, see *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

42 *Id.* at paragraph 243.

43 *Id.* at paragraph 245.

44 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (13 May 2005).

The competent sheriff insisted on a deposit of R1,8 million – an amount which exceeded the worth of the ground concerned – to secure the costs of the evictions. The number of illegal occupants was by then estimated to have increased to approximately 40 000. Modderklip refused to pay, and again sought help from the police, and also approached the President as well as the Ministers of Safety and Security, Agriculture and Land Affairs, and Housing, but to no avail. Finding itself with an eviction order which it could not enforce, Modderklip then approached the courts for relief.

The High Court held that the State, by failing to provide alternative accommodation for the occupants, had breached its obligations to the illegal occupants in terms of sections 26(1) and (2) of the SAC, and that this failure simultaneously amounted to an unlawful expropriation of land and thus an infringement of Modderklip's property rights under section 25(1) of the SAC. The Supreme Court of Appeal essentially endorsed the High Court's findings and granted Modderklip relief in the form of damages to be paid by the State.

The Constitutional Court upheld the order of the Supreme Court of Appeal to the extent that the State was ordered to pay damages to Modderklip, but with a different reasoning. The Constitutional Court found it unnecessary to decide whether Modderklip's right to property and the rights of the unlawful occupiers under sections 26(1) and (2) of the SAC had been breached. Rather, the Court relied on the rule of law and the right of access to courts as provided for by section 34 of the SAC. Whereas the State argued that the matter at hand was a private dispute to be solved between the parties using the existing legislative framework and mechanisms, the Court held that Modderklip had done everything that could be reasonably expected, or in other words, that the eviction order could not have been carried out without further assistance from the State – “*because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.*”<sup>45</sup> It was obvious that the existing framework did not suffice to address the special circumstances at hand. Essentially, the eviction order could not be enforced because the thousands of occupants had nowhere else to go, and evicting thousands of people with nowhere to go would be inconsistent with the rule of law. Also, Modderklip could not be forced to bear the burden of providing accommodation for the occupiers, which should be borne by the State. The State has to make sure that court orders can be enforced. Land invasions do not concern just a single landowner, in that a failure of the State to react appropriately would result in no landowner being able to trust in the State to protect its rights. This could have serious implications for stability and public peace. According to the Constitutional Court, the State's failure to adjust to the extraordinary situation resulted in a breach of Modderklip's constitutional right to an effective remedy as required by the rule of law and section 34 of the SAC.

The Court further held that in the circumstances, and because of section 26(3) of the SAC – on this point the Court referred to the findings in the *Port Elizabeth* matter

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45 Id. at paragraph 48.

(pages 14-15 herein)<sup>46</sup> – the only appropriate remedy was compensation through the payment of damages as ordered by the Supreme Court of Appeal. The Constitutional Court compensated Modderklip for the violation of its rights, but also ensured that the unlawful occupiers would continue to have accommodation: aside from the order for payment of compensation and the declaration in relation to the infringement of Modderklip’s rights, the Court – like the Supreme Court of Appeal before it – declared that “*the occupants are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority*”.<sup>47</sup>

The ***Blue Moonlight Properties***<sup>48</sup> case in 2011 also centred on the issue of evicting illegal occupants from private property, but in this case the question to be decided by the South African Constitutional Court was whether or not an eviction order sought by the landowner, a private company named Blue Moonlight Properties 39 (Pty) Ltd, should be granted. The company had applied for such an order against some 90 persons who had illegally occupied an old commercial complex in the centre of the City of Johannesburg. All of the occupants had been living on the premises for at least six months, and a few of them for many years – the latter having originally been legal tenants who had paid rent to the company which owned the complex previously.

Both the High Court and the Supreme Court of Appeal had granted the eviction order, but had also ordered the City to provide temporary accommodation for the evictees. The Constitutional Court upheld the Supreme Court of Appeal’s order for the most part. The main questions facing all three courts dealing with this case were: firstly, whether the occupants had to be evicted to allow for the owner to exercise its property rights; and secondly, if a court did deem this eviction necessary, whether it had to be linked to an order for the City to provide the evictees with temporary accommodation. Related to the latter question was the question of the constitutionality of the City’s housing policy, or more specifically its Chapter 12 which provides for assistance to people who find themselves in a housing emergency for reasons beyond their control. This chapter had been introduced as an answer to the *Grootboom* judgment (pages 12-13 herein).

