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EVICITION ORDERS FROM PRIVATE LAND: A CASE FOR CONVENIENT DEFERENCE

SUMMARY

Before the *Constitution of the Republic of South Africa, 1996*, imposed a new and equally important right not to be arbitrarily deprived, the relationship between those who have and those who do not have title to land was founded on a tradition that gave a private owner the unrestricted right to exclude all others through the *rei vindicatio*. The Constitutional era favours an approach that promotes balance between ownership and non-ownership interests at points where these interests intersect. Evidence of this shift in approach is most prominent in eviction cases. In addition to the pre-constitutional requirement that evictions be authorised by a court of law, the implementation of the “just and equitable” measure increased the court’s involvement in evictions in South Africa. Key to this article are the three different forms of eviction orders that can be linked to the exercise of the “just and equitable” measure. First, instances in which the courts grant an eviction application and then suspend the order, enabling unlawful occupiers to continue living on the land/property, while the State seeks alternative land to resettle the occupiers. Secondly, instances in which a court grants an eviction order but, for whatever reason, enforcement becomes impracticable, resulting in unlawful occupants remaining on private property that belongs to someone else. Thirdly, instances where a court denies an eviction application, enabling unlawful occupiers to indefinitely remain on land that belongs to someone else. This article explores the court’s approach to the modalities of remaining on land as a consequence of the third type of order. In particular, it investigates the court’s failure to address the legitimacy of this identified fact of remaining on land belonging to another against the plausible counterargument of the need for adherence to the separation-of-powers doctrine.

Keywords: Land, property, separation, landowner, equitable, ownership, rights, remain, just



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1. INTRODUCTION

In South Africa, the eviction-from-land process is unique in that it requires a court order. The court bases its decision on the “just and equitable” criterion, which ensures a fair and reasonable resolution in each case.¹ The implementation of the “just and equitable” criterion results in a value proposition that incorporates both legal and non-legal factors.² The interpretation and application of these value-laden factors can lead to varying outcomes, depending on the specific details of each case. One possible result is that individuals occupying land without countervailing legal rights may be allowed to remain on the property of another.

This scenario involves three forms of eviction orders, each leading to unlawful occupiers remaining on private property without a formal right to do so:

1. An order to evict, with the proviso that the private property owner allows unlawful occupiers to remain on his or her property, while the State seeks alternate accommodation.
2. An order to evict, with the proviso that execution takes place on a specific day in the future, but execution is impossible when the time arrives.
3. An order not to evict, because to evict would be unjust and inequitable.

This article aims to assess if the result of the third form of eviction order suggests the court conveniently deferring to another arm of the state. This deference is rooted in the acknowledgment that a landowner, facing the occupation of his or her property by an unlawful occupier, incurs significant and potentially continuous losses under the current circumstances. While there are extensive limitations to the judicial role, it is widely understood that judges should refrain from legislating, as this is within the legislative sphere. Furthermore, in the absence of specific laws, courts are constrained from facilitating the deprivation of property from one private individual to another. Despite these constraints, an inquiry arises as to whether these considerations impede the courts from formally recognising and evaluating the reasonableness of the continued presence of unlawful occupiers on someone else’s land.³

1 *This article is based on the author’s 2022 doctoral thesis titled ‘To remain’, which was supervised by Prof. Danie Brand at the Free Centre for Human Rights.

See *Van Der Valk N.O and Others v Johnson and Others* (20449/2021) [2023] ZAWCHC 20; *Wormald NO and others v Kambule* 2006 (3) SA 563 (SCA); par.11; *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at 1229E.

2 Van der Walt 2009:54. See *Occupiers, Shulana Court v Steele (Shulana Court)* 2010 4 All SA 54 (SCA); par.13. See also *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd*; par. 16.

3 See Currie 1999; Currie & De Waal 2013; Dugard 2014; Van der Walt 2002a; Ray 2013; Liebenberg 2010; Wilson & Dugard 2011.

This article does not intend to provide primary research on how courts have exercised just and equitable discretion in every eviction case involving unlawful occupiers on private land. Neither does it comprise an investigation into all of the variables that may individually or collectively contribute to the courts' reluctance to recognise and evaluate the reasonableness of the continued presence of unlawful occupiers on someone else's property. This article centres on the concept of judicial deference, particularly when a court determines that an eviction on private land cannot be granted, due to considerations of injustice and inequity. It explores the possibility that such a determination might be influenced by the limitations imposed on the courts by the separation-of-powers doctrine.⁴ Section 1 provides the legislative and jurisprudential background that explains how the "just and equitable" measure is employed in eviction proceedings. Section 2 describes the third form of eviction orders. Section 3 explores the separation-of-powers doctrine as a possible obstacle to assessing the impact of the third order. Section 4 concludes the article.

2. BRIEF BACKGROUND

The introduction of the new constitutional regime provided an opportunity for a change in basic property law assumptions previously guaranteed by common law.⁵ This shift is characterised by the recognition of potentially conflicting socio-economic rights such as property ownership and access to adequate housing.⁶ These constitutional provisions have found statutory safeguards in different legislative acts. These include the *Extension of Security of Tenure Act* 62 of 1997 (hereafter, *ESTA*) and the *Prevention of Illegal Eviction from Unlawful Occupation of Land Act* 19 of 1998 (hereafter, *PIE*), all of which have a broad ambit and apply to those who would otherwise have no common law

4 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Molusi and Others v Voges N.O. and Others* 2016 3 SA 370 (CC); *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

5 See Van der Walt 2011. "The new logic described in *Port Elizabeth Municipality* should guide the process of development of the common law in line with section 39(2) of the Constitution. The point of departure cannot be that existing, vested or acquired rights necessarily trump no-right interests or weaker rights, or that existing, vested and acquired rights must be insulated against regulatory limitation at all costs."

