CONFLICT MANAGEMENT IN AN ERA OF URBANISATION: 20 YEARS OF HOUSING RIGHTS IN THE SOUTH AFRICAN CONSTITUTIONAL COURT

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ABSTRACT

Over the past 20 years, of the 23 socio-economic rights decisions handed down by the South African Constitutional Court, 15 judgments have related to the s 26 right to adequate housing, making it by far the most litigated socio-economic right. The relative frequency of housing rights cases before the Constitutional Court relates to the intensity of post-apartheid struggles over access to urban and peri-urban land. Analysing the contours and consequences of the housing rights related judgments over the past 20 years, we highlight the Constitutional Court’s role as arbiter of clashing rights of ownership and occupation in the context of evolving and inadequately-managed urbanisation.

Key words: adjudication, Constitutional Court, socio-economic rights

I Introduction

The right of access to adequate housing holds a unique position among South African socio-economic rights. It is the most contested, most developed, and most successfully litigated such right. Of the 23 socio-economic rights decisions handed down by the Constitutional Court in the last 20 years, 15 have been concerned with the interpretation and application of the right of access to adequate housing. All have, ultimately, been successful, in the sense that the claimants have been given some relief; in most cases, substantially what they approached the court to ask for.

Part of the explanation for the frequency of housing rights cases before the court no doubt lies in the intensity of present-day struggles over access

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1 In Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes 2011 (7) BCLR 723 (CC), the claimants unsuccessfully appealed against an eviction order, but that order was later discharged. See part VI below.
to urban and peri-urban land.\(^2\) The court itself acknowledged as much in the *Thubelisha Homes* case, when it wrote that particularly eviction cases are symptomatic of ‘the hard realities of urbanisation and homelessness in South Africa.’\(^3\) Urbanisation, a trend by no means peculiar to South Africa, has arguably been more intense in South Africa because, for so long, only a tiny minority of black people were permitted to live lawfully in urban areas.\(^4\) The collapse of influx controls in 1986 unleashed a large pent-up demand for well-located land in South Africa’s cities, for which the state, and urban planners, were ill-prepared. The result was the formation of hundreds of informal settlements, which, on the best estimates available, accommodate around 1.9 million households.\(^5\) In addition, millions more live in backyard dwellings\(^6\) and buildings abandoned in the wake of capital flight from the core of South Africa’s cities. This trend is most pronounced in Johannesburg, where hundreds of buildings left fallow by their owners became an obvious low or zero-rent option for people excluded from the formal urban housing market.\(^7\)

To a large extent, then, the development of the constitutional right of access to adequate housing is the story of the court’s efforts to manage the conflicts that have arisen between property owners (whether public or private) and propertyless occupiers in the wake of rapid, and inadequately managed, urbanisation. There has been a range of well-meant attempts to provide housing at scale, through the Reconstruction and Development Programme (RDP) – later replaced by the project-linked subsidy scheme – consisting of mass-produced identikit housing on the urban periphery. However, the primary response to urbanisation has been passive acquiescence, punctuated only by ad hoc and repressive attempts to displace the informally housed as and when required in order to accommodate private sector investment or state-led


\(^3\) *Thubelisha Homes* (note 1 above) para 49. See also D Bilchitz & D Mackintosh ‘PIE in the Sky: Where is the Constitutional Framework in High Court Eviction Proceedings? *Malboro Crisis Committee v City of Johannesburg*’ (2014) 131 *SALJ* 533.


\(^6\) 736,000 households according to the StatsSA ‘General Household Survey’ (2010).

prestige projects. There has, indeed, often been a significant overlap between the two – with state-led ‘regeneration’ initiatives heavily dependent on the private sector for their implementation and financing. The result is, of course, that the informally housed are progressively displaced, usually in favour of a lower middle class looking for a foothold in an urban housing market. That market is, at present, unable to provide a sufficient number of housing units even to those who, like them, are able to pay the kinds of rents and purchase prices sufficient to enable private sector providers to turn a profit.

Even many of those able to purchase and rent housing have found themselves squeezed out of the urban housing market by escalating prices (supply not yet having caught up with demand) and periodic economic downturns, which tend to hit the most vulnerable, casually-employed segments of the population the hardest. Evictions for inability to pay escalating rents and sales-in-execution of mortgage-bond defaulters’ homes wax and wane with economic conditions, but their impact is felt even more keenly in South Africa, with its massive housing backlog, high levels of structural unemployment and gross inequality.

Against this background, and with great consistency, the court has interpreted s 26 and its subordinate legislation and policy expansively. By doing so, it has, wittingly or otherwise, constructed an ameliorative framework within which the homeless, the informally housed, vulnerable tenants and struggling mortgagors may seek some protection from the harshest and most repressive aspects of the social and economic dynamics set out above. In this article, we explore the form that framework has taken, and we analyse exactly how far it protects and advances the needs and rights of those unable to participate fully in the housing market. We do so in five steps by examining: in part II the judicial interpretation of s 26 of the Constitution of the Republic of South Africa, 1996; in part III the court’s development of the law in relation to eviction from residential property; in part IV the jurisprudence on landlord and tenant relationships; in part V the judicial protection in relation to the execution of debt against residential properties; and in part VI the Court’s engagement regarding informal settlements. We conclude by arguing that, instead of developing a clear sense of what the right to adequate housing entails, the court has opted to play a mediatory role in managing the worst impacts of the clash between the property rights of the powerful on the one hand, and the housing rights of the less powerful on the other. In doing so, the court has been able to protect the rights of millions of poor households to move to and seek social and economic footholds in South Africa’s cities.

II Section 26 of the Constitution

Section 26 has both horizontal and vertical application. In its negative aspect, which is frequently located within s 26(1), the right binds the state and private persons, both of whom are prohibited from interfering with a person’s

8 Mapango v Aengus Lifestyle Properties 2012 (3) SA 531 (CC) para 32. See also Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) para 34.
existing access to adequate housing. The negative horizontal protection can apply directly, but it also ‘ripples out’, applying to, and through, statutes and common law principles which regulate private law relationships dealing with housing.\(^9\) It has been held that tenure rights, such as ownership, are themselves constituents of the negative component of s 26(1), with the effect that the extinction of ownership of one’s home amounts to a deprivation of the right of access to adequate housing, which will always need justification.\(^11\) This has obvious implications for debts secured against property and the procedural and substantive requirements for termination of residential leases.

Insofar as a statutory or common law principle is presented as a ground of justification for a deprivation of existing access to adequate housing, it must meet the constitutional standard of proportionality. In other words, it may not permit a deprivation of existing access to adequate housing which would be disproportionate to the legal interest sought to be vindicated by the deprivation. As we shall see, applicable statutes and regulations, such as the Rental Housing Act 50 of 1999 and procedural rules of court dealing with execution against residential property, also supplement and embroider the proportionality requirement.\(^12\) However, whether a deprivation is proportionate is fundamentally a fact-bound enquiry, although the weight assigned to the interests at play in the proportionality test may vary according to the facts of each case and the nature of the interests involved.

Section 26(3) embodies a particular incident of the negative aspect of the right, as it singles out eviction as being subject to specific constitutional standards and controls.\(^13\) In its language, it echoes some of the more progressive inclinations of the common law and the late-apartheid courts. The prohibition on eviction without a court order is simply a codification of the common law, which prohibits the unauthorised and forcible taking of any property – even, as Voet famously put it, from a thief\(^14\) – whether or not it is used as a home. When not clothed in a statutory right, or done with the freely and voluntarily given consent of the possessor,\(^15\) the common law has always required that the removal of a person from any premises be authorised by a court order. Significant erosions of this principle took place under apartheid in aid of enforcing racial segregation. The Prevention of Illegal Squatting Act 52 of 1951 (PISA) was particularly destructive of the common law, at least insofar as the common law enabled black, poor and informally housed

\(^9\) Tsvelopele Non-Profit Organisation v City of Tshwane 2007 (6) SA 511 (SCA).
\(^10\) Mapango (note 8 above) para 34.
\(^11\) Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC) para 34.
\(^12\) See, for example, Rule 46(1)(a)(ii) of the Rules Regulating the Conduct for the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (Uniform Rules of Court) and s 4(5)(c) of the Rental Housing Act.
\(^14\) Digest 41, 23.16 & 43.16.3.
\(^15\) Mthimkulu v Mahomed 2011 (6) SA 147 (GSJ) paras 13–15.
people to resist being turned off land at a moment’s notice. Indeed, it is South Africa’s shameful history of arbitrary eviction which drove the framers of the Constitution to entrench a requirement which had always been part of the common law. Seen in this light, s 26(3) is a backward-looking ‘never again’ provision.

If s 26(3) of the Constitution looks back, then s 26(2) looks forward. It obliges the state to take steps to provide access to adequate housing. By requiring those steps to be ‘reasonable’ it sets an objective standard by which state action to widen access to adequate housing is to be assessed. However, consistently with its attitude to other socio-economic rights, the court has done little to say what ‘housing’ a rights-bearer is entitled to, and how we will know when, constitutionally speaking, the housing provided is ‘adequate’. Although in Grootboom the court has stated that access to housing requires land, services and financing – more than mere ‘bricks and mortar’ – these attributes of the good remain merely aspirational. They are not – under any conditions – immediately claimable. They lie beyond the reach of the rights bearer, atop a mountain of policy, which a claimant must negotiate and prove is ‘unreasonable’ if she is to be provided with any relief.

