

Reinvigorating the Right of Access to Adequate Housing and the Institutions Responsible for the Enforcement of This Right in South Africa

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Abstracts

Essentially, this paper reiterates the constitutional obligation to ensure that there is ample access to adequate housing in South Africa. The paper contends that in order to provide and deliver this constitutional right to the poor and the needy in South Africa, government has established various institutions to accomplish this objective. However, the paper notes that despite this, officials responsible to perform and deliver have dismally failed to ensure unhindered delivery. It is against the backdrop of these persistent failures that the enforcement mechanisms of the Constitution and legislation compelling performance and delivery is being usually invoked by the victims. The paper accentuates broad accountability enforcement culminating unto access and delivery.

Keywords: adequate housing, South Africa, government, human rights.

JEL Classification: K30, K33, K38

1. Introduction

The right to housing should not only be seen or interpreted as a structure which has four walls and a roof, it should be defined as a person's right to live in a peaceful place where there is security and the protection of other fundamental human rights.³ This is because the right to housing is interrelated with other human rights that are protected and provided for in the Constitution of the republic of South Africa 1996 (Constitution) and other International and national legal instruments.⁴ When interpreting the right to housing, the word adequate should not be left out, a house must be situated and located in satisfactory environment and place where people residing in it are protected and safe, it should be constructed with materials that are of quality and be able to protect the people from any structural defect, danger or harm.⁵ According to the Committee on Economic, Social, and Cultural Rights, "adequate housing" is defined as "housing that is habitable, accessible and a house in which the occupant has legal protection to remain, affordable, and sufficiently close to a school, healthcare facilities, and employment." Similarly, according to the Special Rapporteur on the right to adequate housing "human right to Housing is the basis of stability and security for an individual or family. The centre of our social, emotional and sometimes economic lives, a home should be a sanctuary-a place to live in peace, security and dignity. Increasingly viewed as a commodity, housing is most importantly a human right. To be adequately housed means having secure tenure-not having to worry about being evicted or having your home or lands taken away. It means living somewhere that is in keeping with your culture, and having access to appropriate services, schools, and employment.⁶ In Post-1994 democratic South Africa, most of the people still lack access to adequate housing and in particular, the poor and the indigents. This portrays inequality in housing affordability and availability and as such violation of the right to access to human right to

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³ Commission for Economic, Social and Cultural Rights. General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant). Office of the High Commissioner for Human Rights. (1991) 7.

⁴ Ibid.

⁵ Marcus, C. C., & Sarkissian, W. (1986). *Housing as if people mattered: Site design guidelines for the planning of medium-density family housing* (Vol. 4). Univ of California Press.

⁶ Wilson, S. (2020). The right to adequate housing. *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, 180-201.

adequate housing.⁷ The right to adequate housing and other human rights should apply to everyone equally regardless of their location or background. Mubangizi (2008) stated that "the right to adequate housing is a critical basic life necessity that has a significant bearing on the lives of the poor and in order to defend this substantive right, reasonable mechanisms for the implementation and enforcement of these rights should exist."⁸ It is against the backdrop of this that this paper looks at the overall enforcement interventions for ensuring providing ample access to adequate housing particularly, the institutions that have the responsibilities to provide, fulfil and deliver to the people. In order to provide access and deliver adequate housing by the state, there are tests recognised by the Constitution and the legislation that should be considered and apply.

Because the state has a positive obligation to take necessary steps to realize the right to housing within its available resources, the Constitutional Court applies the reasonableness test to determine whether this obligation is met in accordance with Section 26 of the Constitution.⁹ In the case of *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom's case*), for the first time, the court established the reasonable test for determining adherence to the progressive realization of the right to housing. The main question that must be considered is whether the measures that have been taken by the state in realisation of this right are reasonable. The state may take legislative and other measures, however, legislative measures are not enough. The state is obligated to act in order to accomplish the desired result, and proper, well-directed policies and programs of the executive must always accompany legislative initiatives. This means that when the courts are enforcing the right to adequate housing, they must not only rely on the statutory measures, but they must also make sure that an action is taken after the court judgement. The Optional Protocol to the International Covenant on Economic, social and Cultural rights (OP-ICESCR) showed that most of South African cases relating to the lack of adequate housing are eviction challenges, so it was emphasised that the state has a positive obligation to address the systemic issues causing numerous evictions and to ensure access to housing following an eviction.¹⁰ The state can accomplish this by making sure that those who have been evicted but lack the funds to rent or find alternative housing are helped by giving them a temporary shelter until they find a place to stay. The following principles of reasonableness emerged from the *Grootboom case*:

- the circumstances of the claimants or the affected communities. Responses to obstacles faced by claimants, programs, policies, or legislations must be assessed through the perspective of the claimants' experience with their circumstances. In other words, public involvement is a first step in guaranteeing that the rights of the affected individuals are fully protected because it will enable these people to submit requests of their needs.

- reasonability must be evaluated in light of human rights values, particularly the inherent dignity of the individual. The Constitution guarantees everyone the right to human dignity and equality however to many people, this remains a distant dream since they are living in intolerable places. The constitution will be less valuable if the constitutional right to adequate housing and other human rights are not construed with reference to the concept of human dignity.

- housing programs must provide special attention to the needs of vulnerable and marginalized groups and interact directly with those groups' needs and rights. These people were disadvantaged by the apartheid government before 1994, so when the government make them a priority, it assists in mending the injustices of the past and grow the country's economy.

- racism and other forms of discrimination must be considered. To ensure reasonableness, inequality must be addressed in the context of the transformative constitutionalism since South Africa is transforming from the government where black people were treated unfairly and did not have access

⁷ Sobantu, M. (2019). *A model for enhancing voluntary housing within a social development approach in South Africa*. University of Johannesburg (South Africa).

⁸ Mubangizi, J. C. (2008). Protecting human rights amidst poverty and inequality: the South African Post-Apartheid experience on the right of access to housing. *African journal of legal studies*, 2(2), 130-146.