6 Sec. 25(1) of the *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*) provides that "[n]o one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property". Sec. 26(1) of the *Constitution* provides that "[e]veryone has a right to have access to adequate housing". Sec. 26(2) of the *Constitution* provides that "[t]he state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right". Sec. 26(3) of the *Constitution* provides that "[n]o one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".

right to the land.⁷ These acts are to be viewed as an attempt to manage the inequity in land distribution. A response to legacy challenges by making the court the final balancing arbiter in eviction cases.⁸

Sec. 8(1) reaffirms that the *Constitution* and the Bill of Rights contained therein bind the legislature, executive, judiciary, and all organs of State without qualification.⁹ Sec. 8(2) provides that a natural and juristic person shall be bound by provisions of the Bill of Rights to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.¹⁰ Sec. 8(3) provides that a court must apply and, if necessary, develop the common law to the extent that legislation does not give effect to the right.¹¹ Moreover, it provides that the rules of the common law may be developed so as to limit a right, provided that such limitation would be consistent with the limitations clause in sec. 36.¹² Sec. 39 further establishes the interpretive mandate of promoting the spirit, purpose, and objects of the Bill of Rights, as well as the values that underpin an open and democratic society based on human dignity, equality, and freedom.¹³

While it is clear that the *Constitution* contemplates the horizontal application of constitutional rights related to the use and occupation of another's land, the extent to which it does so has been a source of judicial debate.¹⁴ In *Government of the Republic of South Africa v. Grootboom and others* (hereafter, *Grootboom*),¹⁵ the court provided that horizontal application is contemplated to the point where there is, at the very least, a negative

7 Cloete 2016. See also the *Land Reform (Labour Tenants) Act* 3/1996; the *Interim Protection of Informal Land Rights Act* 31/1996, and the *Housing Act* 107/1997.

8 *The South African Economy: An overview of key trends since 1994*. Input obtained from the Industrial Development Corporation (2013). <https://www.idc.co.za/wp-content/uploads/2018/11/IDC-RI-publication-Overview-of-key-trends-in-SA-economy-since-1994.pdf>.

9 Sec. 8(1) of the *Constitution* reads: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, considering the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court — (a) in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

10 Sec. 8(1) of the *Constitution*.

11 Sec. 8(1) of the *Constitution*.

12 Sec. 8(1) of the *Constitution*.

13 Sec. 39 of the *Constitution*.

14 See *Modderklip Boerdery (Pty) Ltd. v. Modder East Squatters & Another* 2001 (4) SA 385 (W) at 394J–395A–B (S. Afr.) – the court reaffirmed the plausibility of horizontal application only that it did not apply in this instance.

15 *Government of South Africa & Others vs. Grootboom & Others* 2001 1 SA 46. For a full discussion on *Grootboom*, see Joubert 2008; Huchzermeyer 2011; Hohmann 2013. See also *Jafftha v. Schoeman & Others* 2005 (2) SA 140 (CC), 34 (S. Afr.); *Machele & Ors v. Mailula & Others* 2010 (2) SA 257 (CC).

obligation to refrain from obstructing or limiting the right to access adequate housing. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (hereafter, *Blue Moonlight*),¹⁶ the court reaffirmed the view that the vast majority of landowners may have to wait while their ownership rights are temporarily restricted until alternative accommodations can be found.¹⁷ Consistent with this viewpoint, the courts have established a practice of supervising and directing the State on the type and timing of alternative accommodation provision.¹⁸ Furthermore, private landowners have been awarded compensation in instances where the State fails to provide timely and satisfactory alternatives.¹⁹

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- 16 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC). For discussions of *Blue Moonlight*, see Dickinson 2011; Dugard 2014; Tulk & Dewar 2011. Before *Blue Moonlight*, there were several other cases decided on this basis relating to public and private land. On public land, see *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) (Joe Slovo I); *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2011 7 BCLR 723 (CC) (Joe Slovo II); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 (CC) (Olivia Road). On private land, see *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 6 SA 40 (SCA); *Lingwood v The Unlawful Occupiers of R/E Erf 9 Highlands* 2008 3 BCLR 325 (W).
- 17 See *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries* 2012 4 BCLR 382 (CC):par. 11; *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread*:par. 17. See Fick 2017:48-90. See *Diadla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 6 SA 516 (GJ) (Diadla application: Part A and Part B); *Changing Tides v Unlawful Occupiers*, South Gauteng High Court Case No. 14225/2011 (14 June 2011); *Changing Tides 74 (Pty) Ltd. v The Unlawful Occupiers of Chung Hua Mansions*, South Gauteng High Court Case No. 2011/20127 (14 June 2012); *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others* 2013 4 SA 212 (GSJ) (Hlophe); *Berman Brothers Property Holdings (Pty) Ltd v M and Others* 2019 2 All SA 685 (WCC); *Fischer v Unlawful Occupiers and Others* 2018 2 SA 228 (WCC).
- 18 See *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries*:par. 11; *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread*:par. 17. See Fick 2017:48-90. See *Diadla and Others v City of Johannesburg Metropolitan Municipality and Another*; *Changing Tides v Unlawful Occupiers*, South Gauteng High Court Case No. 14225/2011 (14 June 2011); *Changing Tides 74 (Pty) Ltd. v The Unlawful Occupiers of Chung Hua Mansions*; *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others* 2013 4 SA 212 (GSJ) (Hlophe); *Berman Brothers Property Holdings (Pty) Ltd v M and Others*; *Fischer v Unlawful Occupiers and Others*.
- 19 See *Modder East Squatters v Modderklip Boerdery (Pty) Ltd*; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA); *Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Another* (A5019/2022) [2023] ZAGPJHC 897; [2023] 4 All SA 111 (GJ); 2023 (6) SA 551 (GJ) (11 August 2023). See also *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC):paras. 1-12, 54-60.

The above viewpoint introduces the distinction between negative and positive duties in horizontal application. It appears that the courts above consider private parties' role in eviction cases to be one of non-interference. This makes sense in cases where the action is brought directly against the State or where the State has been joined to the proceeding to protect rights other than land or housing. In this case, the State assumes ultimate responsibility for the people on land belonging to another. However, if the issue is solely between private parties, non-interference could mean provision. The state's joinder is not guaranteed in every eviction case.

Rewinding to what could have been, the *Modderklip* case presented the court with the task of defending the property rights of a private landowner whose land had been forcibly occupied by 40,000 people.²⁰ The *Modderklip* court order authorised the eviction of the unlawful occupiers, and the State was required to carry it out, but failed.²¹ Owing to the protracted execution process, the unlawful occupiers remained on the property of another without a countervailing right. Acknowledging the long-term limitation on the proprietor's rights, the Supreme Court of Appeal (hereafter, SCA) stated that, ideally, the State would intervene, expropriate the land, and take on the burden placed on the landowner.²²

Modderklip was ultimately decided on another seemingly convenient note that saw the landowner compensated for what the delay had rendered a positive duty.²³ The court has since acknowledged that the failure and/or incapacity to execute the order to evict puts the landowner, the occupiers, and

20 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) 2005 5 SA 3 (CC). Modderklip was a private landowner of agricultural land in Johannesburg's Benoni neighbourhood that had been occupied by 400 people. Throughout the occupation, *Modderklip* attempted to enforce its rights at various points.

21 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*. Modderklip was a private landowner of agricultural land in Johannesburg's Benoni neighbourhood that had been occupied by 400 people. Throughout the occupation, *Modderklip* attempted to enforce its rights at various points.