What, then, is a ‘reasonable’ policy? In Grootboom several requirements were set out. A reasonable housing policy must be comprehensive, coherent and effective; have sufficient regard for the social context of poverty and deprivation; take into account the availability of resources; take a phased approach, including short-, medium- and long-term plans; allocate responsibilities clearly to all three spheres of government; respond with care and concern to the needs of the most desperate; and be free of bureaucratic

16 While originally providing for eviction only with a court order, the PISA was amended in 1976 to allow for the demolition of (and hence eviction from) a person’s home without a court order, either by the state or a private landowner – even without notice in some cases. See the Prevention of Illegal Squatting Amendment Act 92 of 1976. See also S Liebenberg Socio-economic Rights: Adjudication under a Transformative Constitution (2010) 268–69; Bilchitz & Mackintosh (note 3 above) 525.

17 The exact interaction between the sub-sections that make up s 26 have not been entirely clarified. See, for example; McLean (note 13 above) 55–9 – 55-12. See also M Langford, R Stacey & D Chirwa ‘Water’ in Woolman et al (note 13 above) 56B-i, 56B-24 & 56B-25. Although Langford et al write in the context of the right to water, the court has adopted the same approach in relation to all socio-economic rights. The principles are thus equally relevant to the right to housing.


19 Grootboom (note 8 above) para 35.

20 Ibid para 95.

21 See McLean (note 13 above) 55–12 – 55-14. See also G Quinot & S Liebenberg ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-economic Rights Jurisprudence in South Africa’ (2011) 22 Stellenbosch LR 639, 656, where the authors set out a list of principles for reasonable state policy as developed from Grootboom and subsequent eviction jurisprudence.
inefficiency or onerous regulations. Ultimately, *Grootboom* was decided on the basis that state policy lacked both comprehensiveness and sufficient concern for the needs of the most desperate. In essence, the state had simply failed to take steps to assist those ‘with literally no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations’ and the court made a declaratory order that it was in breach of s 26(2) of the Constitution.

The *Grootboom* virtues have been supplemented in later cases by a recourse to more concrete requirements, developed out of administrative law. State action in the area of housing has been found wanting when procedurally unfair for want of adequate engagement, where it failed to give effect to, or frustrated, legitimate expectations, was inconsistent with the state’s own adopted policies, or irrationally excluded large categories of people in need. The court’s aim has been to control the exercise of power, rather than to prescribe or criticise the ends to which the power has been exercised. Its limitations notwithstanding, this approach has tended to reign in the state’s more repressive instincts and, at the very least, directed its attention toward actually providing housing, rather than attempting to displace, stigmatise or ignore the poor and informally housed – at least in urban areas.

In summary, then, the right of access to adequate housing has been expansively developed, not to define what adequate housing actually is, but to control the exercise of public and private power when interfering with, or attempting to give effect to, the right itself. Next we explore, in outline, the constitutional principles that have been developed in the areas of evictions from residential property, landlord and tenant relations, execution against residential property, and informal settlement upgrading.

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24 *Grootboom* (ibid) para 99.
26 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) 208 (CC).
27 Thubelisha Homes (note 1 above).
28 Abahlali baseMjondolo Movement SA v Premier of KwaZulu Natal 2010 (2) BCLR 99 (CC).
29 City of Johannesburg v Blue Moonlight Properties 2012 (2) SA 104 (CC).
31 However, the spectacular failure of rural land tenure protections cannot be ignored, see Wegerif et al (note 2 above).
III EVICTION FROM RESIDENTIAL PROPERTY

Although self-consciously limited in scope and ambition, the decision in *Grootboom* catalysed the development of the law relating to evictions from residential property. At common law, a landowner was entitled to evict an occupier, through the rei vindicatio, upon mere proof of ownership and the absence of consent or some other right in law to occupy. An owner was entitled to an eviction order notwithstanding the hardship an ejection might cause, and irrespective of how many people were in occupation of the land subject to the order, and for what purpose they occupied it. As André van der Walt has pointed out, the apparently race-neutral language of the common law masked the fact that the ease with which eviction orders could be obtained assisted the apartheid state in corralling black people into the small reserves of land in which they could legally reside. Simply by restricting black landownership by statute, it was possible to allow the rei vindicatio to do a great deal of the work of racial segregation. The eviction of black people could be painted as the enforcement of race-neutral common law. Whatever the common law missed could be dealt with in terms of PISA.

Fully aware of the repressive potential of the common law, the first democratic Parliament passed the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 (PIE Act). The Act gave effect to s 26(3) of the Constitution’s requirement that a court consider all the relevant circumstances before making an eviction order. It required the eviction of an unlawful occupier to be ‘just and equitable’, having regard to a range of factors, including whether alternative accommodation could be made available by the state. The PIE Act was intended to protect the millions of South Africans in urban areas who had no common law entitlement to the land that they lived on, at least until housing could be rolled out at scale. However, for the first few years of its application, the PIE Act did not bring about significant change. Common law-trained judges simply equated ‘justice and equity’ with the enforcement of an owners’ rights and routinely granted an eviction order.

*Grootboom* changed this, as it required the state to take steps to provide at least temporary shelter to people in situations of acute housing crisis. The state’s response to *Grootboom* was the adoption of the Emergency Housing

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32 See *Graham v Ridley* 1931 TPD 476; and *Chetty v Naidoo* 1974 (3) SA 13 (A) 20A-E. See also McLean (note 13 above) 55-43.


34 See for example, *Betta Eiendomme (Pty) Ltd v Ekple–Epoh* 2000 (4) SA 468 (W); and *Groengrass Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T).

35 On the development of the obligation to provide alternative accommodation to those facing homelessness as a result of an eviction, see Wilson (note 23 above); and G Budlender ‘The Right to Alternative Accommodation in Forced Evictions’ in J Squires, M Langford & B Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 127.
Programme,\textsuperscript{36} which made provision for municipalities to apply for grants from provincial governments to provide emergency housing. An eviction was specifically classed in the policy as an emergency housing situation.\textsuperscript{37} It was accordingly only a matter of time before the extent to which a municipality had taken steps to make emergency housing available became a key consideration in deciding whether an eviction order was just and equitable.

The first housing case that analysed an eviction and spelt out, in greater detail, the interaction between the subsections related to housing is \textit{Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd}.\textsuperscript{38} In this case, the Supreme Court of Appeal (SCA) considered the interaction between the right of access to adequate housing in s 26 of the Constitution and owners’ property rights in s 25 of the Constitution. This judgment was later confirmed by the Constitutional Court.\textsuperscript{39} In the \textit{Modderklip} case, 400 people were evicted in May 2000 from the Chris Hani informal settlement that was situated on municipal-owned land. Having nowhere else to go, these persons moved onto a portion of a privately-owned farm known as Modderklip Boerdery. By October 2000 the settlement had swelled to include over 4,000 informal shelters inhabited by approximately 18,000 people. At this point, the owner approached the High Court seeking an eviction order against the occupiers. The eviction order was granted. However, by the time the order became executable, the settlement had grown significantly to roughly 40,000 occupiers. The massive size of the informal settlement meant the cost of executing the eviction order would have been around R1.8 million, substantially more than the land itself was worth. The owner therefore brought a further application in the High Court to compel the state to execute the eviction order on its behalf. The High Court granted this enforcement order, finding that the state was in breach of its constitutional obligation to protect property rights by failing to effectively execute the order. The High Court thus found the continued unlawful occupation on the owner’s land despite an eviction order was a serious deprivation of the private property owner’s rights.

Both the eviction and enforcement orders were appealed to the SCA. In that court, Judge JA Harms held that the continued occupation by the unlawful occupiers in the face of an eviction order amounted to an infringement of the owner’s property rights.\textsuperscript{40} Moreover, the court considered the eviction of

\textsuperscript{36} The Programme was adopted in Chapter 12 of the 2004 National Housing Code but has since been revised in the 2009 National Housing Code. See Department of Housing ‘Chapter 12: Housing Assistance in Emergency Housing Situations’ Part 3 of the National Housing Code (2004); and Department of Human Settlements ‘Emergency Housing Programme’ Part 3 Volume 4 of the National Housing Code (2009).

\textsuperscript{37} Department of Human Settlements (ibid) 9 & 15.

\textsuperscript{38} 2004 (3) All SA 169 (SCA) (\textit{Modderklip} SCA).

\textsuperscript{39} See also President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC) (\textit{Modderklip CC}). For more on the case, see Liebenberg (note 16 above) 281–93; and AJ van der Walt ‘The State’s Duty to Protect Owners v the State’s Duty to Provide Housing: Thoughts on the \textit{Modderklip} Case’ (2005) 21 \textit{SAJHR} 144.

\textsuperscript{40} \textit{Modderklip} SCA (note 38 above) para 21.
the unlawful occupiers – in circumstances where they would effectively be rendered homeless – to constitute a breach of what ‘limited’ right of access to adequate housing they had realised for themselves.\(^41\) Interestingly, the court stated that the real issue in the case was the failure on the part of the state to take any steps to provide alternative accommodation to the unlawful occupiers who the court considered to be ‘in desperate need’.\(^42\)

Referring to \textit{Grootboom}, the court stated there was an unassailable obligation on the state to ensure that, at the very least, evictions are ‘executed humanely’.\(^43\) In the circumstances, it seemed painfully evident the eviction could not be executed humanely without the state providing some form of alternative accommodation or land.\(^44\) In fact, if the occupiers were evicted, they would have had nowhere else to go which would simply have resulted in their reoccupying the Modderklip land or occupying other vacant land, once again rendering them at risk of eviction. As a result, the court held that the failure on the part of the state to fulfil its constitutional obligation to take pro-active steps to realise the right to housing of the occupiers ‘leads … to the conclusion that the State simultaneously breached its section 25(1) obligations towards \textit{Modderklip}'.\(^45\)

According to Judge Harms the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available by the state\(^46\) and to require the state to pay constitutional damages to the property owner for the violation of property rights.\(^47\)

\textit{Modderklip} was crucial in a number of respects. First, \textit{Modderklip} emphasised the interconnected nature of the state’s constitutional obligations, by emphatically recognising that the state’s failure to provide adequate housing to the unlawful occupiers (a positive obligation on the state) also amounted to an infringement of the property owner’s rights (a negative obligation on the state). Second, the case developed a novel way of balancing the conflicting rights and obligations that arise in eviction cases and affirmed the principle that an unreasonable state failure to give effect to the obligation to provide, at least, basic temporary alternative shelter for unlawful occupiers who face homelessness constitutes a breach of constitutional rights.