⁹ Lange, P. A. (2018). *The reasonableness approach of the South African Constitutional Court-making the constitutional right of access to housing "real" or effectively meaningless?* (Master's thesis, University of Cape Town).

¹⁰ Porter, B. (2021). 'Implementing the Right to Adequate Housing Under the National Housing Strategy Act: The International Human Rights Framework' (2021) 56. <https://www.socialrights.ca/2021/Porter%20-%20NHSA%20&%20IHRL.pdf>.

to adequate housing nor enough land.

- each sphere of the government must perform its function and they must assist each other in developing coordinated plan. The national sphere of government must ensure that the laws, policies, programs, and strategies are sufficient to fulfil the section 26 obligations of the State, by delivering services to the people in need. The local sphere is more involved with the affected members of the community; thus, it must ensure public involvement. Once all the community members have voiced their concerns, these spheres must collaborate to ensure that their rights are enforced.

- housing policies and programs adopted by the national sphere of government must adapt to the changing needs and circumstances of a particular affected community. There must be a report containing the records of concerns and whether those concerns were addressed.

2. Interrelation between the right to housing and other human rights

When interpreting the right to adequate housing, we must determine how it is related to other human rights and whether these human rights are also protected, promoted, and enforced. Many other fundamental human rights, such as the right to family life and privacy, the freedom of movement, the right to assembly and association, the right to health, and the right to development, will be jeopardized in the absence of a right to housing.¹¹

2.1. The right to clean environment

Section 25 of the Constitution provides that everyone has a right to safe and healthy environment, because housing is dependent on, and can be affected by, environmental circumstances.¹² A house situated in a safe environment does not pose a threat to the right to adequate housing.¹³ It has been observed that poorest of the poor are most likely to suffer adverse effects of climate change because of the environment where their houses are located and the quality of the materials used to build those houses.¹⁴ The government needs to identify the people that are living in dangerous environment so that they could provide them with adequate housing, by doing this, the state will be fulfilling both the right to environment and adequate housing.¹⁵ In order for the government to identify those in need of adequate housing, each community should have a representative who is responsible for ensuring that residents' concerns are provided requisite assistance at the appropriate departments particularly, in the Department of Human Settlement, which facilitates the creation of suitable human settlement and improves the quality of household life. The government should ensure prior assessment of the potential environmental impacts of proposed projects and their potential impacts and effects on the environment by avoiding pollution, overpopulation and natural disasters. The environmental impact assessment will show whether the environment is suitable and risk free for building houses or not.

2.2. Natural rights

Humans have the right to life, liberty, health, and property.¹⁶ The right to adequate housing simply imply that a person has a right to property, and this is a natural right that every human being acquires at birth.¹⁷ These natural rights are inviolable and inalienable which means the state must

¹¹ Kothari, M., Karmali, S., & Chaudhry, S. (2006). The human right to adequate housing and land. *New Delhi: National Human Rights Commission*, 56.

¹² Shelton, D. (2007). Human rights, health and environmental protection: linkages in Law and practice. *Hum. Rts. & Int'l Legal Discourse*, 1, 9.

¹³ Redie, T., & Temesgen, R. (2021). *The right to adequate housing in Gondar city and the so called "yechereka bets"; challenges and prospects of the right* (Doctoral dissertation, uog).

¹⁴ Knox, J. H. (2009). Linking human rights and climate change at the United Nations. *Harv. Envtl. L. Rev.*, 33, 477.

¹⁵ Leckie, S. (1989). The un Committee on Economic, Social and Cultural Rights and the right to adequate housing: Towards an appropriate approach. *Human Rights Quarterly*, 11(4), 522-560.

¹⁶ Harding, A 'Natural Law and Natural Rights'. (1955) Dallas, Southern Methodist University Press.

¹⁷ Becker, L. C. (2014). *Property Rights (Routledge Revivals): Philosophic Foundations*. Routledge.

protect, promote, and enforce them. For instance, in the United Kingdom (UK), the right to life is safeguarded by Article 2 of the Human Rights Act 1998, nobody including the government may temper with this right. The provision of adequate housing for the citizens is in line with the protection of the right to life and dignity.¹⁸

2.3. Children's rights

Lack of adequate and secured housing can affect children's rights.¹⁹ Children are vulnerable, they need to be protected and taken care of, firstly, for a child to be protected, they need to have adequate houses which they call home.²⁰ Without a decent house, children may be mistreated and neglected and may grow up in an environment that lacks moral and material security. Not having a proper home also discourages a child from focusing on school or to be innovative and when children are lacking focus, their future will be at stake thereby threatening their growth and development. Housing development does not only promote people's right to adequate housing, but it also enhances safety in the area and promote community development activities.²¹ Essentially, the right to housing is particularly important because a child needs to grow in an environment which is healthy and not harmful.²² The primary responsibility for carrying out rights rests with the state. No matter how little the resources are, the state must allocate them in a way that serves the best interests of children.²³

3. Transformative constitutionalism

Since the adoption of the Constitution, the South African government has sought to transform both the state and society by establishing a democratic state with a supreme Constitution and granting all citizens fundamental rights and freedom.²⁴ The preamble of the Constitution explicitly expresses the characteristics of the transformative constitutionalism which is to overcome the injustices of the past, encourage open democracy and public participation while fulfilling every person's rights. Transformation is thus a social and economic advancement.²⁵ Transformative constitutionalism "mandates the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships, and the fostering of a "culture of justification" for every exercise of public power."²⁶ However, there is no single accepted definition of transformative constitutionalism for as long as we keep the spirit of transformation.²⁷ South Africa currently faces unequal and inadequate access to housing, healthcare, food, water, electricity, and education. In the case of *Chaskalson P* stated in *Soobramoney v. Minister of Health, KwaZulu-Natal*,²⁸ the court observed that for as long as there is an increase in the level of unemployment, inadequate healthcare, housing, food and inequality, it will be difficult for South Africa to fulfil the characteristics or the aims of the transformative constitutionalism.²⁹

Transformation in South Africa must not only involve the legal order, but also the alteration of the apartheid government and their institutions prior to 1994.³⁰ Not only the socio-economic rights

¹⁸ Pasqualucci, J. M. (2008). The right to a dignified life (vida digna): the integration of economic and social rights with civil and political rights in the Inter-American human rights system. *Hastings Int'l & Comp. L. Rev.*, 31, 1.