22 *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd*: par. 20. "To the extent that we are concerned with the execution of the court order, *Grootboom* made it clear that the government has an obligation to ensure, at the very least, that evictions are executed humanely."

23 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*. "The court holding that the State was in breach of its constitutional obligations to protect property rights by failing to give effect to the eviction order. The Court held that the provision by the State of land or accommodation to the occupiers would have facilitated compliance with the eviction order. Accordingly, it held that the state's failure to provide such land or accommodation amounted to a breach of its obligation to protect the efficacy of the eviction order as required by sec. 165(4) of the *Constitution*". See also Muller & Liebenberg 2013:554-570.

the courts in an untenable position.²⁴ This scenario frequently leads courts to consider compensation as a means of reinforcing the integrity of court orders as well as the interests of the landowner and occupier. However, this lure is countermanded by the need to seemingly observe the vesting of the statutory power to expropriate in the State and not the court.²⁵ On this basis, in *Fischer*, the court conveniently took advantage to encourage an amenable state and private party towards expropriation through an order by way of agreement.²⁶ In *Living Africa One*, the court ruled that compensation should be awarded to the landowner, due to the State's delay in arranging alternative accommodation for the unlawful occupiers.²⁷ The municipality failed to demonstrate any law of general application that justified limiting the landowner's rights, as outlined in secs. 25(1) and 34(1) of the *Constitution*, along with sec. 1(c).²⁸ Therefore, sec. 36 of the *Constitution*, which deals with limitations on rights, was deemed inapplicable. However, even if it were applicable, it was not proven that the municipality's limitation of the landowner's rights was reasonable and justifiable in a democratic society based on human dignity, equality, and freedom, considering the factors outlined in sec. 36 of the *Constitution*.²⁹ This case stands out, as it is one of the few instances where the courts directly

24 *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA); paras. 160-218. The Court determined that the occupiers' only reasonable course of action was to remain where they were, therefore upholding their constitutional rights in terms of sec. 26. It was also to balance the applicants' sec. 25 counter-right by taking advantage of the alternative proposition of a willing seller.

25 *Fischer and Another v Ramahlele and Others*; par. 167. See Dugard 2018. See *Ekurhuleni Municipality v Dada* 2009 4 SA 463 (SCA) – In an attempt to strike a balance between separation of powers considerations, on the one hand, and the necessity for an effective remedy, on the other, Fortuin, J pointed out three key differences between the *Fischer* and *Ekurhuleni* cases. First, *Ekurhuleni* involved “a small number of individuals”, making the possibility of eviction and relocation “extremely serious”, while *Fischer* had around 100,000 occupants. Secondly, in *Ekurhuleni*, the State was not found to be incapable of supplying alternative emergency housing, whereas in *Fischer*, “it is clear that the city could not provide alternative lodging for the occupiers”. Third, while the occupants in *Ekurhuleni* did not address the issue of expropriation, the occupiers in *Fischer* had expressly highlighted it as part of their prayers.

26 *City of Cape Town & Others v Fischer & Others* 2020 708/2018 (SCA). See *Fischer and Another v Ramahlele and Others*; paras. 197-199 – “to order the National Minister of Housing and/or the Provincial Minister of Housing: Western Cape Government to provide the City with the necessary funds to purchase Mrs Fischer's property, should such funds fall beyond the City's budget, and, in the event of any failure to agree on the value of the property within one month of the order, to report back to the court on the progress of the negotiations”. It is important to note that the matter ended up in the SCA on account of an appeal against the High Court order that was later reconsidered.

27 *Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Another*; par. 101.

28 *Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Another*; par. 101. See *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

29 *Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Another*; par. 101. See *Chief Lesapo v North West Agricultural Bank*.

invoked sec. 25(1) of the *Constitution*, along with the usual secs. 34 and 1(c), which primarily address the authority of the courts rather than the rights of the landowner. It reiterates that the State cannot evade its positive obligation and successfully justify limiting the landowner's rights under sec. 25. What motivates this article is whether the same can be said in matters where the State is not involved.

In the context of this article, two key points are affirmed. First, it underscores the significance of safeguarding the interests of individuals without land by ensuring they have access to it. Secondly, it reinforces the notion that, in the realm of privately owned land, redistributing from those with more to those without, is a straightforward and practical approach to protecting both the interest of those currently with and without land. The primary concern, in this instance, is not whether courts have the authority to non-legislatively order the limitation of another's rights.³⁰ It is clear that, in South Africa, the power to mandate a limitation of rights lies specifically within the purview of lawmakers and policymakers.³¹ The central question revolves around whether apprehensions regarding this mandate, particularly in cases where eviction from private land cannot be granted, due to considerations of injustice and inequity, are sufficient to rationalise the reluctance to fully address the interests of landowners. The following section emphasises the hesitancy to recognise the continuous deprivation of the landowner's interest in the specific situation of occupiers remaining on land owned by another. Subsequently, it discusses the validity of the concern about violating the separation-of-powers doctrine as a fundamental reason for this reluctance.

3. THE ORDER TO REMAIN

The third order, termed "order to remain", pertains to situations where courts do not grant eviction applications, due to the determination that eviction would be unjust and inequitable. In these instances, private property owners are confronted with the practical challenge of unlawful occupants persisting in the occupation of their property, despite lacking any legal right to do so.

In the *Port Elizabeth Municipality v Various Occupiers* case (hereafter, *PE Municipality*),³² the Constitutional Court (hereafter, CC) considered additional factors beyond those mentioned in sec. 6 of *PIE*.³³ The court acknowledged that the occupiers initially believed that they had the owner's permission to be on

30 Draga & Fick 2019:354-406. See also *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC);par. 46.

31 Van der Walt 2011:386-387. The power of expropriation is granted by statute to specific administrators, who must exercise their statutory discretion when deciding whether or not to expropriate. Dugard 2018: "It is evident that, while the Housing Act and Expropriation Act permit the state to seize property in order to advance access to adequate housing, as in the Fischer case, neither piece of legislation expressly permits a court to 'bring about judicial expropriation.'"

32 *Port Elizabeth Municipality v Various Occupiers*. For a full discussion of *Port Elizabeth Municipality*, see Liebenberg 2010.

33 *Port Elizabeth Municipality v Various Occupiers*:paras. 53-61.

the land and had resided there for an extended period of time.³⁴ This had seen eight children attending local schools in the area and a number of the adults working nearby.³⁵ Furthermore, the CC took into account the Municipality's inadequate efforts in securing suitable alternative accommodation for the occupiers, noting a lack of diligence in addressing their housing needs.³⁶ Referencing *Grootboom*,³⁷ the CC asserted that municipalities bear a formal duty to ensure that vulnerable individuals, subject to eviction within their jurisdiction, are provided with a secure alternative.³⁸ It is noteworthy that, in this case, the Municipality took an unusual step by representing the landowner's interests. Despite this, the case involved the complex interplay between a private landowner's interest and those of unlawful occupiers, falling under the third form of evictions, distinct from the second form outlined in this article.