The next critical case related to eviction law was \textit{Port Elizabeth Municipality}.\(^48\) In that matter, the High Court ordered the eviction of a group of 68 people, including 29 children, from privately-owned land in Port Elizabeth. The municipality had sought the eviction after receiving a petition

\(^{41}\) Ibid para 22.
\(^{42}\) Ibid para 22, referencing \textit{Grootboom} (note 8 above) para 63.
\(^{43}\) Ibid para 26.
\(^{44}\) Ibid.
\(^{45}\) Ibid para 28.
\(^{46}\) Ibid para 41.
\(^{47}\) \textit{Modderklip} SCA (note 38 above) paras 43 & 44. The court left open the question of the monetary value of such constitutional damages, but did state that damages would be based on either the value of the land and/or the length of occupation. For more on the question of constitutional damages in this context, see Liebenberg (note 16 above) 438–42.
\(^{48}\) Note 33 above. See also Liebenberg (note 16 above) 273–79.
from 1,600 residents of a neighbouring formal township, including the owner of the land. It had offered the occupiers alternative land in the nearby Walmer township. The occupiers had refused to move because there was no guarantee they would be given some measure of tenure security on the alternative land. The SCA set aside the eviction order on this basis, finding that the occupiers, many of whom had been evicted before, were entitled to expect that they could not be evicted again after their move to Walmer. The municipality then applied for leave to appeal to the Constitutional Court, seeking a ruling that it was not required to provide alternative accommodation as a matter of course when evicting unlawful occupiers. The basis of the application was somewhat curious, since, on the municipality’s version, it had done exactly that, at least in this case.

In a wide-ranging judgment, Sachs J reviewed the way in which the apartheid legal order – particularly through the PISA – deliberately sought to make eviction as easy as possible. The aim was to keep black people out of most urban areas, and to reduce them to the status as temporary guest workers in South African cities. He then characterised s 26(3) of the Constitution and the PIE Act as an inversion of apartheid law, requiring unlawful occupiers to be treated with ‘dignity and respect’, not as ‘obnoxious social nuisances’. The Constitution has thus substantially altered the law relating to evictions by recognising that the ‘normal ownership rights of possession, use and occupation’ are now offset by ‘a new and equally relevant right not arbitrarily to be deprived of a home’. Section 26(3) of the Constitution, Sachs J held, ‘evinces special constitutional regard for a person’s place of abode’ acknowledging that ‘a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security.’ While the Constitution and the PIE Act do not provide that under no circumstances should a home be destroyed, a court should be reluctant to conclude that an eviction would be just and equitable unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending access to permanent housing. Echoing Grootboom, Sachs J held that it was not enough to show that a municipality has in place a programme designed to house the largest number of people over the shortest period of time in the most cost-effective way. In addition to being statistically successful, a municipality must show that its housing programme is sufficiently flexible to respond to immediate housing needs. If that cannot be demonstrated through the ability to make land

49 See also Harrison (note 4 above) 15–17.
50 Port Elizabeth Municipality (note 33 above) para 12.
51 Ibid para 41.
52 Ibid para 23. See also Liebenberg (note 16 above) 274; Bilchitz & Mackintosh (note 3 above) 525–26.
53 Port Elizabeth Municipality (note 33 above) para 17.
54 Ibid para 28. See also Liebenberg (note 16 above) 277–78.
available to relatively settled occupiers facing eviction, then an eviction order


The power of Port Elizabeth Municipality lay in its fusion of the conception of justice and equity under the PIE Act, and the constitutional requirement of reasonableness set out in Grootboom. Whether it is just and equitable to order an eviction under the PIE Act will normally depend on whether an occupier can find alternative accommodation and, if not, whether the state has taken reasonable measures to make accommodation available to occupiers who are unable to provide it for themselves.\(^{57}\) Although the consequences of the Port Elizabeth Municipality decision were yet to work themselves out, the state and private property owners were, or should have been, on notice that the days of quick and easy eviction orders were over.

Yet the pressure to displace the poor from valuable urban land in a (modestly) expanding economy did not abate. In the Johannesburg inner city, the state embarked upon an ambitious regeneration programme, premised entirely on encouraging commercial property developers to take control of urban slum properties, evict the occupiers and refurbish them for occupation at much higher rents.\(^{58}\) The City of Johannesburg’s 2003 inner-city regeneration strategy made no provision for the re-accommodation of poor and vulnerable people currently living in slum properties, who would be unable to afford the rents demanded by the owners of the refurbished properties. In the early stages of the programme, part of the attraction of the scheme for private property developers was that the City would itself evict the current occupiers of slum properties, delivering the hulk of a building, vacant and ready for refurbishment to the developer. The vision was one of gradual displacement of the poor from the urban core, through a process of accelerated, state-assisted gentrification.\(^{59}\)

The City relied on the National Building Standards and Building Regulations Act 103 of 1977 (the NBRA) to drive its eviction programme. Section 12(4)(b) of that Act permitted a municipal official, if she was of the opinion that it was necessary ‘for the safety of any person’ to order the ‘vacation’ of a property, merely by issuing a notice. The use of the NBRA in this way assisted the City to characterise the slum properties in the inner city as health and safety nuisances rather than sites of dire housing need urgently requiring attention.

The strategy employed exactly the same approach to the urban poor so stringently disapproved of by Sachs J in Port Elizabeth Municipality. In the early years of the strategy, approximately 10,000 people were evicted by the City under the auspices of the strategy.\(^{60}\)

\(^{55}\) Port Elizabeth Municipality (note 33 above) para 29.

\(^{56}\) Ibid para 61.

\(^{57}\) See Liebenberg (note 16 above) 278.


\(^{59}\) See Wilson (ibid) 134. See also Du Plessis & Wilson (ibid).

\(^{60}\) Wilson (ibid) 137.
The implementation of Johannesburg’s inner-city regeneration strategy generated two cases before the court. The first was *Olivia Road*\(^{61}\) where the applicants were several hundred occupiers of two buildings in the Johannesburg inner city. One of the buildings was a 16-storey residential block, which had already been earmarked for a property developer to refurbish. In both cases, the City had issued a notice in terms of s 12(4)(b) of the NBRA and then applied to the High Court for an eviction order to give effect to the notice.

In the High Court Jajbhay J dismissed the application, on the basis that the City had failed to adopt a policy through which the occupiers could access affordable alternative accommodation.\(^{62}\) The High Court declared the absence of such a policy to be in breach of the City’s constitutional obligations, and interdicted the City from evicting the occupiers until alternative accommodation was made available to them.\(^{63}\) On appeal to the SCA, Harms JA set aside most of the High Court’s order, holding that the City’s right to seek the ‘evacuation’ of buildings it considered unsafe was not conditional on it being able to provide alternative accommodation.\(^{64}\) The eviction order was reinstated.\(^{65}\) Nonetheless, Harms JA held, the City did have a constitutional obligation based on *Grootboom* to provide emergency shelter to all those who requested it on eviction. He accordingly directed the City to open a register in which the occupiers could place themselves for the provision of emergency accommodation once they were evicted.\(^{66}\)

Fearing they would be left homeless while the City compiled its register and identified emergency accommodation, the occupiers applied for leave to appeal to the Constitutional Court. There, the application turned on quite different considerations. Reluctant to delve into the critical question of whether the City had an obligation to adopt a policy in terms of which the occupiers should be afforded alternative accommodation, the court instead focused on the absence of ‘meaningful engagement’ with the occupiers prior to eviction.\(^{67}\) The court gave an interim ruling directing the City and the occupiers to meaningfully engage with each other in order to resolve the application and find ways to improve the safety of the building in the interim. After two months of intensive negotiations, the matter was finally resolved with the occupiers being offered and accepting accommodation in a building yet to be refurbished elsewhere in the inner city.

In the judgment of the court, Yacoob J held that the aspects of the dispute relating to the constitutionality of the City’s housing policy and eviction practices had become moot because of the agreement reached between the

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61 Note 26 above. For a comprehensive description of the case and how it influenced the development of a ‘new paradigm’ in eviction law, see Liebenberg (note 16 above) 293–303.
62 City of Johannesburg v Rand Properties 2007 (1) SA 78 (W) (*Rand Properties W*) para 1 of the court’s order.
63 Ibid para 1.
65 Ibid para 78.
66 Ibid para 78.
67 See, specifically, *Olivia Road* (note 26 above) para 23.
occupiers and the City. Nonetheless, the court took the opportunity to expand upon the concept of meaningful engagement as constituent of reasonable state action required by s 26(2) of the Constitution. Most significant steps in the implementation of housing policy, Yacoob J held, must be taken after meaningful engagement with the people affected by it. Where the state intends to remove or displace people from their existing housing, engagement is normally a prerequisite to the institution of eviction proceedings. Engagement must be individual and collective, presumably meaning that affected communities must be engaged as a group in relation to the impending removal, as well as at an individual and household level, in order to ensure all relevant personal circumstances are taken into account in the process. Engagement must be undertaken without secrecy, and should focus on meeting the reasonable needs of an affected community, and providing alternative accommodation where it is needed. Because no such engagement had been undertaken by the City in relation to the Olivia Road occupiers, Yacoob J held that the eviction order issued by the SCA should be set aside.