¹⁹ Chodroff, C. N. (2004). Children's Need for Safe Housing. *Child. Legal Rts. J.*, 24, 2.

²⁰ Lansdown, G. (2002). Children's rights. In *Children's Childhoods* (pp. 39-50). Routledge.

²¹ Hart, R. A. (2013). *Children's participation: The theory and practice of involving young citizens in community development and environmental care*. Routledge.

²² Bartlett, S., Hart, R., Satterthwaite, D., de la Barra, X., & Missair, A. (2016). *Cities for children: children's rights, poverty and urban management*. Routledge.

²³ Alderson, P. (2008). *Young children's rights: Exploring beliefs*. Jessica Kingsley Publishers.

²⁴ Teshome, M. (2011). Transformative Constitutionalism in South Africa. *Research Gate*.

²⁵ Langa, J. P. (2006). Transformative constitutionalism. *Stellenbosch Law Review*, 17(3), 351-360.

²⁶ Pieterse, M. (2005). What do we mean when we talk about transformative constitutionalism?: journal. *SA Publiekreg = SA Public Law*, 20(1), 155-166.

²⁷ Langa, J. P. (2006). Transformative constitutionalism. *Stellenbosch Law Review*, 17(3), 351-360.

²⁸ 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC).

²⁹ Ibid, para 8.

³⁰ Van Rooyen v S 2002 8 BCLR 810 (CC) para 50.

must be fulfilled, but there must also be equal opportunities and employment for all. In the case of *Van Rooyen v Stoltz*,³¹ two women had borrowed money so that they could pay for their houses and a time came which they could no longer afford to pay, this led to their houses being sold. They claimed that this violates their right to housing and security of tenure. The constitutional court decided to develop the law governing the sale in execution of property, particularly immovable property used as the debtor's house, in order to satisfy a debt. The court considered the historical and socioeconomic context, as well as the importance of housing security of tenure, and determined that any measure that allows a person to be denied access to adequate housing violates the rights guaranteed by section 26(3) of the constitution.³² The court demonstrated that access to adequate housing must transform to accommodate everyone, including those who were previously disadvantaged or vulnerable.

In the case of *President of the Republic of South Africa, Minister of Agriculture and Land Affairs v. Modderklip Boerdery (Pty)Ltd.*³³ the court was faced with a situation where it had to prioritise either the right to property owners or the obligation of the state to provide houses. In this case, several residents moved out of an overcrowded town in Johannesburg's east and illegally occupied nearby land that they thought belonged to the municipality but was owned by the Modderklip farm. The landowner filed an eviction application under the Prevention of Illegal Eviction Act so that those people could leave his property. The eviction order was issued, and the occupiers had only two months to vacate the premises. Given that there were over 4000 occupiers in the area and that they had made their homes there, they did not abide by the interdict.³⁴ The landowner approached various bodies of the government including the President and Department of Housing so that they could take all necessary steps to remove unlawful occupiers on his land.³⁵ The Supreme Court of Appeal provided that the state has a constitutional obligation to protect, respect and fulfil the rights in the Bill of Rights³⁶ therefore the state must ensure that they protect the rights of the property owner at the same time while ensuring that those illegal occupier's right to housing is fulfilled. The constitutional court argued, the rights state has a duty to assist the landowner in enforcing his rights. This argument was made without mentioning section 7(2) or the general concept of the state's duty to protect its citizens' rights from unlawful interference. Property interests are still recognized and protected, but to prevent unfair treatment of poor or marginalized members of society, it is necessary for owners and the courts to exercise some compassion and patience when enforcing property against the homeless.³⁷

4. Meaningful engagement

The doctrine of meaningful engagement is one of the principles of fair democracy, and it has enormous potential for both prominent empowerment and improving public administration by incorporating local knowledge into decision-making.³⁸ Section 2(1)a of the Housing Act 107 of 1997 provides that in order for the government to ensure housing development, effective community engagement with those impacted by the housing crisis is necessary to help the government understand the problems that these people are facing on a daily basis. The local sphere of the government which includes municipality must be the one that employ individuals who will act in good faith to understand the interests of the affected individuals, this sphere is empowered by section 229 of the Constitution to allocate duties appropriate to the local government. The affected communities must elect a leader or committee that will represent them, the representative will be responsible for making sure that

³¹ 2005 2 SA 140 (CC).

³² Ibid, para 34.

³³ (CCT20/04) [2005] ZACC 5.

³⁴ Ibid, para 8.

³⁵ Ibid, para 6 and 31.

³⁶ Section 7(2) of the Constitution.

³⁷ Van der Walt 'The state's duty to protect property owner's vs the state's duty to provide housing: Thoughts on the Modderklip case' forthcoming 2005 SAJHR. 159.

³⁸ Williams, L. A. (2013). The right to housing in South Africa: an evolving jurisprudence. *Colum. Hum. Rts. L. Rev.*, 45, 816.

information is delivered to the community in a way that is both clear and respectful of their culture.³⁹ To ensure that everyone's needs, and concerns are heard and met, these representatives must only carry out the mandate set forth by the community. Participation cannot be discriminatory based on gender, socioeconomic status, or disability. Women must be treated equally with males, and their ideas or contributions must always carry the same weight in the community as those of men.