By recognising that traditional ownership rights such as possession, use, and occupation are now counterbalanced by the equally important right to not be arbitrarily evicted, the *Constitution* has significantly transformed eviction law.³⁹ However, this change does not mean that the *Constitution* intends for a judicial *fiat* to effect a transfer of ownership.⁴⁰ That is, residents of informal communities may be forced to leave, even if it means losing their homes.⁴¹

The CC vehemently criticised the role adopted by the Municipality and underscored the reprehensible attitude of the State.⁴² The court stressed that both the state and the Municipality should prioritise considerations of humanity and dignity in cases of eviction. In the *PE Municipality* case, the Municipality was reprimanded for its failure to, at the minimum, investigate the circumstances of the occupiers and pursue reasonable steps to seek a solution before advocating for eviction.⁴³ This was further exacerbated by the absence of evidence to advance the position that the landowners were in immediate need of the occupied property. The situation was further complicated by the absence of evidence substantiating the assertion that the landowners urgently needed the occupied property.⁴⁴ This presented a significant challenge, especially with the Municipality representing the private landowner's case.⁴⁵ Given the reasons elucidated above, the CC determined that the eviction could not be granted. The occupiers remained on land belonging to the private owners (not the Municipality).

34 *Port Elizabeth Municipality v Various Occupiers*.

35 *Port Elizabeth Municipality v Various Occupiers*.

36 *Port Elizabeth Municipality v Various Occupiers*:par. 54.

37 *Government of South Africa & Others vs. Grootboom & Others* 2001 (1) SA 46.

38 *Port Elizabeth Municipality v Various Occupiers*:paras. 56-61.

39 *Port Elizabeth Municipality v Various Occupiers*:par. 23. See also Liebenberg 2010:274.

40 *Port Elizabeth Municipality v Various Occupiers*:paras. 20-22.

41 *Port Elizabeth Municipality v Various Occupiers*.

42 *Port Elizabeth Municipality v Various Occupiers*:paras. 56-61.

43 *Port Elizabeth Municipality v Various Occupiers*:paras. 56-61.

44 *Port Elizabeth Municipality v Various Occupiers*.

45 *Port Elizabeth Municipality v Various Occupiers*.

In the *PE Municipality* case, the court emphasises that the connection between the right to adequate housing and the right to property does not imply that the unlawful occupier has a right to remain on land owned by another. However, the court stops short of explicitly stating its intended implications. While suggesting that it may be reasonable to expect property owners, whether voluntarily or involuntarily, to share their property with those lacking it, especially given the historically unequal land distribution in South Africa, the court employs a strategy that aims to uphold both the right to property and the right to housing simultaneously, without thoroughly addressing the practical implications within the current legal framework. However, this approach lacks a thorough examination of the practical implications within the existing legal framework, particularly in cases where compelling justifications may require the ownership right to yield to a non-ownership right.

In the *PE Municipality* case, efforts to arrive at a just and equitable conclusion are hindered by a lack of guidance on the proper exercise and maintenance of the rights involved. For instance, there is a notable absence of direction or guidance on the preservation of the landowner's sec. 25 right to property when the court determines that unlawful occupiers should remain on land owned by another, due to the belief that eviction would not be just and equitable.

In *Molusi and Others v Voges N.O. and Others* (hereafter, *Molusi*),⁴⁶ private landowners brought an action against the occupants who were accused of breaching a material term of the lease by failing or refusing to pay rentals.⁴⁷ The CC determined that the SCA had not conducted a complete investigation required to establish, among other things, a balance between the interests of the landowner and the occupiers.⁴⁸ The SCA did not assess the reasonableness of revoking the applicants' residency rights and did not adequately consider the potential hardship. As a consequence, the CC overturned the earlier eviction order, allowing the occupiers to remain on the land. However, it is emphasised that this decision did not grant the occupiers any specific legal right to stay on the property.⁴⁹

In *All Building and Cleaning Services CC v Matlaila and Others*, (hereafter, *All Builders*),⁵⁰ referencing the *City of Johannesburg v Changing Tides Properties*,⁵¹ the High Court held that the onus to prove and/or disapprove

46 *Molusi and Others v Voges N.O. and Others*.

47 *Molusi and Others v Voges N.O. and Others*: paras. 1-15.

48 *Hattingh & others v Juta* 2013 3 SA 275 (CC); 2013 5 BCLR 509 (CC): Quoting Zondo J in *Hattingh*, "and the requirement in sec. 8(1) that the termination of an occupier's right of residence must not only be based on a lawful ground but also that it must be 'just and equitable', having regard to all relevant factors. These factors ... make it clear that fairness plays a particularly significant role".

49 *Hattingh & others v Juta* 2013 3 SA 275 (CC); 2013 5 BCLR 509 (CC): Quoting Zondo J in *Hattingh*, "and the requirement in sec. 8(1) that the termination of an occupier's right of residence must not only be based on a lawful ground but also that it must be 'just and equitable', having regard to all relevant factors. These factors ... make it clear that fairness plays a particularly significant role".

50 *All Building and Cleaning Services CC v Matlaila and Others*.

51 *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others*.

the availability of an alternative accommodation was on the private landowner seeking to evict occupiers from his or her land and to show that the occupiers' eviction would be just and equitable.⁵² Proving ownership of the property and that the occupiers are in unlawful occupation is insufficient, if the causal effect is to make the occupiers homeless.⁵³

As a result, the High Court considered the circumstances and factors set out in sec. 4(7) of the *PIE*, namely the length of time the occupiers had occupied the premises; the circumstances under which they moved onto the premises; the presence of an old-age pensioner; the unavailability of alternative accommodation, and the landowner's unwillingness to meaningfully engage with the two occupiers with the aim of including them in the residential development.⁵⁴ The High Court ruled that the factors above clearly tilted the scales of justice in favour of the occupiers.⁵⁵ The eviction application was denied, effectively enabling the occupiers to remain on the property indefinitely.⁵⁶

In *Classprop Pty Ltd v Nini Crescent Legode and Others* (hereafter, *Classprop*),⁵⁷ Ms Legode's defence against an eviction application in the High Court was based on the disputed validity of Classprop's title to the house, with the further assertion that without a valid title to the house, Classprop lacked *locus standi* to file the application.⁵⁸ In dealing with this contestation, Brand AJ agreed with Classprop's line of reasoning in that the existence of the agreement of sale, as alleged by Ms Legode, did not, at best, comply with the *Alienation of Lands Act*,⁵⁹ for Ms Legode to take transfer of the property.⁶⁰ Brand AJ further ruled that the agreement between Ms Legode and Mr Dockrat had no contractual connection with Classprop, and, therefore, Ms Legode could not assert a contractual right based on that agreement.⁶¹ Despite resolving the issue of unlawful occupancy, the inquiry did not conclude at this point.⁶²

52 *City of Johannesburg v Changing Tides Properties*. In *All Building and Cleaning Services CC v Matlaila and Others*.