The apparently onerous requirements relating to engagement set out in the Olivia Road judgment, together with the strong implication that alternative accommodation would have to be provided to those who needed it, effectively put a halt to the City’s programme of removals from slum buildings. The City had neither the accommodation nor the political will to start providing shelter to the inner-city poor at a large scale. So the burden of removing the poor from the inner city passed from the City itself to individual private landowners. It was not long, however, before essentially private law disputes between owners and occupiers of inner-city properties drew the City in. As the court made clear in Port Elizabeth Municipality, whether an eviction that would otherwise lead to homelessness could be carried into effect depended crucially on whether

68 Ibid para 34.
70 Olivia Road (note 26 above) para 9 ff.
71 Ibid para 30.
73 Ibid paras 14, 18 & 21.
74 Meaningful engagement should ordinarily take place prior to institution of eviction proceedings. See, for example, L Chenwi & K Tissington ‘Engaging Meaningfully with Government in the Realisation of Socio-economic Rights in South Africa: A Focus on the Right to Housing’ (2010) SERI and Community Law Centre (CLC) Research Report 21; Liebenberg (note 16 above) 486 fn 21. See also Olivia Road (note 26 above) para 30; Abahlali (note 28 above) paras 69 & 119–20.
75 Despite the procedural protections of meaningful engagement, some have warned there is a very real risk that meaningful engagement could become ‘a purely procedural “box to tick”’ thereby circumventing the quality and purpose of engagement. See Tissington (note 5 above) 46 fn 179. See also, Ray (note 69 above) 111 & 122; and Liebenberg (note 69 above) 19–20.
a municipality had taken reasonable steps to meet emergency housing needs within its area of jurisdiction.

The court would, therefore, have to address the absence of any real housing solutions for people living in slum properties in the inner city of Johannesburg again, albeit from a different angle. In *Blue Moonlight Properties*, the court had to address more closely the concrete duties of a municipality where an ordinary common law eviction would result in homelessness. In that matter, 86 people faced eviction from a disused set of factory buildings and warehouses in Saratoga Avenue, Berea, in the Johannesburg inner city. The owner brought an eviction application relying on the bare rei vindicatio. The occupiers alleged and proved that an eviction would leave them homeless, and brought an application to join the City to the proceedings, as a prelude to seeking an order that it provide them with alternative accommodation in the event of their eviction. The City, for its part, stated that it had, since the decision of the court in *Olivia Road*, devised a policy to provide accommodation to people it removed from unsafe buildings from within its own resources, but denied any obligation to provide accommodation to occupiers facing eviction by a private landowner. The City stated that the obligation lay with provincial government, to which it had applied for funding in terms of the Emergency Housing Policy, and been refused.

Taking their cue from *Grootboom* and *Port Elizabeth Municipality*, the High Court and SCA judgments both declared unconstitutional the City’s differentiation between people it evicted from allegedly unsafe properties, and those evicted by private landowners. Both *Grootboom* and *Port Elizabeth Municipality* made it clear that the state had an obligation to respond to the needs of people facing housing emergencies. *Port Elizabeth Municipality* made clear that the primary duty to do so lay with a municipality, even where occupiers were sought to be evicted from privately-owned land.

The City then applied for leave to appeal to the Constitutional Court. In its judgment, Van der Westhuizen J confirmed the SCA’s findings in all material respects. He found in particular that the PIE Act limited the rights of owners to undisturbed use and enjoyment of their property. If homelessness would otherwise result, s 26 of the Constitution and the PIE Act require that an owner patiently wait to vindicate her property until the state has been given a reasonable opportunity to discharge its obligations, grounded in *Grootboom*, to provide alternative accommodation. A municipality, for its part, is not

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76 Note 29 above.
77 Ibid paras 48 & 49.
78 *Blue Moonlight Properties v Occupiers of Saratoga Avenue* 2010 ZAGPJHC 3 (4 February 2010).
79 *City of Johannesburg v Blue Moonlight Properties* 2011 (4) SA 337 (SCA).
80 *Blue Moonlight* (note 29 above) para 102.
81 Ibid para 37.
82 Ibid para 40.
entitled to cast its obligations on national and provincial government. It has the obligation to plan and procure resources to meet emergency housing needs within its area of jurisdiction. It cannot rely on an absence of resources to do so if it has not at least acknowledged its obligations and attempted to find resources to allocate to emergency housing projects. This obligation becomes particularly apparent when one considers that municipalities are ideally suited to react, engage and plan to fulfil the needs of local communities. Moreover, a municipality cannot pick and choose to which housing crises it responds, but must prioritise its response to emergency housing situations in a reasonable manner. To differentiate between emergency housing situations caused by eviction by reference to the identity and purposes of the evictor is unreasonable, since it matters little to a homeless person what the cause of her homelessness is. Her need is the same.

These principles were elaborated in two decisions handed down just after Blue Moonlight. In Occupiers of Skurweplaas v PPC Aggregate Quarries and Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread the court was dealing with two groups of people who had moved onto open land just outside Pretoria because they had been evicted or otherwise displaced from neighbouring informal settlements. Both groups of people had been resident on the land for very short periods of time (in contrast to the occupiers in Blue Moonlight, who had resided at Saratoga Avenue for periods of up to 30 years). The court affirmed its decision in Blue Moonlight in all material respects, but added four important observations. First, the court deplored the citation of the occupiers in both matters as ‘invaders’. This description, the court held was ‘emotive and judgmental’ and undermined the occupiers’ humanity. Second, the court took into account that, even though the occupation had only begun a relatively short period before eviction proceedings were instituted, the probability that an eviction would lead to homelessness meant the provision of alternative accommodation or land was still required. Third, the court took into account the owners’ failure to demonstrate that they had any urgent or compelling use for the land unlawfully occupied. This militated against ordering a speedy eviction without the provision of alternatives. Finally, the court emphasised that High Courts have the power and the duty to order municipalities to take steps to investigate and furnish information relating to

83 See, in relation to the responsibilities of the various spheres of government to fulfil the realisation of the right to housing and specifically the role of local government, J de Visser ‘A Perspective on Local Government’s Role in Realising the Right to Housing and the Answer of the Grootboom Judgment’ (2003) 7 Law, Democracy and Development 201.
84 Blue Moonlight (note 29 above) para 74.
85 Ibid paras 47 & 57. See also De Visser (note 83 above) 214.
86 Blue Moonlight (note 29 above) para 95.
87 2012 (4) BCLR 382 (CC) (Skurweplaas).
88 2012 (2) SA 337 (CC) (Mooiplaats).
89 Mooiplaats (ibid) para 4; Skurweplaas (note 87 above) para 3.
90 Mooiplaats (ibid) para 4; Skurweplaas (ibid) para 14.
91 Mooiplaats (ibid) para 18; Skurweplaas (ibid) para 12.
their ability to provide alternative accommodation, in the event it is found that a municipality’s approach is unsatisfactory.92

Inevitably, devices have been contrived to circumvent the court’s powerful framework for regulating evictions, and protecting the poor from homelessness. But the court has, so far, stood firm against them. One strategy has been to redefine what constitutes an ‘eviction’. In *Motswagae v Rustenburg Local Municipality*,93 the court decided that any interference with the use and enjoyment of one’s home amounted to an eviction. This meant the state could not avoid having to apply to court to evict an unlawful occupier by commencing earthworks nearby in such a manner that would undermine the foundations of that person’s dwelling. Section 26(3) entitles even an unlawful occupier to an interdict against attempts to evict ‘through the back door’.94

In *Zulu v eThekwini Municipality*95 the court had to decide whether an interdict restraining any person from ‘occupying’ a piece of land amounted to an ‘eviction’ order. The MEC for Human Settlements in KwaZulu-Natal had obtained an order restraining any person from occupying well over a thousand properties, and directing the eThekwini Municipality and the minister of Police to demolish any structure erected on the property from the date on which the interdict was granted. The order was subsequently used to evict Mr Zulu and the other occupiers of the Madlala Village informal settlement 25 times over a period of a year. The MEC and the municipality argued that Mr Zulu and his neighbours had not in fact been ‘evicted’. They had merely been ‘prevented’ from ‘occupying’ the land. The court dismissed this specious claim, branded the land occupation interdict an eviction order,96 and referred the matter back to the High Court to determine the validity of the interdict.97

*Blue Moonlight*, supplemented by *Mooiplaats* and *Skurweplaas*, finally spelt out the substantive framework of relationships between owners, occupiers and the state in relation to access to land. They developed the *Grootboom* principle to its logical conclusion. Property owners were no longer entitled to insist on the immediate enforcement of common law rights if this meant homelessness for poor and vulnerable people with nowhere else to go. Unlawful occupiers, though they are without common law rights, do acquire a temporary, limited and circumscribed entitlement to remain on land without an owner’s consent until the state can reasonably be expected to make good, at least rudimentarily, on the Constitution’s promise of housing for all who need it. As recognised by the Constitutional Court, in South Africa’s historical and social context, it is simply wrong to ignore the acute hardship caused by the enforcement

92  *Mooiplaats* (ibid) para 13.
93  2013 (2) SA 613 (CC) (*Motswagae*).
94  Ibid para 16.
95  2014 (4) SA 590 (CC) (*Zulu*).
96  Ibid para 27. See also SERI ‘Submission to the Lwandle Ministerial Enquiry’ (2014) 8–11.
97  The minority judgment of Van der Westhuizen J opined that the order should have been set aside without remitting the matter back to the High Court. Van der Westhuizen J found the interim order was unlawful and unconstitutional as it sidestepped the PIE Act and the protections enshrined in s 26(3) of the Constitution (*Zulu* (ibid) paras 45, 46 & 50). See also SERI (ibid) 9–10.
of statutory or common law rights which so easily lend themselves to social exclusion and the reproduction of structural inequality. In limiting property rights in favour of housing rights, the court has granted the poor a secure legal foothold in urban South Africa by protecting occupation rights in a balancing act with ownership rights.