Regarding the first question, the Constitutional Court held that a private landowner could not be expected to provide free housing for the homeless for an indefinite period, but might in certain circumstances have to accept a temporary restriction of his property rights. The Court stated that the right to use and enjoy the property one owns could be limited in the process of the justice and equity enquiry mandated by the PIE. In the present case, it had to be considered that the occupants had occupied the property for a long time, and in some cases the occupation had once been lawful. Eviction would have rendered them homeless. Blue Moonlight Properties was aware of the occupants when it bought the property, and there was no competing risk of homelessness on the

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46 See *id.* at paragraph 55.

47 *Id.* at paragraph 68.

48 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC)) [2011] ZACC 40; [2011] ZACC 33 (1 December 2011).

part of the company since the property had been bought for commercial purposes. However, the ultimate decisive factor was the question of whether the City was obligated to provide alternative accommodation.

The general obligation of the State to provide assistance to people in a housing emergency was never disputed or questioned. The issues before the Constitutional Court – apart from the question of which sphere of government (national, provincial or local) was primarily responsible – were the availability of resources and the City’s housing policy. The Court concluded that the City had not sufficiently established that it was unable to provide alternative accommodation. The Court argued that it was not good enough for the City to state that it had not budgeted for something, since it should indeed have planned and budgeted for it in the fulfilment of its obligations. The Court further declared the City’s housing policy unconstitutional in that it provided for temporary accommodation for persons evicted by the City itself, but not for those evicted by private landowners. The Court found the distinction unreasonable as it did not meaningfully and reasonably allow for the needs of those affected to be taken into account.

In conclusion, the Constitutional Court found that the City was obliged to provide alternative accommodation, thus the eviction order had to be granted. The eviction had to be linked, also in respect of specific dates, to the provision of temporary accommodation by the City. Ultimately the City was given a period of four months to provide alternative accommodation, and the occupants were ordered to leave the premises no later than two weeks after the alternative accommodation had been provided.

## 4.5 **Schubart Park:** **Alternative Accommodation / Temporary Removal**

The case of **Schubart Park**,<sup>49</sup> heard and decided in the Constitutional Court of South Africa in 2012, dealt with a markedly deteriorated City-owned apartment complex named Schubart Park in downtown Pretoria, City of Tshwane, which was occupied by a large number of poor people.

After the City stopped the water and electricity supply, residents started protesting about the living conditions. The protests rapidly turned violent, which resulted in localised fires in one of the blocks. On the same night, the police removed the residents of the block concerned, and cleared the entire complex a week later. An urgent application by the residents for re-occupation was dismissed by the High Court because of the state of the buildings. The Court concluded that the conditions were life-threatening, and consequently decided, referring to section 38 of the SAC, that “*appropriate relief in those circumstances [could not] be an order allowing these people to go back into life-threatening circumstances.*”<sup>50</sup> The High Court ordered the City to ensure temporary

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49 *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC).

50 *Id.* at paragraph 14.



accommodation by providing habitable dwellings which offered living conditions at least equal to those in Schubart Park. The City was also ordered to provide assistance to the residents to remove their belongings and to provide storage facilities for those. Additionally the High Court ordered the City to refurbish and renovate the complex, subsequent to which the residents should be allowed to return. Furthermore, in the event that – based on technical advice – the complex had to be demolished, the City was ordered to provide alternative accommodation.

On appeal this judgment was overturned by the Constitutional Court, which declared that the residents were entitled to return to their homes as soon as reasonably possible. The removal of the residents itself, and their right to reside in Schubart Park, were not issues facing the Court in this case, since the respondents conceded to the residents' right to return to the site in principle. Premising that the basic requirements for the remedy originally sought, the *mandament van spolie*,<sup>51</sup> were met, i.e. that the removal had been unlawful, there had been an infringement of rights. The question remained whether the original court order counted as “appropriate relief” in terms of section 38 of the SAC. In other words, the main issue for the Court to consider was the *effect* of the original court order. More specifically, the question was whether the High Court's dismissal order actually amounted to an eviction order lacking any lawful foundation and thus contravening section 26(3) of the SAC which affords the right to not be evicted from one's home without a court order. The Court decided that spoliation proceedings, such as the original case involved, could not serve as a judicial foundation for permanent dispossession (i.e. eviction), thus a separate eviction order would be necessary to fulfil the requirements of section 26(3) of the SAC.

Consequently, the Court stated that in cases where there is no ground for unconditional final dismissal of the remedy, but immediate restoration of possession still cannot be ordered, it must be made clear that the refusal to grant the remedy is on temporary grounds only. It must be clarified that the refusal to order re-occupation does not result in the eviction being lawful in terms of section 26(3) of the SAC. The order must be temporary only, and subject to revision by the Court.