53 *All Building and Cleaning Services CC v Matlaila and Others*.

54 *PIE*:sec. 4(7): "(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

55 *All Building and Cleaning Services CC v Matlaila and Others*.

56 *All Building and Cleaning Services CC v Matlaila and Others*.

57 *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910.

58 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*:par. 29.

59 *Alienation of Land Act* 68/1981.

60 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*:paras. 32-36.

61 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

62 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

Quoting secs. 4(7) and 4(8) of the *PIE*, the High Court set out an often-blurred distinction and departure of the *Act* from common law evictions.⁶³ Brand AJ held that the common misconception is that one should only show ownership and the absence of a defence or countervailing right, and that considerations of justice and equity only arise once the order has been granted, to determine the conditions under which it must be granted. Brand AJ emphasised that justice and equity unite both subsections, meaning that when a court establishes the applicant as the rightful owner and determines that the occupier lacks a valid defence or countervailing right, it cannot issue an eviction order, unless it also concludes that, considering all pertinent circumstances, such an order would be fair and just.⁶⁴ To that end, Classprop's failure to address the "just and equitable" requirement as part of its application was fatal.⁶⁵

Considering this perspective, the Court reasoned that issuing the eviction order would have an undesirable outcome of leaving a vulnerable indigent woman and her grandchildren without shelter. The potential harm to these individuals was deemed more significant than the adverse impact on an innocent third-party property landowner who would suffer the consequences of a dispute in which they were not initially involved. The Court, in weighing the relevant circumstances, found that the potential harm to the occupants outweighed the interests of the property landowner in this particular case.⁶⁶ Given the ongoing contestation and uncertainty surrounding the title, the court took this into consideration as an additional factor that weighed against granting the eviction order in favour of Classprop at that juncture.⁶⁷

The Court then considered the significance of its decision and cautiously explained what it does not mean in this narrow context. The Court reasoned that denying an eviction application as unjust and inequitable in the current circumstances did not grant Ms Legode and her grandchildren any permanent legal right to continue occupying the house.⁶⁸ As a result, if circumstances change in the near future, Classprop will be able to file a new application for the eviction of the occupiers based on the change in circumstances.⁶⁹

63 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*:par. 38. *PIE*:sec. 4.

64 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

65 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*:paras. 38-42.

66 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*:paras. 47-55.

67 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*. The eviction was, in part, refused because there was an ongoing disagreement regarding the occupier's (Ms Legode's) legal claim to her home. This dispute had been brought before the appropriate administrative agencies and was still pending. This should be distinguished from where there is an active appeal to the eviction order that has already been granted, as in *Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited* [2022] ZACC 28.

68 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

69 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

In this case, the anticipated resolution of Ms Legode's and Mr Dockrat's pending title dispute was envisioned as providing such an opportunity to then revisit the matter.⁷⁰ In this instance, it appears to be one of the rare cases where a court initiated the process of establishing the legal standing of an unlawful occupier, given the specific circumstances. However, it is evident that the court was constrained by the facts and did not progress further. The court's order took the form of an interdict, temporarily prohibiting eviction pending the resolution of another application, specifically the title dispute. The court opted to await the outcome of the title dispute before making a final determination on the occupier's legal status in this complex situation.

Convenient deference is predicated on the idea that the court can resolve the dispute more effectively. Consequently, it is also a question of whether the court has the power to resolve these practicalities in one way or the other. The investigation into the implications of the court order highlights several practical realities. A significant outcome of the described court order is that the landowner is currently prevented from evicting an unlawful occupier from his or her land. However, it is noteworthy that this order does not necessarily preclude the landowner from initiating a new eviction application. This potential ability to file a new eviction application raises concerns about the prospect of parties entering into a seemingly never-ending cycle of approaching the courts on essentially the same cause of action. The practical effect of this situation is a legal scenario where the landowner may find himself or herself in a recurring cycle of legal proceedings in an attempt to address the issue of unlawful occupation.⁷¹

This must not be mistaken with or applied as an alternative to the appeal and review options that the dispute resolution framework provides. An appeal can be filed against a court order that denied an eviction on the grounds that doing so would not be "just and equitable".⁷² The court order is subject to appeal, a process that typically involves escalating the case to a higher court, and often, as a general rule, to the highest court available. This common practice introduces a dynamic where disputes over eviction and rights related to land occupation are put on hold or exist in a state of uncertainty and potential threat until the appeals process reaches a conclusion. Some may interpret this as a demonstration of deference to the legal process.

70 *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

71 See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562 C-D. The question is whether the effect of the order is such that the court has reached a final decision on the merits. The courts reiterate in *African Farms and Townships Ltd v Cape Town Municipality* that "the rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings".

72 See *Grobler v Phillips and Others* (CCT 243/21) [2022] ZACC 32 (20 September 2022).

The question arises as to whether the appeals process, by design, conveniently defers conflict resolution. This viewpoint can be a subject of debate, and it introduces a perspective that differs from the one under consideration. Importantly, this potential deferral is not limitless and, significantly, it is not initiated at the discretion of the court itself but rather as a result of the parties involved pursuing the appeals process. The nature and impact of such delays in reaching a final resolution become a key aspect in discussions surrounding the effectiveness and efficiency of the legal system in addressing eviction disputes and related issues.

Indeed, the situation described differs from instances where other laws such as those enacted in response to a state of disaster impose a general moratorium on the execution of evictions. For instance, during the recent global pandemic, various jurisdictions implemented moratoriums on evictions as part of efforts to control the spread of the COVID-19 virus.⁷³ These moratoriums represent a distinct approach compared to the appeals process and the eviction order under consideration. While appeals processes involve legal avenues pursued by parties involved in the dispute, moratoriums on evictions are typically broader measures implemented by authorities in response to specific circumstances such as public health emergencies. These measures are aimed at providing temporary relief and protection to individuals and communities facing potential eviction during times of crisis.⁷⁴ It differs because these moratoriums are time-bound, as informed by the legislation that enclaves them.⁷⁵ A state of disaster is often linked to specific circumstances, and once those conditions change or improve, the state of disaster is expected to be lifted. Similarly, the appeals process has a foreseeable conclusion once the appellate court renders a decision. On the other hand, the relevant legal order resulting from an eviction case might lack a clear endpoint or resolution timeline.