IV LANDLORD AND TENANT RELATIONSHIPS

Many, if not most, South Africans secure access to adequate housing by contracting for it on the open market. A great many borrow money under mortgage bond agreements in order to buy their homes – the debt is repayable in instalments over several years and secured against the property itself, which is subject to foreclosure if the debt is not paid (discussed in part V). Many others lease property owned by landowners, for a fixed or indefinite period, subject to the obligation to pay rent. The right of occupation may normally be terminated by a landlord for non-payment of rent, causing damage to the property or using the property illegally. In addition, a landlord, at common law, has the ‘bare power’ to terminate any lease, at will, on reasonable notice.

Both the power of a mortgagee to call up the bond, in the event of a debtor’s default on repayment obligations, and the power of a lessor to terminate an indefinite lease on notice clearly affect the right of access to adequate housing. Where the exercise of powers in the context of common law relationships causes hardship disproportionate to the interests served by the exercise of the rights, they may cause an unjustifiable infringement of the right. They are accordingly subject to constitutional and statutory oversight. In this section we discuss the impact of the Constitution on the landlord and tenant relationship. In the next section, we deal with mortgagors and mortgagees.

In *Maphango*, the court was asked to consider the impact of s 26 of the Constitution on the landlord tenant relationship. In particular it was asked to decide whether the right fettered a landlord’s general discretion to terminate a lease on notice. The applicants were 15 tenants living in a residential building in Braamfontein, Johannesburg. The building had, in the past, been refurbished using government subsidies, and most of the tenants had taken up occupation of the building after that refurbishment. The subsidised nature of the accommodation resulted in the incorporation of some unusual terms in the residents’ leases. Most of the leases contained a provision subjecting rent increases beyond those permitted annually to the approval of the Rental

98 *Maphango* (note 8 above) para 3.
99 Ibid.
Housing Tribunal. They also provided for the spouse or child of the lessee to succeed to her rights and obligations in the event of her death. Where a tenant’s rent was fully subsidised, the termination of the lease was solely within her discretion.

Several years after the leases were concluded, ownership of the building changed hands. The new owner, Aengus Lifestyle Properties, was in the business of property speculation. It would buy up residential properties, refurbish them, and let them out at increased rents. In a letter to the tenants, Aengus purported to terminate their leases, and invite the tenants to enter new leases, on the same terms, but at rents between 100 and 150 per cent more than the existing rates. The tenants refused to accept the increases and lodged a complaint with the Rental Housing Tribunal.

Aengus then terminated the tenants’ leases and applied for their eviction. As a consequence, the tenants were forced to withdraw their complaint from the Rental Housing Tribunal. In the High Court, relying on the decision of the Constitutional Court in *Barkhuizen v Napier*, the tenants argued the termination of their leases amounted to an unreasonable and unfair infringement of their right of access to adequate housing, and contrary to public policy. They also argued that public policy was informed by, amongst other things, the Rental Housing Act, which sought to ensure fairness and equity in landlord-tenant relations. They drew on s 4(5)(c) of the Act, which prohibited lease terminations on ‘grounds which constitute an unfair practice’. The termination of their leases was unfair, the tenants argued, because their leases clearly envisaged they would not be deprived of occupation of the property for the sole purpose of imposing a disproportionate rent increase. In any event, as a matter of procedure, Aengus was required to first seek the leave of the Tribunal before imposing a rent increase larger than those permitted annually. It could not avoid the obligation to do so by simply terminating the lease on notice, only to conclude new leases at a much higher rent. Two of the tenants, whose rent was fully subsidised, relied directly on the clause which left the termination of the lease within their discretion.

Save in relation to the fully subsidised tenants, the High Court rejected these defences, holding that the right of access to adequate housing did not apply horizontally between private parties. The High Court furthermore held that no landlord would have negotiated a termination clause in a lease if it could not be used to terminate a tenants’ occupation in order to obtain a higher rental. The High Court accordingly granted the eviction orders sought against most of the tenants. In respect of the tenants who had raised the special defence that their eviction would lead to homelessness, he postponed the application in

101 *Maphango* (note 8 above) para 8.
102 Ibid para 9.
103 Ibid para 8.
104 Ibid para 11.
105 2007 (5) SA 323 (CC) (*Barkhuizen*). For a description of this case and the implications in relation to the realisation of socio-economic rights, see Liebenberg (note 16 above) 366–72.
106 *Aengus Lifestyle Properties (Pty) Ltd v Maphango* Case 22346/09 (7 May 2010) unreported.
order to allow for the joinder of the City. The eviction application against the two fully subsidised tenants was dismissed.

The remainder of the tenants appealed to the SCA. There, they fared little better. Although Brand JA, writing for a unanimous court, held that the right of access to adequate housing did apply horizontally, the tenants agreed in advance that the ambit of the right would be limited by the termination clause in the lease. There was therefore no infringement of the right when the leases were terminated. He furthermore held that there was no freestanding requirement that the exercise of a contractual power had to be reasonable and fair. In any event, he did not agree that what the landlord had done – in terminating the lease in order to secure a more commercially acceptable rental – was unreasonable or unfair.

Brand JA was critical of the manner in which the tenants had relied on the Rental Housing Act. Instead of relying on the Act as informing public policy, he suggested the tenants should have relied directly on the Act. Because s 4(5)(c) of the Act prohibited lease terminations on grounds which amounted to an unfair practice, the tenants, he suggested, should simply have relied on a direct breach of the statute. He then proceeded to decide the matter as if they had. He held that the commission of a single act, such as the termination of a lease, could not amount to a practice, which was rather to be understood as ‘incessant or systemic conduct’. In any event, Brand JA emphasised, he could not say that Aengus’ conduct was unreasonable or unfair.

The tenants then applied for leave to appeal to the Constitutional Court. Cameron J, writing for a majority (with Zondo AJ, Mogoeng CJ and Jafta J dissenting), held that the right of access to adequate housing applies horizontally between private persons, but did so, in this case, through the Rental Housing Act. He therefore found it unnecessary to consider the arguments the tenants developed relating to public policy. He instead interpreted and applied the Act. He held that, whatever the nature of the reliance the tenants placed on the Act, the case could not be decided without reference to it.

The Act, Cameron J held, ‘superimposes’ a comprehensive scheme of regulation on the landlord and tenant relationship. Although, in the past, rent control legislation had clamped down harshly on a landlord’s right to terminate a lease on notice – in some instances precluding the exercise of that power completely – the Rental Housing Act now imposes a ‘complex, nuanced and potentially powerful system for managing disputes between landlords and tenants’. At the heart of this system is the concept of an unfair practice,
defined in the Act as any contravention of the statute itself, or any practice prescribed by regulation as unfair.\textsuperscript{116} The tenants had based their unfair practice submissions on provisions of the Act prohibiting ‘exploitative rentals’ and provisions of the Unfair Practices Regulations\textsuperscript{117} prohibiting ‘oppressive or unreasonable conduct’. Cameron J confirmed s 4(5)(c) of the Act had to be interpreted as precluding unfair lease terminations.\textsuperscript{118} He furthermore held that the concept of an unfair practice was not limited to incessant conduct, and could include one act on an isolated occasion – such as a lease termination.\textsuperscript{119}

In light of all this, Cameron J held that the tenants should be permitted to press their complaint at the Rental Housing Tribunal to its conclusion. This is because the Act makes clear that the Tribunal is the appropriate forum to decide whether an unfair practice has been committed. It is also empowered to decide whether the termination of a lease should be set aside.\textsuperscript{120} It is even empowered, quite independently of the terms of the leases relied upon by the tenants, to make rent determinations which are ‘just and equitable’ to both tenant and landlord.\textsuperscript{121} Cameron J accordingly postponed the appeal and directed the parties, if so advised, to launch a complaint at the Tribunal within six weeks of the judgment.\textsuperscript{122}

\textit{Maphango} constitutes a seismic shift in landlord-tenant relationships in South Africa. What Cameron J referred to as the landlord’s ‘bare power’ of termination was, after the repeal of rent control legislation, thought to be inviolate. By adopting an expansive interpretation of the Act, the court brought considerations of reasonableness, fairness and good faith right to the heart of the landlord-tenant relationship, and granted the Rental Housing Tribunal the power to fundamentally restructure rental housing relationships on a case-by-case basis. By confirming that the Tribunal has the power to determine rents, the court has placed a potentially very powerful tool in the hands of tenants. Although, as Cameron J emphasised, the Rental Housing Act states that the Tribunal must have regard to the need to give landlords a realistic return on their investment, it is unlikely that this extends to granting a landlord leave to charge a rent which would effectively exclude a tenant from the rental housing market. The whole purpose of the Act is to expand access to rental housing, not diminish it.\textsuperscript{122}

If taken up and used effectively before the Rental Housing Tribunal, the \textit{Maphango} judgment could prove to be a powerful ameliorative limitation on gentrification. It will slow down – in some cases stop – the exclusion of relatively poor people from rental opportunities in advantageous urban locations. The court’s decision in \textit{Maphango} is another manifestation of the role it has crafted for itself in fostering an inclusive urban housing framework.

\begin{footnotes}
\item[116] Ibid para 40.
\item[117] GN 4004 of 2001.
\item[118] \textit{Maphango} (note 8 above) para 50.
\item[119] See generally De Villiers (note 100 above).
\item[120] \textit{Maphango} (note 8 above) para 58.
\item[121] Ibid para 43.
\item[122] Ibid para 35.
\end{footnotes}
Maphango was not the only case in which the Constitutional Court was required to consider the interplay between public and private law in the context of a landlord-tenant relationship. In *Joseph v the City of Johannesburg*, it was asked to consider whether privity of contract meant a municipality was not required to give notice to tenants prior to disconnecting an electricity supply to a block of flats, because a landlord had not paid his account. The applicants were all tenants of a block of flats in Ennerdale, to the south of Johannesburg. They paid rent, inclusive of electricity and water charges to their landlord, Thomas Nel. Mr Nel did not pass their payments on to City Power, the City’s electricity utility. Over a substantial period of time, Mr Nel ran up massive arrears, on the basis of which City Power disconnected the electricity supply to the building. It gave notice to Mr Nel, but did not give any notice to the tenants.