The rights of persons facing eviction are protected under Section 26(3), which also states that the court cannot issue an eviction order without considering all relevant factors or circumstances. This basically means that the court may not issue an eviction order without first determining where the person/s will reside and how it will affect their other human rights. The core of this principle of meaningful engagement is that there must be a meaningful communication with the individuals who will be impacted by an eviction application to give them opportunity to express their needs and the detrimental effects the eviction would have on them. The main goal of the meaningful engagement is to resolve the conflict that arises when private evictions or any house crises occurs between property rights and housing rights it can also be a helpful tool for coming up with original solutions and identifying the unique needs of a community.⁴⁰ Meaningful engagement in the informal settlement where eviction was to take place is also essential. In the case of *Port Elizabeth Municipality v. Various Occupiers*⁴¹ was concerned with the eviction application by the Port Elizabeth municipality. This application was made against 68 individuals, including 23 minors, who had occupied privately owned, undeveloped land under the jurisdiction of the Municipality.⁴² It was said that when addressing the issues of inadequate or lack of housing, the parties are encouraged and required to engage with each other in an initiative-taking and honest effort to find mutually acceptable solutions is one potentially dignified and effective method of achieving sustainable reconciliations of the different interests involved.⁴³

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and others the city of Johannesburg*, the city applied to the Johannesburg High Court for the eviction of more than 400 residents of inner-city buildings on the grounds that they were unsafe and unhealthy.⁴⁴ The court granted eviction on the condition that the City provide alternative housing for those who would be made homeless.⁴⁵ The Constitutional Court clarified the necessity of meaningful engagement and consultation with occupiers prior to conducting evictions,⁴⁶ as the results of such engagement will help the courts determine whether or not it is just to issue an eviction order.⁴⁷ All parties to the engagement must act reasonably; no party may make demands that are unachievable or unreasonable and the rights of vulnerable groups and those who could be evicted must be protected and prioritised at all times.⁴⁸ Meaningful engagement will change how the government approaches housing development projects in that it will be required to assess itself of, among other things: first, the full range of consequences that could result from the proposed housing development; second, what will be needed to ease the plight of those living in terrible conditions; and third, the cost and scope of interim measures it may need to take.

5. Examining the institutions responsible for the enforcement of the right to access to adequate housing in South Africa

Housing contributes to economic development by influencing employment, savings,

³⁹ Muller, G. (2011). Conceptualising "meaningful engagement" as a deliberative democratic partnership. *Stellenbosch Law Review*, 22(3), 742-758.

⁴⁰ Knipe, P. (2019). Roundtable discussion on Meaningful engagement: challenges in the realisation of the right to adequate housing in South Africa (27 may 2019). *ESR Review: Economic and Social Rights in South Africa*, 20(2), 27-29.

⁴¹ (1) SA 217 (CC) (2005).

⁴² Ibid, para 1.

⁴³ Ibid, para 39.

⁴⁴ 2008 3 SA 208 (CC) para 1.

⁴⁵ Ibid, para 43.

⁴⁶ Ibid, para 30.

⁴⁷ Ibid, para 18.

⁴⁸ Ibid, para 19.

investment, and labour productivity, appropriate governance is required. Transparency, accountability, competent governmental institutions, respect for human rights, and public participation by all citizens in choices that impact their lives are all components of good governance.⁴⁹ The institutions responsible for exercising governmental authorities are required to act and carry out their duties in accordance with the Constitution.

5.1. The judiciary

Courts are responsible for enforcing the right to adequate housing. The South African Constitutional Court has ruled in several notable cases that provide vital insights into the judicial enforceability of the right to adequate housing and other human rights. The South African Constitution empowers courts to make decisions that are just and equitable while ensuring that Bill of Rights purports and objects are promoted.⁵⁰ However, the courts are constrained in their enforcement role by the separation of powers, they may avoid entering the territory of other branches of government.⁵¹

Eviction issues within the housing sector have been the focus of the Constitutional Court's where they consistently consider social and economic jurisprudence. Mostly, South Africans that lack access to adequate housing live in informal settlements and are prone to face eviction.⁵² If evicted, the eviction they will not have anywhere to go, and their human rights will be violated. The judiciary requires the state to take reasonable legislative and other measures for the progressive realisation of the right to adequate housing. The protection of the right to adequate housing has therefore been considerably more successfully invoked by litigants when such right is threatened or violated by unfair eviction. However, a broad and lenient "reasonableness evaluation" approach is used to assess the constitutional sufficiency of the government's programs to carry out its affirmative commitments to give effect to socio-economic rights.⁵³ A person is typically not entitled to prompt supply of any specific social good.

In the case of *Grootboom*, the court held that the responsibility or obligation to fulfil the right to adequate housing does not only rest on the state.⁵⁴ Other institutions may be given the opportunity by legislation to provide additional means of access to adequate housing, amongst others these include financial institutions which are best suited to provide access to housing through mortgage loans.⁵⁵ In this case, the Constitutional Court held that the right to adequate housing was an unqualified constitutional right, and that it was therefore inappropriate to consider whether the state possessed the necessary resources. According to the judge, this case demonstrates that thousands of people in the country live in intolerable conditions,⁵⁶ and the state is obligated to take positive action to meet the needs of those who are poor or homeless and living in intolerable housing.⁵⁷

In *Port Elizabeth Municipality v. Various Occupiers*, Section 6 of the Prevention Of Illegal Eviction Act 19 of 1998 (PIE) provides that "an organ of State may institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction," served as the foundation for the application.⁵⁸ The respondents stated that they would be willing to leave the property if given suitable

⁴⁹ Gisselquist, R. M. (2012). *Good governance as a concept, and why this matters for development policy* (No. 2012/30). WIDER Working Paper.

⁵⁰ Section 39(2) of the Constitution.

⁵¹ Mbiada, C. J. T. (2017). The public protector as a mechanism of political accountability: The extent of its contribution to the realisation of the right to access adequate housing in South Africa. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 20(1).

⁵² Strauss, M., & Liebenberg, S. (2014). Contested spaces: Housing rights and evictions law in post-apartheid South Africa. *Planning Theory*, 13(4), 428-448.

⁵³ *Grootboom*. Para 44.

⁵⁴ *Grootboom*, para 46.

⁵⁵ Nengome, R. (2005). The right to access adequate housing, fair lending and the role of financial institutions. *Codicillus*, 46(2), 24-44.

⁵⁶ *Grootboom*, para 93.

⁵⁷ *Grootboom*, para 24.