To be clear, the practical consequence of the third form of order does not ensure a continuous guarantee of rights associated with the occupation of land. This order does not provide a shield for the occupier against potential future eviction applications initiated by the landowner. The occupier retains the same legal status as any other unlawful occupier and remains subject to the possibility of being brought before a court of law. In this context, the previous decision against the landowner in an eviction application is considered alongside any new relevant facts that may arise.

73 See Reg. 11CA of the Amendment of Regulations Issued in Terms of sec. 27(2) of the *Disaster Management Act 57/2002* in No R 465 in GG 43232 of 16 April 2020. See also *South African Human Rights Commission v City of Cape Town* [2021] 2 SA 565 (WCC) (Qolani); *Community of Hangberg v City of Cape Town* [2020] ZAWCHC 66.

74 See *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015).

75 See *Pheko and Others v Ekurhuleni Metropolitan Municipality*.

Distinguishably, the order does not establish a lasting or absolute protection for the occupier but rather situates his or her status within the broader legal framework, leaving room for potential legal proceedings based on evolving circumstances or new facts that may emerge. Neither does the order provide for a remedy for an unlawful eviction that occurs despite the court's injunction. The third form of eviction orders stands out from other types of orders that allow unlawful occupiers to remain on land after an eviction process. It also differs from instances observed during the COVID-19 pandemic where measures such as moratoriums on evictions provided temporary relief.

The crucial aspect, in this instance, revolves around the potential practice of assuming use and enjoyment entitlements as if they were inherent rights, akin to a conventional landowner-tenant contractual arrangement where occupancy is indefinite. The third form of order appears to make minimal, if any, efforts to tackle the ongoing consequences of allowing such extended stays on the constitutional rights of the landowner.

In contrast, in other eviction contexts, burdening a landowner with such indeterminate or seemingly perpetual stays is considered either inconceivable or reprehensible.⁷⁶ In cases where it becomes unavoidable, there is a recognition that this burden should be compensable.⁷⁷ This legal question serves as the focal point, influencing both the argument that it is deference and, more significantly, the perceived convenience of such deference in the third form of eviction orders.

4. SEPARATION OF POWERS

When confronted with the inevitable prospect of unjustly evicting an unlawful occupier from private land, the court not only avoids issuing an eviction order, but also refrains from providing clarity on the implications of being unable to evict. This lack of clarity, especially regarding the landowner's property rights under sec. 25, gives rise to persistent assumptions.⁷⁸ On the one hand, there are assumptions about the implications for the landowner's ownership rights. On the other hand, there are assumptions about why the courts have not delved

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

77 See *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA); *Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Another*.

78 Sec. 25 of the *Constitution*: "(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure because of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 because of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water, and related reform, to redress the results."

into the implications of an unlawful occupier remaining on land belonging to a private landowner. The ongoing uncertainty fuels conjectures about the impact on the landowner and the reasons behind the court's reluctance to explore this aspect.⁷⁹ The discussion in this section does not primarily seek to advance further speculation about the impact on the landowner, as this has been explored in previous writings on the subject.

This section examines the doctrine of separation of powers as a potential reason why the court hesitates to investigate the impact on the landowner's right. The concept of separation of powers recognises that each arm of government (executive, legislative, and judicial) operates independently within its own area of competence.⁸⁰ It also recognises the concept of checks and balances, emphasising the importance of preventing any one branch from exceeding its authority and seizing control from another, while, if indispensable, regulating the extent to which one branch may occasionally need to assume the functions of another branch, in order for the government to operate properly.

There are two primary concerns with the separation of powers. First, whether the relevant eviction legislation as a 'law of general application' is interpreted as warranting the limitation of another person's property rights.⁸¹ Relatedly, it is whether the court has jurisdiction over the implementation of such limitation or not. The concern arises from the rule that certain limitations cannot be carried out by the judicial branch absent specific legislation enacted by the legislative branch. Since the courts do not have the authority to legislate, they are unable to initiate certain limitations without the requisite legislation in place.

Sec. 25(1) of the *Constitution* provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". According to Van der Walt, deprivation involves limiting a person's ability to use, enjoy, and exploit his or her property without compensation, whereas expropriation, also a form of deprivation albeit higher, occurs when the state acquires property for public use or in the public interest, typically in exchange for compensation.⁸² The case law discussion on the third form of eviction orders of which the impact is in dispute, makes the following evident. A "just and equitable" order to not grant the eviction of an unlawful occupier, despite his or her unlawful occupation, does not confer

79 Numerous reasons can be advanced such as whether the parties have properly placed expropriation as a defence. This account does not discount those factors where there might have arisen. For example, see *Fischer and Another v Ramahlele and Others*; [2014] 3 All SA 395 (SCA):par. 15.

80 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC):par. 109; *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19, 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC).

81 See sec. 25 of the *Constitution*: "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Van der Walt 2011:28.

82 Van der Walt 2011:194-196.

any permanent legal right for the unlawful occupier to continue staying on the property.⁸³ Furthermore, the continued presence without legal entitlement is contingent on the continuance of the conditions that the court found would render eviction unjust and inequitable when compared to the landowner's position. If the factors examined by the court change over time, the landowner may submit a new eviction application based on the changed circumstances.⁸⁴ Assuming that the character of the unlawful occupation is not constant, an interference with some landowner rights (use and enjoyment), when weighed against a constitutional objective such as land reform, will be deemed to be constitutionally acceptable as per sec. 25.⁸⁵ This is also clear from the case law in the second form of eviction orders, where the premise is that landowners may be justifiably deprived of their use and enjoyment rights while the State implements alternative plans.⁸⁶ To the extent that deprivation à la sec. 25 animates a limitation of rights in favour of the public good, the following circular argument can be extended.⁸⁷ The limitation of a right and the logic under sec. 36(1) of the *Constitution* specify that rights in the Bill of Rights can only be restricted by laws that apply generally.⁸⁸ It follows that, if a limitation on a right in sec. 25(2) occurs, it triggers an analysis under sec. 36(1) to determine if there is a valid public purpose or a "greater good" justification. If the deprivation test under sec. 25(1) is shown to serve a legitimate public purpose, expropriation is unlikely to be challenged for lacking public purpose.⁸⁹

83 See *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

84 See *Classprop (Pty) Ltd v Nini Crescent Legode and Others*.

85 See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); paras. 57-58; *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v Member of Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC). See Van der Walt 2011:206-208, 264; Van der Walt 2016:606.