The tenants then brought an application for the reconnection of their electricity supply to the High Court. The High Court held that the tenants had no right – as against City Power – to pre-disconnection notice. Their remedies lay in their contracts with Nel. City Power had provided Mr Nel with a pre-disconnection notice, in terms of its contract with him, and in terms of its bylaws. The tenants had no contractual right to notice against City Power, and no general right to notice based on any other law. Their application was dismissed.

The tenants then applied for leave to appeal directly to the Constitutional Court. They argued that the right of access to adequate housing, in an urban setting, included a right not to have an existing supply of electricity unjustifiably interfered with. Skweyiya J, writing for a unanimous bench, took a somewhat different approach. He held that s 152(2) of the Constitution, ss 4(2)(f) and 73 of the Local Government: Municipal Systems Act 32 of 2000 and s 9(1)(a)(ii) of the Housing Act 107 of 1997 created a general obligation on municipalities, and their utilities, to provide basic services, including electricity. That meant the tenants had a correlative public law right to receive electricity, the most basic incident of which had to be the right to notice in the event of a possible interference with it. City Power was ordered to reconnect the supply.

*Joseph* is a textbook example of the court shrinking from giving any content to the right of access to adequate housing, while at the same time adopting expansive interpretations of statutes which give effect to constitutional provisions. The right to housing was not interpreted, but the obligation to provide basic municipal services, which was given full effect to by legislation.

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123 2010 (4) SA 55 (CC) (*Joseph*).
124 See Murcott (note 25 above), who argues that this case was, at core, one about the adjudication of socio-economic rights and not an administrative law case.
125 Darries v City of Johannesburg 2009 (5) SA 284 (GSJ).
126 *Joseph* (note 123 above) paras 35–39.
127 Ibid para 40.
128 Ibid para 47.
was interpreted in light of that legislation. While somewhat contorted in its reasoning, the court’s judgment achieves the required result. In doing so, it, once again, prevents the exclusion of poor people from the provision of adequate housing by infusing common law relationships, albeit indirectly, with constitutional values. In this way, constitutional rights to social goods are interpreted less as all-encompassing entitlements than as mechanisms through which common law principles, statutory frameworks and notions of reasonableness and fairness are reworked to ensure the poor and vulnerable are given effective protection against social and economic processes which tend towards their exclusion from urban life.

V Execution of Debt Against Residential Property

The right to execute against property is fundamental to the operation of the credit and banking system. Yet, it is open to abuse. Clearly, the sale of a very poor person’s home for a trifling amount is an abuse of the rules of court and the common law which permits execution against property to recover debt. In the South African context of deep poverty and gross structural inequality, execution against a person’s home may have an impact disproportionate to the interest a creditor has in recovering a debt. Unless properly controlled, it is an additional mechanism through which poor people can be unfairly deprived of access to adequate housing and excluded from full urban citizenship.

In *Jaftha v Schoeman; Van Rooyen v Stoltz* the court was required to consider the appropriate constitutional response required to safeguard against the unjustified execution of debt against a person’s home. Ms Jaftha was an unemployed woman in ill health. She borrowed R250, repayable in instalments. When she fell behind with her instalments the debt was referred to an attorney, who obtained judgment against her for R632.45 plus interest and costs. Having no moveables to excuss, the execution was levied against her home, which had been acquired with a state subsidy. By the time of execution, the debt had ballooned to R7,000. Ms Van Rooyen borrowed R190 to buy groceries. She was also poor and had acquired her home by inheritance. By the time her house was sold, her debt had ballooned to R1,000.

By the time their case reached the Constitutional Court, the sole issue remaining for determination was the constitutional validity of s 66(1)(a) of the Magistrates’ Court Act 32 of 1994, which permitted an execution against a person’s immovable property for the recovery of a debt if insufficient moveable property is found to satisfy a judgment debt. The High Court had found that s 66(1)(a) of the Act was not unconstitutional because, amongst other reasons,

129 See in this regard Murcott (note 25 above).
130 See *Absa Bank v Ntsane* 2007 (3) SA 554 (T), where a bond was called upon and sought to be executed upon for arrears of R18.46.
131 *Jaftha* (note 11 above).
132 For more on this case, see Liebenberg (note 16 above) 215–18; and McLean (note 13 above) 55–44 – 55–45.
133 *Jaftha* (note 11 above) para 4.
the right of access to adequate housing does not protect a person’s ownership of a home. It only protects occupation, deprivation of which is regulated by the PIE Act.\textsuperscript{134}

Mokgoro J, in a unanimous judgment, held that security of tenure forms part of the negative aspect of the right of access to adequate housing.\textsuperscript{135} Although Mokgoro J does not expressly say so, it is impossible to make sense of the scheme of the decision in Jaftha unless it is accepted that ownership of one’s home forms part of the exercise of the right of access to adequate housing. As one of the strongest forms of security of tenure, it must be understood as one of the range of interests protected by the right. As a consequence, a deprivation of ownership of one’s home must be considered an interference with the negative aspect of the right of access to adequate housing. It is in this light that Mokgoro J’s statement that ‘any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1)’. One of those rights, it must be accepted, includes the common law right of ownership, where a person’s existing access to adequate housing as a homeowner.

Once this is accepted, the question becomes one of justification. Applying s 36 of the Constitution, Mokgoro J enquired into the circumstances in which it would be permissible to execute against a person’s home to recover a debt. Mokgoro J considered a wide range of circumstances which would be relevant to the question of justification. These include the availability of alternative mechanisms to satisfy the debt, the degree of proportionality between the interest of the creditor in obtaining payment of the debt and the interests of the debtor in retaining ownership of her home, the circumstances in which the debt arose, the nature and size of the debt, the efforts made by a debtor to pay the debt off, and the availability of a source of income from which a debt may be paid off.

The open nature of the enquiry and the wide range of circumstances to be taken into account require that the decision of whether to authorise execution against residential property is properly one for a judicial officer. To the extent that s 66(1)(a) of the Act authorised execution without judicial oversight, it was unconstitutional. As the statute did permit execution to be authorised by a clerk of the court, and not a magistrate, Mokgoro J declared the provision unconstitutional, and read-in a proviso requiring execution to be authorised by a court, after considering all the relevant circumstances.

The reach of the court’s decision in \textit{Jaftha} was disputed for several years. While the execution of all debts against immovable property in the Magistrates’ Courts had now to be subjected to the \textit{Jaftha} enquiry, execution against immovable property in the High Court carried on more or less as before. Indeed, many debts which fell within the monetary jurisdiction of the Magistrates’ Courts were enforced in the High Courts, because there the registrar was still empowered, in certain circumstances, to grant orders

\textsuperscript{134} Ibid para 13.
\textsuperscript{135} Ibid paras 25 & 29.
declaring immovable property executable. An early attempt to extend *Jaftha* principles to execution in the High Court failed. Finally, almost seven years later, the Constitutional Court took up the issue again. In *Gundwana v Steko Development* the court had to consider whether the *Jaftha* principles applied to mortgage bond agreements, or merely to other debts which were not specifically secured against a person’s home.

Elsie Gundwana was the owner of the only black-owned bed and breakfast establishment in George. The establishment was housed in her extended home in Thembelethu township. During 2003, she ran into difficulties repaying the bond she had passed in order to extend the property. The bank called up the debt and obtained default judgment against her, together with an order declaring her home specially executable in terms of the mortgage bond agreement. The order was obtained from the registrar. The bank did not take further action in relation to execution for four years, during which time Ms Gundwana restructured her payment plan with the bank and formed the impression that the bank’s claim had been compromised and the default judgment had been abandoned. When she fell into difficulties again four years later, the bank executed upon the default judgment it had obtained in 2003 and sold her home to Steko Development.

When Ms Gundwana’s case reached the Constitutional Court, the “ultimate constitutional issue” was described as whether a High Court registrar was empowered to grant an order declaring a person’s home specially executable. It was argued on behalf of the bank that because Ms Gundwana voluntarily placed her home at risk by putting it up as security for a debt she accepted she would lose her property if she did not comply with the terms of the bond agreement. Froneman J, for a unanimous court, rejected this contention. He held that a debtor who places their home at risk does not thereby waive the right of access to adequate housing and the protections it affords, including the right to execution only under court sanction. Intriguingly, Froneman J also held that a debtor does not agree that execution could be carried out “in bad faith.” The suggestion that s 26 precludes the exercise of a contractual power to cause execution against a person’s home is entirely novel. It is nowhere to be found in *Jaftha* and it remains to be seen how, and if, this principle is developed in future cases.