⁵⁸ Note 161 above, para 25.

alternative land to relocate to.⁵⁹ The municipality refused to give them an alternative plot of land or a place to live on the grounds that it would give the impression that these unauthorized occupants were receiving preferential treatment.⁶⁰ The court determined that the provisions of both section 26 of the Bill of Rights and the PIE must be interpreted within the context of their constitutional frameworks and the rehabilitative and reformatory purposes of these provisions in order to arrive at a "just and equitable decision" in eviction cases, given the history of unfair eviction practices in the past.⁶¹ The Constitutional Court mandated that municipalities have equal accountability to occupiers and landowners in eviction proceedings.⁶² However, the court determined that, unlike private landowners, municipalities had specific duties under Section 26 of the Constitution.⁶³ These responsibilities influenced whether it is 'just and equitable' to make an eviction order under PIE section 6. However, the court determined that the relevant circumstances identified in Section 6 of PIE were not an exhaustive list.⁶⁴ In order for the eviction to be just and equitable, factors such as the length of occupation and the extent to which negotiations had taken place to reach an equitable solution must be considered. It was stated that "it would not ordinarily be just and equitable to order eviction if proper discussions and or mediation had not been attempted."⁶⁵ The court also determined that evicting the occupiers was not "just and equitable" because the land was not required for immediate use by either the landowner or the municipality.

The applicants in *Jaftha v. Schoeman and Others* and *Van Rooyen v. Stoltz and Others*⁶⁶ had been evicted in execution of a court warrant due to judgment debts. Their homes were attached after they were unable to find immovable property to satisfy the judgment debts.⁶⁷ This was done in accordance with Section 66(1)(a) of the Magistrates Courts Act 32 of 1994. The applicants argued that even though the Magistrate Court Act's purpose was acceptable, Section 66(1) (a) had allowed for the development of a process that could cause people to be unfairly and disproportionately deprived of their homes.⁶⁸ They also claimed that the section allowed for the sale of immovable property, which could be the judgment debtor's home, for insignificant debts and at large expense.⁶⁹ The question was whether the attachment of immovable property constituting state-aided houses violated Section 26 of the Constitution, which guarantees the right to adequate housing.⁷⁰ The court concluded that the right stipulated in Section 26(1) differs from the right to adequate housing found in international covenants in that it is a right of access to adequate housing.⁷¹ According to the court, "the right to access adequate housing entails more than just walls; it requires available land, appropriate services, such as provision of water and removal of sewerage."⁷² The court further ruled that Section 26(1) and (2) must be read together in order for the scope of the right to be best described as correlative of the positive and negative obligations imposed on the State as well as on other entities and individuals.⁷³

Alexandra Township residents were displaced by severe flooding in *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*.⁷⁴ The government created a transit camp on state-owned land as a temporary solution in an effort to assist these people.⁷⁵ When such housing became available, the populace would relocate there, and the camp would be

⁵⁹ Ibid, para 2.

⁶⁰ Ibid, para 3.

⁶¹ Ibid, para 8,9,10.

⁶² Ibid, para 61.

⁶³ Ibid, para 56.

⁶⁴ Ibid, para 30.

⁶⁵ Ibid, para 43.

⁶⁶ (8617/01) [2003] ZAWCHC 26.

⁶⁷ Ibid, para 3 and 7.

⁶⁸ Ibid, para 32.

⁶⁹ Ibid.

⁷⁰ Ibid, para 41.

⁷¹ Ibid, para 31.

⁷² Ibid, para 35.

⁷³ Ibid, para 38.

⁷⁴ (CCT 55/00) [2001] ZACC 19.

⁷⁵ Ibid, para 8.

destroyed.⁷⁶ Without consulting nearby residents, the plan was developed.⁷⁷ Thus, a residents' association filed a lawsuit, requesting that the High Court restrain the Minister of Public Works and the contractor from establishing and building the camp.⁷⁸ The association argued that the government's action in this matter was not justified by legislation. Additionally, it was argued that the construction of the camps violated a town planning scheme,⁷⁹ as well as land and environmental laws, and that it had been done without consulting the local authority. In accordance with Section 26(2) of the Constitution, the Constitutional Court ruled that the national government was in charge of ensuring that laws, policies, programs, and strategies were sufficient to fulfil the state's duty to guarantee access to adequate housing.⁸⁰ This demonstrates how important it is to follow the laws and regulations in place to ensure that everyone have access to adequate housing. The judiciary also has the authority to oversee the enforcement of these laws and regulations.

The local government sought from the court for an interdict in the case of *City of Johannesburg v. Rand Properties (Pty) Ltd. and others*⁸¹ to compel building occupants to leave because doing so is essential for either their safety or the safety of others.⁸² The occupants were in an emergency situation, the buildings in question were in appalling, abject, and occasionally disgraceful condition, and there were fire and health risks.⁸³ Most of the residents were extremely poor, lacked formal employment, and had no stable income.⁸⁴ The central issue was whether the City of Johannesburg is barred from exercising its authority to order people to leave unsafe buildings unless it first provides adequate alternative housing.⁸⁵ A related question was whether such alternative housing had to be located within the city limits. The Supreme Court of Appeal (SCA) decided that the City's authority to order the evacuation of dangerous structures is independent of its ability to provide occupants with alternative housing.⁸⁶ However, the SCA also decided that when tenants are evicted, the City is constitutionally obligated to offer at least minimal shelter to those tenants who lack access to alternative housing.⁸⁷ It further ruled that the shelter the City must provide need not be situated in the inner city as the respondents had insisted.⁸⁸

In *President of the Republic of South Africa and Others v. Modderklip Boerdery (Pty) Ltd. and Others*,⁸⁹ the Johannesburg High Court ordered an eviction against a group of about 400 people who had moved onto private land owned by Modderklip Boerdery (Pty) Ltd. due to a lack of land and the area being overcrowded in the Chris Hani Informal settlement.⁹⁰ The occupiers did not leave the premises within the two-month window set by the court. Their numbers grew throughout this time and there were thought to be 18 000 occupants on the land.⁹¹ The landowner made an attempt to obtain state assistance in the Transvaal Provincial Division for the execution of the eviction order. At the time, eviction was estimated to cost around R2.2 million due to the need for outside contractors.⁹² The landowner resisted spending this sum. The Transvaal Provincial Division determined that the state had violated both its constitutional obligations to the rights of the illegal occupants to adequate housing and its duty to the landowner.⁹³ As a result, it mandated that the state come up with a detailed plan to put an end to the occupation of the land. The Constitutional Court did not deem it necessary

⁷⁶ Ibid, para 6.