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

87 *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd* 2009 5 SA 661 (SE); *Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Another*.

88 Roux (2008:19-29) contends that this approach diminishes the prospective of balance in earlier phases of constitutional property analysis in favour of the arbitrariness test in sec. 25(1); Van der Walt 2011:220-223: the public interest in expropriation will not be addressed in a sec. 25(2) to (3) expropriation inquiry. This appears to be decided in accordance with sec. 25(1). This is because, in any instance, a constraint on property that does not meet the conditions of sec. 25(1) is unlikely to be acceptable under sec. 36.

89 See sec. 25(8) of the *Constitution*: "[n]o provision in this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that the departure of the provisions of this section is in accordance with the provisions of section 36(1)."

Expropriation, in this instance, however, further demands that there be legislated acquisition which is accompanied by compensation.⁹⁰ The necessity and permanency of acquisition as a requirement for expropriation have long been debated.⁹¹ It is important to emphasise that this context-dependent criterion does not rely entirely on state acquisition nor its permanence.⁹² Examples such as asset preservation orders in criminal cases demonstrate that neither state acquisition nor the length of time determine whether the limitation is a deprivation or expropriation. Furthermore, it is accepted that confining the investigation of expropriation to whether acquisition occurred obscures the true reason why the violation qualifies as expropriation, as it confuses the cause and effect.⁹³

Van der Walt, however, rightfully points out that “there is no common law authority for expropriation in South African law”.⁹⁴ Expropriation in South Africa is carried out pursuant to legislation.⁹⁵ Yet, the *Expropriation Act* 63 of 1975 precedes the *Constitution* that has seen, for instance, the possibilities of unlawful occupiers indefinitely occupying property belonging to another. Indeed, these kinds of situations are not provided for in the *Expropriation Act* and must be interpreted via the prism of case-specific statutes such as *PIE*. Notably, different kinds of interpretations of whether or not eviction legislation specifically authorises an expropriation calls to question certain decisions where the courts have awarded *ad hoc* compensation.⁹⁶ The prevalence of *ad hoc* compensating relief granted in conjunction and through any other linkable section but not directly sec. 25 is significant in this regard.⁹⁷ The general lack of judicial effort to at least explore the limitations under sec. 25 without depending on precedent that similarly did not deal with it adequately, if at all, remains puzzling.⁹⁸ It speaks to the above-mentioned legal concerns, as well as perhaps more difficult extra-legal concerns.

90 Sec. 25(2) of the *Constitution*. For a full discussion, see Sibanda 2019. See also Lubbe & Du Plessis 2021.

91 Van der Walt 2004b.

92 Van der Walt 2005:347-349. See *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC): paras. 58-59 – in this instance, the decision is that the state must acquire property for it to be expropriation.

93 Marais 2015:3033-3069.

94 Van der Walt 2011:453.

95 Van der Walt 2011:453.

96 See *Fischer and Another v Ramahlele and Others*:par. 167. See Dugard 2018. See *Ekurhuleni Municipality v Dada* 2009 4 SA 463 (SCA). In an attempt to strike a balance between separation-of-powers considerations, on the one hand, and the necessity for an effective remedy, on the other, Fortuin, J pointed out three key differences between the *Fischer* and *Ekurhuleni* cases. First, *Ekurhuleni* involved “a relatively small number of individuals, making the possibility of eviction and relocation “extremely serious”, whereas *Fischer* had approximately 100,000 occupants. Secondly, in *Ekurhuleni*, the State was not found to be incapable of providing alternative emergency housing, whereas, in *Fischer*, “it is clear that the city cannot provide alternative lodging for the occupiers”. Thirdly, whereas the occupants in *Ekurhuleni* did not address the issue of expropriation, the occupiers in *Fischer* had expressly highlighted it as part of their prayers.

97 See *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC):par. 99.

98 See Draga & Fick 2019; Dugard 2014.

While it is legitimate to be concerned about the potential of infringing on the separation-of-powers doctrine, this alone does not explain why the courts have abstained from engaging in such exercises totally. In addition to the foregoing, there is an inconsistency between this refrain and the typical jurisprudential approach to the separation-of-powers theory. The general attitude that has emerged in the last few years dealing with the separation-of-powers concept in the South African setting has yielded some intriguing findings that are relevant to the suggestion of convenience.

Initially, there was a rigid belief that courts should not determine the minutiae of social and economic rights, as evidenced by the *Mazibuko* case.⁹⁹ It has now been established that, in cases seeking effective remedy, whether a function is administrative or executive rather than judicial, while crucial, it does not necessarily have to be the sole role-determining factor.¹⁰⁰ Where violations occur (or can be seen to likely occur), the courts must intervene and provide direction.¹⁰¹ The separation-of-powers doctrine cannot be used to avoid a court's obligation to ignore a violation of the *Constitution*.¹⁰² Sec. 172 of the *Constitution* provides a vital 'operational check' within the separation of powers: it grants the courts a wide discretion to 'make any order that is just and equitable' in fulfilling their mandate to declare invalid law or conduct that is inconsistent with the *Constitution*.¹⁰³ Sec. 38 of the *Constitution* enjoins the courts to order effective relief.

The courts' role in this instance is not unilateral. If another functionary fails to take action to protect the rights, the courts will step in and require it to do so. In cases where such a plan is in place, the courts may step in to require that government activities be reviewed to ensure that they fulfil the constitutional test of reasonableness. This discretion is inherent in the courts, regardless of what the parties assert is the issue.¹⁰⁴

In the eviction context, there is a distinguishable legislative plan in place that manages the relationship between unlawful occupiers and landowners. What could prompt the courts to provide guidance in this case is whether this legislative plan is reasonable, given the nature of such a prolonged stay.¹⁰⁵

99 *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

100 *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*: paras. 46-48.

101 *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*: paras. 46-48.

102 *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*: paras. 46-48; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC): par. 200 – "The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."

103 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC): paras 42-45.

104 Sec. 38 of the *Constitution* directs a court to grant appropriate remedy in the event of a violation of rights. Sec. 172(2)(b) of the *Constitution* gives courts discretion to issue orders that are "just and equitable" in constitutional situations.