In any event, we confine ourselves here to the observation that the waiver argument bears a striking resemblance to the reasoning of Brand JA in *Maphango* – that, by entering into a contract a person limits her constitutional

136 2011 (3) SA 608 (CC) para 18 (*Gundwana*).
138 *Gundwana* (note 136 above).
140 See Founding Affidavit of Elsie Gundwana, application for leave to appeal.
141 *Gundwana* (note 136 above) para 1.
142 Ibid para 44.
rights and subjects them to the strictures of the common law. Gundwana, taken together with Jaftha, constitutes powerful authority for the opposite contention – that common law relationships will always be subject to constitutional control where they affect a person’s ability to exercise a constitutional right. The question will always be whether the exercise of the right is reasonable and proportionate in the circumstances. In the case of execution against residential property, this determination will always have to be made by a judicial officer. The nature of the relationship between the debt and the property against which it is secured, together with the common law governing the arrangement, will always be important considerations in the decision-making process. They are not however determinative of whether execution should be permitted. Elise Gundwana’s case was referred back to the High Court for it to balance these considerations out.

Much as Maphango tells us that a lease termination must be reasonable and fair, Gundwana emphasises that execution against a person’s home must be a proportionate response to the failure to pay a debt, even if the debt is specifically secured by it. These decisions should, we consider, be seen as incidents of an evolving constitutional principle. This principle is that the exercise of private power which infringes on constitutional rights must have a legitimate purpose, and must be proportionate to that purpose.

VI INFORMAL SETTLEMENTS

The right of access to adequate housing has a direct impact on the steps to be taken to address the needs of South Africa’s informal settlers. The Constitutional Court has considered the steps taken to address the provision of housing to informal settlers in at least three cases. Regrettably, these are all cases in which the state has sought approval to implement informal settlement policy coercively, through forced eviction.\(^{143}\) We consider these cases separately from the eviction cases, however, because they raise issues which are separate from, albeit related to, the clash of interests between landowners and unlawful occupiers.

Historically, South Africa’s response to informal settlements has been managerial and coercive.\(^ {144}\) These instincts have yet to recede. In Pheko v Ekurhuleni Municipality\(^ {145}\) the court had to consider whether it was ever permissible to evict informal settlers from their homes without a court order. The case concerned the Bapsfontein informal settlement, which was home to several thousand informal settlers living in shacks. The 25 hectares on which


144 See, generally, M Huchzermeyer Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil (2004); and M Huchzermeyer Cities with ‘Slums’: From Informal Settlement Eradication to a Right to the City in Africa (2011).

145 2012 (2) SA 598 (CC) (Pheko).
Bapsfontein stood underlain by dolomite, a rock which is water soluble. The dolomite underneath Bapsfontein was gradually dissolving, leaving substantial subterranean voids just under the surface. Very occasionally, the land above the void collapsed into the void, forming 'sinkholes'. Bapsfontein was known to be at risk for the formation of sinkholes for at least 20 years prior to December 2010. There had been no loss of life during that time, and there was no indication, in the months leading up to December 2010, that the situation was getting precipitately worse. However, it was in December 2010 that the Ekurhuleni Municipality chose to act to address the danger perceived to exist there. It did so with devastating speed.

On 10 December 2010, Ekurhuleni issued a notice in the Gauteng Provincial Gazette purporting to declare a local state of disaster in terms of s 55(1) of the Disaster Management Act 57 of 2002 (DMA). During three meetings with some members of the several thousand strong Bapsfontein community held on 14, 16 and 23 December 2010 – when it must have known that most of the residents of the community would have travelled to rural areas to commune with extended families there – Ekurhuleni informed the Bapsfontein community that it would be relocated to Tsakane, over 30 kilometres away, where they would be provided with temporary housing.

The relocation commenced just four days after the third meeting – on 27 December 2010, but soon ran into resistance. Ekurhuleni’s response was, on 17 February 2011, to issue a directive in terms of s 55(2)(d) of the DMA, purporting to authorise the forced eviction of the Bapsfontein community. Section 55(2)(d) of the DMA authorises a municipality to set up temporary shelters for the victims of a disaster. It then employed the Wozani Security Company (Pty) Ltd (colloquially known as ‘the Red Ants’) to forcibly remove Bapsfontein’s residents.

The Bapsfontein residents turned to the High Court, seeking an interdict restraining their eviction without a court order, which, they said, was contrary to s 26(3) of the Constitution. In a judgment which can fairly be described as shocking both in its disregard for the facts and in its characterisation of resistance to an apparently brazen act of illegality, Makgoba J, in the Pretoria High Court, likened Bapsfontein residents to ‘a person burning in a fire and refusing to be rescued’. He held that he had a duty to protect the lives of the Bapsfontein residents, and dismissed the eviction application on that basis.

On appeal to the Constitutional Court, the central issue was whether s 55(2)(d) of the DMA permitted evictions without court orders in emergency situations. Ekurhuleni argued that it did, seeking support for this proposition in a novel, disjunctive reading of s 26(3). It argued s 26(3) contains two separate and independent elements: a prohibition on evictions without court

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146 Ibid para 41.  
147 Ibid para 44.  
148 Ibid para 41.  
149 Ibid para 11.  
150 Ibid para 15.
orders and a prohibition on legislation permitting arbitrary evictions. These elements, it was argued, had to be read separately, meaning that legislation could permit evictions without court orders if to do so was ‘non-arbitrary’. The DMA was just such legislation, in that it permitted ‘evacuations’ to temporary shelters without a court order only in emergency situations, where a state of disaster has been properly declared. Ekurhuleni contended that an eviction in these circumstances was not ‘arbitrary’ and was permitted by the DMA. Accordingly, although it took place without a court order, it was permitted by the second sentence of s 26(3), so long as that provision was read disjunctively.

Ekurhuleni’s counsel found support for this argument in the decision of Harms JA in *Rand Properties SCA*. In that matter, Harms ADP held that, where an eviction was authorised by a notice issued in terms of a constitutionally non-suspect statute, the enquiry under s 26(3) is limited to whether or not the notice has been lawfully issued and whether there was in fact a breach of the statute. As pointed out in *Brisley v Drotsky* these are the only ‘legally relevant’ circumstances that a court is permitted to take into account. Absent a review of the decision to issue the notice, a court has no discretion to refuse to give effect to it. This is, of course, not authority for the proposition that a court order may be dispensed with altogether. But the point Ekurhuleni sought to drive home was that once a notice had been issued in terms of the DMA and that notice authorised the municipality’s action, there was no potential arbitrariness or unlawfulness which might require judicial oversight.

Nkabinde J, writing for a unanimous court, held that the interpretation advanced by Ekurhuleni ‘turns section 26(3) on its head’. Section 26(3) must be read conjunctively, as prohibiting evictions from homes without court orders in all circumstances, even when authorised by statute. In any event, the DMA had to be interpreted narrowly. So interpreted, what the DMA authorises, according to Nkabinde J, is a temporary removal from a home without a court order in a situation of dire emergency, after which a person will be allowed to return. What Ekurhuleni did was to permanently evict the Bapsfontein residents. The DMA does not permit this, and Ekurhuleni’s actions were not authorised by it. Accordingly, the eviction of the Bapsfontein residents was declared unlawful and Ekurhuleni was ordered to identify land within the vicinity of Bapsfontein for the resettlement of the Bapsfontein residents within one year.

The conditions in the area to which the Bapsfontein residents were resettled were said to be atrocious and very overcrowded. In addition, Tsakane was so far away from the residents’ jobs, livelihoods and social and cultural networks

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151 *Rand Properties SCA* (note 64 above).
152 2002 (4) SA 1 (SCA). See Liebenberg (note 16 above) 358–61; and McLean (note 13 above) 55–44.
153 There was no challenge to the decision to issue the DMA notices in *Pheko*.
154 *Pheko* (note 145 above) para 35.
155 Ibid para 37.
156 Ibid para 53.
157 See the replying affidavit, application for leave to appeal.
that it likely destroyed them. Informal settlers are at their most vulnerable to coercion where the undoubted health risks they face in their daily lives are used to justify ‘urgent’ remedial action which may in fact leave them worse off. The court’s decision in Pheko constitutes a strong bulwark against this strategy. In the past, especially in the Olivia Road case, the tendency had been to uncritically accept both the state’s diagnosis and prescription for unsafe living conditions, however prejudicial it may be to the people affected.

However, Pheko makes clear that the extent of the danger presented by unsafe living conditions must be considered by a court in the full context of the proposals to alleviate them. In an implicit rebuke to both the High Court and Harms ADP’s restricted interpretation of s 26(3) in Olivia Road, Nkabinde J held that a broad range of ‘relevant circumstances’ must be taken into account, even where an eviction is authorised by an unchallenged notice issued in terms of a valid statute.\(^ {158}\) In Pheko, these should have been taken to include (but obviously not be limited to) whether the disaster was so sudden as to warrant a hasty relocation; whether Bapsfontein could have been rehabilitated; whether an adequate disaster management plan was in place; whether there had actually been any loss of life; whether alternative land had been made available, or could reasonably be made available; and the length of time that the residents had resided at Bapsfontein.\(^ {159}\) A court may decline to authorise an eviction, even from admittedly unsafe conditions, having considered these and other relevant factors.

Strategies of management and coercion have also been attempted – and disallowed by the court – at a legislative level. In Abahlali baseMjondolo Movement SA\(^ {160}\) the court considered the constitutional validity of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007. At the heart of the Act was s 16, which assigned powers to the provincial member of the executive council (MEC) for Housing to direct owners of unlawfully occupied land to bring eviction proceedings within a period specified by notice in the provincial gazette. If owners failed to do so, the municipality having jurisdiction was required to institute eviction proceedings itself.

The Act authorised an eviction bonanza. While it contained vague, generalised provisions which hinted at the provision of alternative accommodation, this was not obligatory. What is more, the Act clearly empowered the MEC, if he so chose, to simply gazette the eviction of every unlawful occupier (and hence most, if not all, informal settlers) in the province in one go.\(^ {161}\) The Act clearly had the potential to lead to homelessness on a massive scale.