Additionally, the Court declared that the original order fell short of the requirements of section 26(3) of the SAC insofar as restoration of the residents to Schubart Park subsequent to its renovation was made conditional upon proof of their rights of occupancy.

Lastly, the Court ordered the parties to engage meaningfully with each other to achieve the residents' restoration to Schubart Park, and to reach agreement as to the details of that process. As in other cases discussed in this paper,<sup>52</sup> the Court held that the Constitution requires people to be substantively involved in decisions that might affect their lives.

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51 Defined in footnote 30 on page 12 herein.

52 *Grootboom*; *Port Elizabeth Municipality*; *Blue Moonlight Properties*; and *Joe Slovo*.

# 5

## Conclusion

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The following conclusions can be drawn from an assessment of the implications of the judgments discussed in this paper.

These judgments make clear that post-apartheid constitutional values and provisions such as socio-economic rights and the right of access to courts have enabled the courts to strongly restrict the power of the authorities to act against illegal settlements.

Eviction – i.e. the forced removal of people from their shelters and/or the demolition of those shelters – without first obtaining a court order is unlawful. The new constitutional dispensations focus strongly on protecting the rights of the vulnerable, which is why evictions without a court order, or without a court considering all sides of a dispute, is now considered to be unconstitutional. Victims of unlawful evictions seeking help from the courts will be restored to their land, and the authorities might even be ordered to restore the structures which they may already have demolished. Anyone wanting to evict illegal settlers will have to follow proper legal procedures.

The exact requirements for obtaining an eviction order in Namibia are not yet cast in stone. Given that Namibia's legislation does not (yet) include an equivalent of South Africa's PIE, the decisions of the Constitutional Court of South Africa in the *Port Elizabeth Municipality* matter cannot be applied directly. However, it seems likely that Namibian courts will likewise resort to additional requirements for granting an eviction order – i.e. other than the occupation of the land being unlawful. Invoking as part of Namibian law the right to adequate housing guaranteed by the Covenant, the courts could ultimately draw the same conclusions as the Constitutional Court of South Africa. The guarantees and implications of this right as interpreted by the CESCRC are very similar to those of Article 26 of the SAC as interpreted by the South African Constitutional Court. This applies in respect of protection against forced evictions (or in other words the requirements for an eviction order), and in respect of the obligations of the State in relation to the provision of (alternative) adequate housing.

In the judgments outlined herein, one discerns a general tendency of the courts in both countries to protect illegal occupants against measures to remove them, despite their lack of any right to occupy or use the land concerned. The courts are very mindful of

the historical facts and the current circumstances which resulted in the predicament at hand. Consequently the courts (especially the South African courts), in seeking to balance the constitutional rights of the illegal settlers (e.g. in terms of Article 26 of the SAC) and the rights of the public or private landowner concerned, tend to rule in favour of the settlers. This does not mean that landowners are deprived of their property rights; rather it means that their rights might have to (temporarily) ‘stand back’ as a result of the judges’ appreciation of the historical facts and/or the respective circumstances and rights of the disputing parties.

However, this ‘balancing of rights’ has different consequences for private landowners on the one hand and the State on the other. The private owner’s constitutional rights have to be taken into account as well. Private owners, depending on the circumstances, can be forced to temporarily – *not indefinitely* – tolerate illegal settlements on their property. The State, on the other hand, can be forced to provide shelter to evictees *indefinitely*, because the State bears the ultimate responsibility for providing shelter to people in need, and for finding permanent solutions to the housing problem generally. A court may either refuse to grant the State an order to evict people from its own property, or oblige it to provide temporary alternative accommodation for those being evicted from private land, but in the latter case, the obligation is temporary only in the sense that it is meant to endure until the State or the people themselves – with the State’s help – are able to find a permanent solution.

Article 26 of the SAC or the right to adequate housing as guaranteed by the Covenant, as the case may be, do not prevent evictions per se, and certainly do not grant the right to unlawfully seize or occupy land. But one has to follow the proper legal procedure, and the Constitutional Court of South Africa has imposed many obligations on the State in respect of the right to adequate housing. The conditions upon which eviction and relocation orders were ultimately granted are extensive and far-reaching in their consequences for the authorities concerned. Apart from the rather ‘high’ requirements relating to the provision of alternative accommodation, the Court’s tendency to stress the importance of *meaningful engagement* with the occupants concerned, both prior to and during the process of eviction and relocation, has to be noted.

Although all of the judgments outlined in this paper resulted – at least in some way – from eviction proceedings and must be understood in this context, the basic reasoning has to apply autonomously.

It will certainly be interesting to see whether Namibian courts adopt the same approach as that of the Constitutional Court of South Africa.

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