⁷⁷ Ibid.

⁷⁸ Ibid, para 8.

⁷⁹ Ibid, para 89.

⁸⁰ Ibid, para 39.

⁸¹ 2007 SCA (RSA).

⁸² Ibid, para 1.

⁸³ Ibid, para 2.

⁸⁴ Ibid.

⁸⁵ Ibid, para 4.

⁸⁶ Ibid, para 68.

⁸⁷ Ibid, para 64.

⁸⁸ Ibid, para 67.

⁸⁹ (CCT20/04) [2005] ZACC 5.

⁹⁰ Ibid, para 3.

⁹¹ Ibid, para 6.

⁹² Ibid, para 8.

⁹³ Ibid, para 16.

to rule on any of the state's assertions. It concluded that it was unfair to require a private company like Modderklip to shoulder the state's obligation to provide housing for the occupiers.⁹⁴ According to section 5 of the PIE Act, Modderklip would not have satisfied the strict requirements for an urgent eviction order.⁹⁵ The court determined that Modderklip's claim was supported by the fact that it had been denied the right to land ownership.⁹⁶ It could not be held accountable for its actions because they were "prudent and reasonable in the circumstances" when they attempted to involve the state.⁹⁷

Eviction cases differs hence it is necessary to treat each differently, this was shown in the case *Blue Moonlight Properties 39 (Pty) Limited v. Occupiers of Saratoga Avenue and Another*⁹⁸ it was said that the circumstances of illegal occupiers, both individually and collectively, are also distinctive. As a result, it is necessary to request specific information from the city regarding a particular case. Therefore, a one-size-fits-all approach to eviction cases is not only impractical but also unacceptable.⁹⁹ The City's irregular joining of this matter was the initial concern raised. Section 4 of PIE Act was brought up on behalf of the city, who argued that it was improper for a respondent to join the city as a co-respondent. It was brought up that the City granted permission for the joinder on the grounds that it wanted to raise the issue of joinder as part of the opposing application.¹⁰⁰ The city must take action in response to potential homelessness, regardless of its cause, the judgment states. Additionally, the judgment requires the city to address the unique circumstances of the individuals facing eviction rather than merely providing a court with a general report on its housing policy.¹⁰¹ The city must respond with strategies that consider and take into account people's unique situations, something it frequently fails to do. Since the occupiers' constitutional right to adequate housing and a property owner's common law right to the use of his or her property may be violated if the city does nothing, it may be held to a very high standard of justification.¹⁰² The City of Johannesburg was ordered by the court to offer the residents of Saratoga Avenue alternative housing and, in the absence of such housing, to pay their rent elsewhere.¹⁰³ The case of *City of Cape Town v. Neville Rudolph and Others*¹⁰⁴ revolved around the occupation of land owned by the applicant, the City of Cape Town. The respondents in these eviction proceedings were all residents of Valhalla Park, an area under the applicant's jurisdiction. Some of the respondents had been on the applicant's housing waiting list for as long as ten years. Because of the overcrowding and intolerable conditions in which they were living at the time, they decided to relocate onto vacant land owned by the applicant. In addition to opposing the application, the respondents also filed a counterapplication on the grounds that the applicants' housing policies and programs had fallen short of their legal and constitutional responsibilities to realize their right to adequate housing under Section 26 of the Constitution.¹⁰⁵ They argued, specifically, that the applicant had disregarded the ruling in the Grootboom case. The court acknowledged that the housing situation had gotten worse despite the Grootboom judgment. The Accelerated Managed Land Settlement Program was cited by the Constitutional Court in the Grootboom decision as an illustration of the kind of program that would help those in great need. Such a program had not yet been implemented.¹⁰⁶ The applicants had thus fallen short of gradually realizing their legal entitlements to adequate housing, as outlined in the Grootboom ruling. The Court concluded that the City of Cape Town's housing policies did not uphold its constitutional and statutory obligations in light of the standards established in Grootboom. The City of Cape Town was therefore

⁹⁴ Ibid, para 45.

⁹⁵ Ibid, para 30.

⁹⁶ Ibid, para 31.

⁹⁷ Ibid, para 38.

⁹⁸ (2006/11442) [2008] ZAGPHC 275.

⁹⁹ Ibid, para 64.

¹⁰⁰ Ibid, para 3.

¹⁰¹ Ibid, para 63.

¹⁰² Ibid, para 42.

¹⁰³ Ibid, para 66.

¹⁰⁴ (11) BCLR 1236 (C) (2003).

¹⁰⁵ Mahomed, A. (2003). Grootboom and its impact on evictions: Rudolph and Others v City of Cape Town: case review. *ESR Review: Economic and Social Rights in South Africa*, 4(3), 2-4.

¹⁰⁶ Ibid.

required by the Court to adhere to these obligations and submit a report within 4 months outlining the steps it has taken to address the situation and the upcoming policies and programs that will be implemented in this regard.

5.2. Institutions

Certain institutions supporting constitutional democracy are established by Chapter 9 of the 1996 Constitution.¹⁰⁷ According to Section 181 of the Constitution, these institutions have the authority to enforce the right to adequate housing and other constitutional rights. Even though most of these institutions are crucial to the protection and promotion of human rights, the South African Human Rights Commission, and the Public Protector play an important role in advancing human rights.