Mosevene DCJ, writing for the majority (Yacoob J being the only dissenter), held that the power to coerce owners and municipalities to evict informal

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158 Olivia Road (note 26 above).
159 Pheko (note 145 above) para 43.
160 Note 28 above.
161 Ibid paras 117 & 118.
settlers conflicted with three principles embodied in s 26(2) of the Constitution. First, he held that the section was incapable of being implemented in a manner that permitted reasonable engagement.\textsuperscript{162} Engagement is necessarily an open ended process, not suited to the imposition of arbitrary deadlines. The outcome of a proper engagement process is a prerequisite for the institution of eviction proceedings. Section 16 of the Act would likely preclude such a process. Second, Mosekene DCJ held that both the Housing Act 107 of 1997 and the National Housing Code of 2009 – enacted to give effect to s 26(2) – make clear that evictions are to be considered a measure of last resort for the implementation of housing policy. Section 16 allows for evictions to be resorted to immediately.\textsuperscript{163} Finally, s 16 undermines security of tenure, whereas s 26(2) requires the state to progressively realise rights to tenure security.\textsuperscript{164}

However, the court remains sensitive – perhaps too sensitive – to the perceived need to allow the state to facilitate its housing programme through eviction. In \textit{Thubelisha Homes}\textsuperscript{165} 20,000 people from Joe Slovo informal settlement in Cape Town appealed to the court to set aside an order for their eviction granted by the Cape High Court. The High Court ordered the eviction of the residents and their forced relocation to temporary housing to a new development near Delft, some 15 kilometres away. A government contractor, Thubelisha Homes sought the eviction order to implement what it called an upgrading project on the Joe Slovo site. However, there was no guarantee that the residents were going to be permitted to return to the Joe Slovo site after the upgrade, and no plan for what would happen to those who did not.

The residents claimed the proposed relocation would cause considerable hardship and fundamentally compromise their access to hospitals, schools, employment and social, cultural and family life. They presented (substantially undisputed) evidence about the likely adverse impact of the move. This included the facts that residents were not being offered security of tenure or guaranteed access to formal housing, and that the new location did not have public amenities such as a clinic, a school or a community hall. Moreover, the new location was far away from residents’ existing jobs and livelihoods and in most cases the cost of commuting between existing jobs and the new settlement would have doubled (amounting to upwards of half or more of their monthly incomes). In addition, being further away from Cape Town’s city centre and linked settlements, Delft did not provide the opportunities for piece jobs that kept many of the residents financially afloat.

In short, the relocation would have been an economic and social disaster, despite the fact that better constructed housing (as opposed to shacks) was

\begin{itemize}
  \item \textsuperscript{162} Ibid paras 113–15. It is not clear how this differs from the ‘meaningful engagement’ required by \textit{Olivia Road}, but we treat them as the same thing. See also Clark & Tissington (note 143 above); and Chenwi (note 143 above) 560.
  \item \textsuperscript{163} See Clark & Tissington (ibid); and Chenwi (ibid) 560.
  \item \textsuperscript{164} \textit{Abahlali} (note 28 above) paras 102, 113, 114, 115 & 118. See also Clark & Tissington (ibid); and Chenwi (ibid) 560.
  \item \textsuperscript{165} \textit{Thubelisha Homes} (note 1 above). Our exposition of this case draws on the summary and critique of the case provided in Wilson & Dugard (note 30 above) 682, 678 ff.
\end{itemize}
being offered on the relocation site. The residents, together with two amici curiae, argued that the advantages their current location afforded them, in the context of their poverty, economic vulnerability and social disadvantage, ought to be protected by the right of access to adequate housing. Housing is, after all, more than mere bricks and mortar.

The *Thubelisha Homes* decision was clearly difficult for the court. No less than five separate judgments were prepared over a period of almost ten months, which take up 127 pages of the law reports. Ultimately, however, the court sanctioned the eviction, subject to stringent conditions, which included a detailed timetable, and a requirement that 70 per cent of the housing opportunities to be provided at Joe Slovo be allocated to people who currently lived there.\(^\text{166}\) This was not the same, of course, as allowing all, or even most, of the Joe Slovo residents a right to return, especially since only 1,500 housing opportunities were guaranteed to be available to the residents.\(^\text{167}\)

Although Moseneke DCJ’s judgment did acknowledge the need for ‘special concern where settled communities face the threat of being uprooted to other neighbourhoods distant from employment, schooling or other social amenities’;\(^\text{168}\) the court trivialised the clearly devastating impact the relocation would have had. The residents’ interest in their location was reduced to one of mere ‘convenience’.\(^\text{169}\) The court stated that while being relocated would be ‘an inevitably stressful process’,\(^\text{170}\) ‘there are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later’.\(^\text{171}\)

The court did not apply the reasonableness test to weigh up the interests of the residents and the harm to be suffered against the justifications of the government for the relocation. The hardships were largely written off as unfortunate consequences of policy choices over which the court was unable to exercise any scrutiny. The judgment of Sachs J put this at its bluntest when it stated that ‘in essence these are largely operational matters in relation to which the state should ordinarily have a large discretion’. He warned, ‘courts would not normally intervene to decide how well or badly programmes are being managed’.\(^\text{172}\)

In upholding the eviction but placing conditions on the relocation, the court seemed to conceive of its role as requiring the government to implement the best possible version of the policy it had presented. It did not attempt to delve into the question of whether the policy was appropriate to the community’s objectively established needs. In the event, however, the conditions placed

166 *Thubelisha Homes* (note 1 above) para 7, referring to para 17 of the order.
167 Ibid para 18 of the order.
168 Ibid para 165. See also Clark & Tissington (note 143 above); and Chenwi (note 143 above) 554.
169 *Thubelisha Homes* (ibid) para 321.
170 Ibid para 399.
171 Ibid para 107.
172 Ibid para 381.
by the court on the eviction proved so hard to fulfill that the eviction order eventually had to be discharged. An upgrade in situ is now envisaged.\textsuperscript{173}

VII CONCLUSION

As Thubelisha Homes highlights, the Constitutional Court – save for its remarks on the importance of tenure security – has been reluctant to develop a substantive account of the goods guaranteed by the right of access to adequate housing. After 20 years, claimants are substantially in the dark about what ‘housing’ or ‘adequacy’ are, and in relation to what aspects of those goods the reasonableness of a housing policy falls to be assessed.

The court has instead concerned itself with the resolution of conflict\textsuperscript{174} in an era of urbanisation. It has strongly disapproved of the most repressive and exclusionary aspects of state and private power, and constructed frameworks within which a great many housing disputes can be resolved on an equitable basis. In doing so, the court has developed an effective set of defensive measures that provides meaningful substantive protection to the millions of people living without secure tenure in urban and peri-urban areas. It has done so, not by either developing the common law or by giving content to the constitutional right of access to adequate housing. Rather, the court has chosen to position itself and its housing rights jurisprudence as arbitrating the inevitable clashes between more and less powerful interests in the context of urbanisation in South Africa.

Undoubtedly, the court has been, and continues to be, acutely sensitive to South Africa’s historical and social context of poverty and great inequality. It is, for the most part, obviously sympathetic and compassionate to the poor. In the field of socio-economic adjudication, any inability to translate the needs of the poor into progressive legal principle is explained more by the court’s desire to balance competing interests, including those of the executive, than by a blindness to the suffering of disadvantaged groups.

In the final analysis, the court’s failure to even begin to interpret the right of access to adequate housing as an ideal construct of what adequate housing is can rightly be criticised. The failure to say what adequate housing actually is retards the vindicatory purpose of litigation.\textsuperscript{175} Poor people are unable to develop a particularly distinct idea of what to expect from the court. Litigating the right to housing therefore becomes more about enlisting judicial sympathy than about making arguments based on principle. It could be argued that this is a necessary result of a court having to simultaneously construct and apply new principles for the enforcement of housing rights. In an evolving

\textsuperscript{173} The subsequent decision to upgrade the informal settlement in situ raises a number of questions in relation to the state’s vehement denial that informal settlement upgrading was possible and the court’s deferential attitude to the state. See Clark & Tissington (note 143 above).

\textsuperscript{174} The resolution of conflict is thought, by Cameron J, a sitting member of the court at the time of writing, to be a major role of courts in enforcing rights. See E Cameron ‘What you can do with Rights’ Leslie Scarman Lecture (2012) para 12.

\textsuperscript{175} See Wilson & Dugard (note 30 above) 672.
jurisprudence, certainty and predictability may not be the primary goals. Still, one might reasonably have expected greater definition to the right to housing to have been provided in the 20 years, and unusually high volume of cases, the court has had to deal with.

None of this should blind us to the pivotal role the Constitutional Court has played in getting the state to face up to urbanisation in a way that empowers rather than represses, and in controlling the worst excesses of both public and private economic power. The eviction cases, in particular, have made substantial inroads into a common law tradition of absolute property rights which was nothing if not actively hostile to the interests of the poor and landless. At the same time as it resolved conflict, the court has done much to level the playing field between those with and those without common law rights.

The court has done this by establishing a broad equitable jurisdiction. In the cases of landlord and tenant, unlawful land occupation and debt execution, the court has replaced the win/lose logic of the common law with a context sensitive evaluation of what is fair in the circumstances. From ‘fairness’ we have seen some ameliorative principles evolve: evictions that lead to homelessness will not, generally be permitted; sales in execution of residential property will not be permitted where the outstanding debt is trifling; landlords will not be permitted to terminate residential leases where to do so would be unreasonable or oppressive; and government policy must mean in practice what it says on paper.

When they can be deployed, these principles constitute an important safe harbour for the urban poor against the rough end of the economic system. These principles have often protected the poor against the expulsions and dispossession that Saskia Sassen has argued characterise late neoliberalism.176 Without these principles, urbanisation in South Africa would be a good deal more chaotic, and substantially less just.