105 See *PIE* sec. 4(7), read with sec. 26 of the *Constitution*.

The fact that the courts have not attempted to examine the implications of a longer stay on another person's land in cases where the decision to not grant an eviction is taken on the basis that evicting the unlawful occupier would not be "just and equitable", is both avoidant and convenient. In *Thubakgale*, the court accepted that, while it cannot directly compel the state to provide housing, it can invalidate a measure if it finds it irrational and delegate responsibility for resolving it to the appropriate authorities.¹⁰⁶ In this way, the judicial, legislative, and executive functions achieve appropriate constitutional balance.¹⁰⁷ Determining the reasonableness of legislation enabling unlimited stays on someone else's property necessitates analysing the impact on the landowner's rights. As a result, the failure to consider this consequence itself disenables the exercise of the discretion in sec. 172.

Notwithstanding, in the South African context, jurisprudence appears to be allowing for more in the judicial determination of what mechanisms another functionary needs to put in place, in order to fulfil its constitutional obligations, falls outside the scope of judicial authority.¹⁰⁸ It would seem that, this time around, courts can be more specific about size, representations, procedure, and provision for the entirety of another functionary's processes.¹⁰⁹ What this may look like in the third form of eviction orders is something we can only begin to imagine and consider more authoritatively once the courts have set out the landowner's position *vis-à-vis* the unlawful occupier. In this instance, the focus is not to merge the general approach to separation of powers with the specific approach in eviction cases. Rather, I point to a seemingly progressive climate that suggests that more can be accomplished.

In sum, it is difficult to accept that the courts, in the third form of eviction orders, may be weary of violating the separation of powers. The doctrine does not prevent courts from proceeding with the sec. 25 process, which pits the landowner's individual right against the occupier's right in sec. 26,

106 *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 157/20) [2021] ZACC 45; 2022 (8) BCLR 985 (CC) (7 December 2021); par. 168; *Minister of Health v Treatment Action Campaign* (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC); *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

107 See *Minister of Health v Treatment Action Campaign* (No 2); 2002 (10) BCLR 1033 (CC); par. 113.

108 See *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11, 2016 (3) SA 580; *Doctors for Life International v Speaker of the National Assembly and Others*; par. 37.

109 *Economic Freedom Fighters v Speaker of the National Assembly and Another* [2017] ZACC 47, 2017 (2) SA 571 (CC); paras. 253-254. CJ Mogoeng (as he was then) described the act in the dissent: "This time around, we are even specific about size, representations, procedure, provision for the entirety of the process, avoiding abuse of majority representation, institutional predetermination of grounds before debating and voting on impeachment. That, in my view, is an unprecedented and unconstitutional encroachment into the operational space of Parliament by judges. There exists no jurisdiction in the whole world, that I am aware of, where a court has decided for Parliament how to conduct its impeachment process. Respect for separation of powers explains why this is so."

to its conclusion of deprivation, expropriation. It also does not prevent the courts from asking more from the functionaries with the authority to enact/ amend laws, in order to address the sec. 25 property right challenges that arise once they become apparent. This is not synonymous with the courts assuming superior wisdom over the legislature. The necessity to defend the individual rights that are the cornerstone of our democratic system must take precedence over the (unwarranted) fear of overstepping the separation-of-powers boundary. In this circumstance, prioritising non-interference in the internal affairs of another branch of government cannot be the primary focus. Instead, the emphasis should be on court action taking all feasible procedures, until the junction of the landowner's rights and those of the unlawful occupiers becomes so inconceivable that outside functionary intervention is necessary.

5. CONCLUSION

Accordingly in this situation, the courts have the authority to, at the very least, do the following in relation to the land question that arises from the third form of eviction orders. First, to establish if what the eviction legislation permits – that an unlawful occupier may remain on another's property indefinitely when eviction is denied, is itself "just and equitable". Whether this does or does not, in fact, amount to fulfilling all the constitutional obligations envisaged?¹¹⁰ It would be up to the courts to decide what the law, not simply the law governing eviction, but rather the law in general, may enable with respect to the processing of the practical issues envisioned by the order.¹¹¹ In addition to this, the Court can ostensibly assume responsibility by suggesting how to reconcile the two warring interests in the absence of State intervention.¹¹²

Any attempt to arrive at a solution has to start first with acknowledging what the order entails practically for both the landowner and the unlawful occupier. This is seemingly something the courts in the third order have opted not to do but which they should. To explore the questions raised by this order may lead to a deeper and more beneficial conversation. The challenge is that not enough consideration has been given to the possible loss of ownership-related entitlements. This challenge should further be weighed against the understandable fear of opening a Pandora's box when it comes to the security of property rights.

110 See *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*; *Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC); *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC); *Black Sash Trust v Minister of Social Development and Others* 2017 (3) SA 335 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1.

111 Sec. 172(1) of the *Constitution* deals with the court's powers. When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the *Constitution* is invalid to the extent of its inconsistency. Sec. 172(1)(b) of the *Constitution* reads as follows: "When deciding a constitutional matter within its power, a court may make any order that is just and equitable."

112 *Economic Freedom Fighters v Speaker of the National Assembly and Another*; paras 253-254.

The eviction jurisprudence, to varying degrees, demonstrates the courts' increasing readiness to take on greater accountability in enforcing constitutional duties. This prospect is as intriguing as it is dangerous, especially in a democracy as young as South Africa's. Yet, the course of property law discussions is heavily influenced by the underlying power relations. In South Africa, property and power are closely intertwined. Those who hold power and have the ability to exert it are typically property owners. Consequently, in any society, those with resources will attempt to shape conversations to impact personal and professional attitudes towards open-ended values.¹¹³ This results in a tendency to maintain the status quo. This is not entirely a bad thing to the extent that it guarantees market certainty and predictability. However, it also has the unintended consequence of stalling and occasionally drowning out uncomfortable conversations such as the one above, making both those in power and those without power increasingly insecure.¹¹⁴

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113 For the different kinds of plausible manifestations, see Klare 1998:147, relying on Kennedy 1997; Kennedy 1996; Kennedy 1991:83; Kennedy 1986; Van der Walt 2002b, relying on, among others, Cover 1986 and Cover 1983 in Brand 2009:46-72.

114 See Baker 2021:796-813; Wilde 2020:1-20 in Ndhlovu 2022: "According to Baker, we must not only analyse enforcement methods of eviction but, more importantly, also seek to understand the underlying coercive political, economic, and policing institutions which premise and ground the powerful and social practices of evicting. Ik Wilde adds that interpretation of the process of being evicted should take account of the trauma that results from having to navigate an array of conflicting interests of mediating actors such as the state, local government officers (the gatekeepers who interrogate tenants and 'squatters' and make judgements on their vulnerability, distinguishing 'deserving' from 'undeserving' cases), legal authorities, bailiffs, predatory landlords, and radical community activists. These encounters can lead to either the reproduction of the status quo or more collective class and political struggles against hegemonic power as well as denial of housing as a right."

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