5.2.1. South African Human Rights Commission (SAHRC)

Monitoring and advancing human rights are mandated tasks for the SAHRC. It ensures that everyone in South Africa, especially the poor, vulnerably situated, and socially marginalized fully benefit from democracy, this also includes the advancement of economic and social rights. According to Section 184 of the Constitution, the SAHRC's primary duties are to advance respect for human rights and a culture of human rights, to advance the protection, development, and realization of human rights, and to monitor and evaluate how well those rights are being upheld in the Republic. In addition, section 184(3) requires pertinent state agencies to report to the SAHRC annually on the steps they have taken to implement the socio-economic rights outlined in the Bill of Rights regarding housing and other basic rights including environment. This is yet another way to guarantee that public funds are not mismanaged, and nepotism is prevented. The SAHRC has played, and continues to play, a significant role in numerous other ways regarding the right of access to housing. It created a report on the right to adequate housing in 2004 and made an urgent recommendation to create a fund specifically for buying prime land for affordable housing.¹⁰⁸ According to the 2011 Statistics South Africa Census's Key Findings, 70% of households have access to sanitation that meets Reconstruction and Development Programme (RDP) standards, and 85% of households have access to water that meets those standards.¹⁰⁹ Nevertheless, the National Development Plan notes that despite the significant progress made in gradually realizing these rights, the implementation of various housing programs has led to "poor quality units; uniform and monotonous settlements on the urban edge; and poor-quality residential environments lacking the necessary social facilities and supportive infrastructure."¹¹⁰ Essentially, post-apartheid housing policies do not completely overthrow the apartheid regime housing deprivation and discrimination.¹¹¹

According to the 2014/2015 report, the city of Johannesburg is currently responsible for 181 informal settlements; however, 15 informal settlements have been prioritized because they lack access to basic services such as water and sanitation, refuse removal, electricity, and roads. The eThekweni Municipality estimates that it is responsible for 400 informal settlements, which has approximately 253 000 households. Due to limited resources, not all settlements receive full services or low-income housing. The eThekweni Municipality stated that if the provincial legislature provided more funding, it would be able to build more houses. According to the Studies in Poverty and Inequality Institute, housing programs such as the Upgrading of Informal Settlement Program are not being implemented at scale due to implementation challenges related to spending and procurement.¹¹²

¹⁰⁷ Section 181 – 194 of the Constitution.

¹⁰⁸ South Africa Human Rights Commission, 'The Right of Access to Adequate Housing' (21 June 2004) 5th Economic and Social Rights Report Series, 2002/2003 Financial Year.

¹⁰⁹ The South African Human Rights Commission Investigative Hearing: Report Access to Housing, Local Governance and Service Delivery. (2015), <https://sahrc.org.za/index.php/focus-areas/access-to-justice-adequate-housing>, accessed 25 September 2022.

¹¹⁰ The National Development Plan 2030: Our future – make it work, p.268.

¹¹¹ Desai, A. (2002). *We are the poors: Community struggles in post-apartheid South Africa*. NYU Press.

¹¹² Ibid.

The SAHRC is required to request annual reports from the appropriate state organs on the steps they have taken to implement the Bill of Rights' safeguards for housing including health care, food and water, social security, education, and the environment. According to the 2019 analysis report, households headed by women, Black South Africans, those with less education, the unemployed, large families, consistently have the highest rates of poverty. There were 269 complaints about inadequate housing that were received and approved by the SAHRC during the 2019-2020 financial year.

5.2.2. Public protector

Unlike the courts, Public Protector is not a sphere of government and therefore it does not adhere to separation of powers. In comparison to the Human Rights Commission, the Office of the Public Protector plays a more indirect but no less significant role.¹¹³ The Public Protector's three main responsibilities under section 182 of the Constitution are to investigate any improper conduct in state affairs or public administration, to report such conduct, and to take the necessary corrective action. It could be argued that by carrying out these duties, the Public Protector not only prevents violations of human rights brought on by state wrongdoing and poor public administration, but also defends and upholds constitutional rights, such as the right of access to housing. The preamble of the Public Protector Act states that the public protector may investigate matters and defend the public from things like improper conduct by a public servant, improper acts involving public funds, improper or illegal enrichment of a public servant, and an act or omission by a public servant leading to improper or unlawful enrichment and violation of another person's rights. The public protector has the authority to investigate and file a report on any officials working on housing projects and programs who act in an illegal manner and thus violate people's rights. Two residents filed complaints against the Steve Tshwete Local Municipality. Both complainants claimed they were assigned low-cost subsidy housing, they also claimed that they had unsuccessfully approached the Municipality for their title deeds since being assigned their houses because it was alleged that another person had already registered in one of the complainants' names, but he was unaware of it.¹¹⁴ The Public Protector met with municipal officials and wrote to them as part of its investigation into the complaints.¹¹⁵ The name of the complainant was on the list that had been forwarded to the service provider, Sisonke Development Planner, who had been hired to register housing beneficiaries, according to Ms FE Phiri, the Municipal Executive Manager of Public Services, who responded to the Public Protector's written inquiry about the complaint. To clarify the report the Municipality provided, the Public Protector met with Ms. Phiri. In the complainant's case, it appeared that the service provider had fallen short of its obligation to register the title deeds of not only the complainant but also of all other residents of low-cost subsidy houses in the area.¹¹⁶ After investigating, the Public Protector determined that the Steve Tshwete Local Municipality had neglected to assist the complainants in obtaining a title deed for their stand in a timely manner and to address the Department of Local Government and Housing regarding stands that had been improperly assigned. The Public Protector then suggested that the Municipal Manager take action to register the complainant's title deed and carry out the Mayoral Committee's decision. Additionally, the Public Protector advised the Municipal Manager to make sure that recipients of low-cost subsidy housing received assistance to obtain title deeds for their properties within a reasonable amount of time.¹¹⁷

¹¹³ Mubangizi, J. C. (2008). Protecting human rights amidst poverty and inequality: the South African Post-Apartheid experience on the right of access to housing. *African journal of legal studies*, 2(2), 130-146.

¹¹⁴ Public Protector's Annual Report No 3 of 2010/11 dated 14 June 2010.

¹¹⁵ Mbiada, C. J. T. (2017). The public protector as a mechanism of political accountability: The extent of its contribution to the realisation of the right to access adequate housing in South Africa. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 20(1).

¹¹⁶ Ibid.

¹¹⁷ Ibid, 19.

5.3. Institutions that may be of assistance to those enforcing the right to adequate housing

5.3.1. Non-profit organisations

A strong network of civil society organizations exists in South Africa and is crucial to the safeguard of human rights. This role must be viewed in consideration of the nation's distinctive history. Over time, Non-Profit Organisations' (NPO) operational methods change, due to the emergence of democratic institutions and a new political and constitutional order, as well as new challenges in South Africa, many NPOs modified the ways in which they operate.¹¹⁸ These organizations seek to collect, evaluate, and disseminate information, advocate for relief or legal aid to human rights victims and their families, foster solidarity among the oppressed and those whose rights are violated, internationalize and legitimize local human rights concerns.¹¹⁹ These organizations may also litigate on behalf of individuals who are unable to bring their cases to court; they also assist marginalized individuals who are in need of housing to apply for housing. Non-profit organizations that help the poor realize their human rights include, among others, the following:

5.3.1.1. Legal Resources Centre (LRC)

This organization is dedicated to advancing the needs of the underprivileged. Before 1994, when the LRC first started operating, its main concerns were the end of apartheid and the transition to democracy. The LRC in post-apartheid South Africa has reorganized to concentrate on two key areas which are constitutional law and land, housing, and development.¹²⁰ The new constitutional order has clearly enabled the LRC to do more for South Africa's poor people. In the specific context of the right to adequate housing, the LRC presented arguments in the Grootboom case on behalf of Irene Grootboom and 900 other people. The Constitutional Court not only explicitly acknowledged the organization's role in its decision, but also accepted their arguments, ruling that the government housing program did not meet the constitutional test of reasonableness and that the state had failed to meet the obligations imposed on it by section 26.

5.3.1.2. Socio-Economic Rights Institute of South Africa

This is a non-profit organization devoted to the safeguarding and advancement of human rights. Since 1996, this organization has been tasked with conducting a review of South Africa's housing policy.¹²¹ Its primary goal is to promote socioeconomic rights in poor communities and to help poor and disadvantaged people achieve a decent standard of living.¹²² It also contribute to public governance by empowering local communities to know their rights and government processes, and to effectively participate in such processes, thereby holding government accountable

5.3.1.3. Centre for Applied Legal Studies

The Centre for Applied Legal Studies (CALS) is an independent organization committed to promoting democracy, justice, equality, and peace in South Africa addressing and undoing the country's legacy of oppression and discrimination through the realization of human rights for all in South Africa under a just constitutional and legal order. CALS aims to contribute to human rights literacy and the realization of human rights within disempowered communities through independent

¹¹⁸ Note 26 above, 145. (mubangizi).

¹¹⁹ Abdullahi, A. N. (1997). Human rights protection in Africa: Towards effective mechanisms. *East African Journal of Peace and Human Rights*, 3(1), 1-31.

¹²⁰ Andrews, P. (2006). The South African constitution as a mechanism for redressing poverty.

¹²¹ Socio-Economic Rights Institute of South Africa, <https://www.seri-sa.org/>, accessed 25 September 2022.

¹²² Socio-Economic Rights Institute of South Africa (SERI) | Popular Education South Africa, <https://www.populareducation.org.za/content/socio-economic-rights-institute-south-africa-seri>, accessed 25 September 2022.

research, focused policy advocacy, and public interest litigation in the fields of housing, health, education, water, healthcare, and gender rights. CALS seeks to accomplish its goals through undertaking rigorous research, writing, analysis and briefings; teaching and providing public education and training; the collection and dissemination of information and publications; and legal advice and litigation, participation in policy formulation, law reform, dispute resolution and institutional development and coordination.

5.3.1.4. The Department of Human Settlement

In cooperation with provinces and municipalities, the Department of Human Settlements is tasked with establishing and facilitating a sustainable housing development process. The Housing Act of 1997's Section 3 serves as the foundation for this requirement. The department's primary duties include setting broad national housing delivery goals, establishing national policy and norms and standards, providing funding to provinces and metropolitan municipalities, and monitoring the financial and non-financial performance of provinces and municipalities in relation to these goals. In carrying out these duties, the department also strengthens municipal and provincial capacity and encourages consultation with all parties involved in the housing delivery chain.

This Department intended to maintain its emphasis on four areas over the medium term: promoting the development of integrated human settlements, modernizing informal settlements, offering affordable rental housing, and offering affordable housing financing. It also aims to support local small and medium-sized businesses by promoting local businesses and widening up employment opportunities in the supply and manufacturing businesses. The department will concentrate on the growth and accreditation of suppliers and manufacturers of building materials in order to achieve this. The department will utilize unemployed graduates through this process, particularly those who received their training through the Human Settlements program.

6. Conclusion

An adequate house must not only be seen as adequate in the eyes of the people, but the resources used must be of high quality so that it can accommodate people and their needs and last them their entire lives. Applying a reasonable test to determine whether a house is adequate is the correct method because this test first determines the circumstances of the people in need of housing; when doing so, these people must be treated equally to uphold the principle of transformative constitutionalism. Our country can only transform if the government ensures community engagement, the significance of the right to adequate housing and other human rights cannot be fully understood until the people who are claiming them meaningfully engaged with as the rights holders. The people impacted know and understand what they desire and what they would like to achieve as a community, therefore the state must let them voice their concerns, then the state may then restructure and rethink the policies and programs to best fit the desires of the rights holders. The courts have always attempted to ensure that the people of South Africa are afforded their right to adequate housing by making decisions that uphold the right to adequate housing. Where eviction is involved, the courts have always taken reasonable and equitable decisions by giving those people reasonable time to find alternative housing and also by compelling the government to provide them with alternative shelter. In addition, the institutions help the government enforce the right to adequate housing. These institutions can also be recognized as regulatory agencies because they can advise the government on how to enforce people's rights; some of these institutions fight for people's rights.

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